





THE
PRACTICE
OF THE
COURTS OF KING'S BENCH,
AND
COMMON PLEAS,
IN PERSONAL ACTIONS, AND EJECTMENT.
TO WHICH ARE ADDED,
THE LAW AND PRACTICE OF EXTENTS,
AND THE
RULES OF COURT, AND MODERN DECISIONS.
IN THE
Exchequer of Pleas.

BY WILLIAM TIDD, ESQ.

IN TWO VOLUMES.
VOL. I.

THIRD AMERICAN, FROM THE NINTH LONDON EDITION.
WITH NOTES OF RECENT ENGLISH STATUTES AND DECISIONS,
BY FRANCIS J. TROUBAT.

FOURTH AMERICAN EDITION. WITH ADDITIONAL NOTES,
BY ASA I. FISH.

PHILADELPHIA:
ROBERT H. SMALL, LAW BOOKSELLER,
NO. 21 SOUTH SIXTH STREET.
1856.

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T 4337p
1856
vol. 1

Entered according to act of Congress, in the year 1856, by

ROBERT H. SMALL,

In the Clerk's Office of the District Court for the Eastern District of Pennsylvania.

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Author of
History of the
City of Philadelphia
1791-1856

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Lodge Street

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ADVERTISEMENT

TO THE

THIRD AMERICAN EDITION.

SINCE the publication of the *ninth* Edition of Mr. Tidd's Practice, in *Trinity* Term 1828, many important alterations have been made in the Practice of the Superior Courts of Law at *Westminster*, by various Statutes, Rules of Court, and Judicial decisions. The principal Statutes, by which these alterations were effected, are the Administration of Justice act, (11 Geo. IV. & 1 W. IV. c. 70;) the Speedy Judgment and Execution act, (1 W. IV. c. 7;) the Examination of Witnesses act, (1 W. IV. c. 22;) the Interpleader act, (1 & 2 W. IV. c. 58;) the Uniformity of Process act, (2 W. IV. c. 39;) and the Law Amendment act, (3 & 4 W. IV. c. 42.)

In pursuance of the power given by the Administration of Justice act, general rules were made by all the Judges, in *Trinity* term, 1831, and *Hilary* term, 1832. The rules of *Trinity* term chiefly relate to the putting in and justifying of *special* bail; the shortening of *declarations* in actions of *assumpsit*, or *debt*, on bills of exchange, or promissory notes, and the common counts; the delivery of *particulars* of the plaintiff's demand, under those counts; the time for delivering declarations *de bene esse*; the service of declarations in *ejectment*; the time for pleading; rules to plead several matters; and judgment of *non pros*, &c. The object and intent of the rules of *Hilary* Term appear to have been, to assimilate the practice of the different courts, and to render the proceedings therein more expeditious, and less expensive to the suitors.

Under the Law Amendment act, general rules were made by all the judges of the superior courts of common law at *Westminster*, in *Hilary* term 1834; which having been laid the requisite time before both houses of parliament, came into operation on the first day of *Easter* term following. These rules, which may be considered as the commencement of a new *era* in pleading, in England, are of two kinds: 1st, general rules, relating to all pleadings; and, 2ndly, rules relating to pleadings in the particular actions of *assumpsit*, *covenant*, *debt*, *detinue*, *case* and *trespass*.

Some additional rules were also made by the judges in pursuance of the law amendment act, and of the powers given them by the administration of justice act, relating to the *practice* of the courts, in *Hilary* term, 1834, which took effect on the first day of *Easter* term following. These rules chiefly relate to *demurrers*, and proceedings in *error*; and contain provisions respecting the admission of written documents.

The present edition of this work consists of the ninth of the author, with so much of the new practice incorporated in notes, as was thought to be of interest or utility in this country. For this part of the publication, the editor is chiefly indebted to the author's most recent work published in 1837, entitled, *The New Practice of the Courts of King's Bench, Common Pleas and Exchequer of Pleas, in Personal Actions and Ejectment*. The judicial decisions of the courts referred to in that work, are, for the most part, founded on the new statutes and rules of court, and as a whole, the system thus worked up, independently of its philosophical merits, has but little in it useful to the American lawyer.

PHILADELPHIA, *May*, 1840.

PUBLISHER'S PREFACE

TO THE

FOURTH AMERICAN EDITION.

IN this new impression of Tidd's Practice, the reader will find all that the third edition embraced, with the addition of copious and extended notes by the present editor. The object of these notes has been chiefly to illustrate the text, and adapt it to the practical wants of the profession in this country. As the editor's labours were intended to be useful in all the States where the common law prevails, statutory changes, and special State legislation, have not been largely introduced.

AN effort has been made, to confine the notes within a moderate compass, in order that neither the bulk nor expense of the volumes would be much increased ; and the publisher has every reason to believe, that he now presents to the practising attorney this valuable manual in a more satisfactory manner than at any time heretofore.

PHILADELPHIA, *September*. 1856.

PREFACE.

SINCE the publication of the *eighth* edition of the following Work, several acts of parliament have *expired*, or been *repealed*, and others passed, which have occasioned considerable alterations in the practice of the different courts. Some new rules of court have also been made, during that period, and upwards of *eight hundred* cases published, on practical subjects.

The restrictions on cash payments under the *Bank* acts having finally ceased, it is no longer necessary to negative a *tender* of the debt in bank notes, in an affidavit to hold to bail. The *alien* acts having expired, *aliens* are now no longer privileged from arrest. The statute 51 Geo. III. c. 124, having also been suffered to expire, an act was made in the last session of parliament,^(a) to prevent *arrests* upon mesne process, where the debt or cause of action is under *twenty* pounds; and to regulate the practice of arrests. By this act, no person can, in general, be arrested or held to special bail, where the cause of action is less than *twenty* pounds; nor, in *Wales* or the counties palatine, unless the process be duly marked and indorsed for bail in a sum not less than *fifty* pounds. And where the writ or process is issued by a plaintiff in his own person, the sheriff shall not execute the same, unless it be delivered to him by some attorney of one of the courts of record at *Westminster*, &c., and indorsed with the name and place of abode of such attorney. The defendant is allowed, by this statute, to *deposit* and pay into court the sum indorsed upon the writ, together with an additional sum for costs, to abide the event of the suit, in lieu of putting in and perfecting *special bail*. And where the plaintiff does not proceed by *capias* against the person, but by *original* or other writ, and *summons* or *attachment*, or by *subpœna* and *attachment* thereupon, against any person not having privilege of parliament, the same mode of proceeding is given by this statute, as was before provided by the 51 Geo. III. c. 124.

The *stamp duties* on law proceedings were *repealed*, by the statute 5 Geo. IV. c. 41. And the statutes relating to *bankrupts* and *insolvent debtors* having been repealed, except in certain cases, the laws respecting the former, and for the relief of the latter, were amended or consolidated, by the statutes 6 Geo. IV. c. 16 and 7 Geo. IV. c. 57. The laws relating to the *customs* having also been repealed, by the statute 6 Geo. IV. c. 105, an act was made for the prevention of smuggling;^(aa) in which there are clauses relative to the *limitation* of actions against officers of the *army*, *navy*, or *marines*, *customs* or *excise*, or any person acting under the directions of the *commissioners* of the customs, for any thing done in the execution or by reason of their offices; and requiring *notice* in writing to be given to such officers, *one* calendar month before the writ sued out, and enabling

(a) 7 & 8 Geo. IV. c. 71.

(aa) 6 Geo. IV. c. 108.

them to *tender* amends, plead the *general* issue, and bring money into court, &c. The statutes of *hue and cry*, &c., having also been repealed, by the statute 7 & 8 Geo. IV. c. 27, an act was made, ^(b) for consolidating and amending the laws in *England*, relative to remedies against the *hundred*, for the damage done by persons riotously and tumultuously assembled, (for which alone the hundred is now liable :) and a summary mode of proceeding is provided by that act, before two justices of the peace, in cases where the damage does not exceed *thirty* pounds.

Other acts have been made, affecting the jurisdiction and practice of the courts, of which the following are instances : First, the act to enlarge and extend the power of the judges of the several courts of Great Sessions in *Wales*, and to amend the laws relating to the same : ^(a) Secondly, Mr. *Peel's* act, for consolidating and amending the laws relative to *jurors*, and *juries* : ^(bb) Thirdly, the acts to abolish the sale of *offices*, in the courts of King's Bench and Common Pleas, and to make provision for the chief justices ; ^(c) for augmenting the salaries of the Master of the Rolls, and Vice Chancellor, the Chief Baron of the court of Exchequer, and the *puisne* judges and barons of the courts in *Westminster Hall*, ^(d) &c. ; and to authorize the purchase of the office of receiver and comptroller of the seal of the courts of King's Bench and Common Pleas, and of *custos brevium* of the latter court : ^(e) Fourthly, the act for preventing frivolous *writs of error* ; ^(f) by requiring that upon any judgment to be given in any of the courts at *Westminster*, or in the counties palatine and great sessions in *Wales*, in any personal action, execution shall not be stayed or delayed by writ of error or *supersedeas* thereupon, without the special order of the court, or some judge thereof, unless a recognizance, with condition according to the statute 3 Jac. I. c. 8, be first acknowledged in the same court : And lastly, Lord *Tenterden's* acts, for rendering a written *memorandum* necessary to the validity of certain promises and engagements ; ^(g) and to prevent a failure of justice by reason of *variances* between records, and writings produced in evidence in support thereof. ^(h)

In preparing the *present* edition, it has been the Author's endeavour to render his work less unworthy of the very favourable reception it has met with from the profession. The whole has been carefully revised, and such corrections made as appeared to be necessary, as well in the text, as in the notes and references. The several acts of parliament and rules of court, which have been made since the publication of the last edition, are introduced in the present ; together with such of the *practical* decisions of the courts, as were published before the work went to press, or could be inserted while it was printing off : The rest are given at the end, by way of *Addenda*, together with some other matters which were inadvertently omitted, with directions for incorporating them ; and are for the most part referred to in the *Index*. These decisions are brought down to the end of *Michaelmas* term last, in the King's Bench, and Exchequer ; and to the end of *Hilary* term, in the Common Pleas. References are also made to the second volume of the reports of the late Lord *Kenyon* ; and the references to text writers, and books of practice, &c., have been altered throughout to the latest editions.

The general arrangement of the work is pretty much the same in this edition as the last, except that the *twentieth* chapter of the last edition, which treated of motions and rules peculiar to the action of *ejectment*, and affidavits in support of

(b) 7 & 8 Geo. IV. c. 31.

(bb) 6 Geo. IV. c. 50.

(d) 6 Geo. IV. c. 84.

(f) 6 Geo. IV. c. 96.

(h) 9 Geo. IV. c. 15.

(a) 5 Geo. IV. c. 106.

(c) 6 Geo. IV. c. 82, 3.

(e) 6 Geo. IV. c. 89.

(g) 9 Geo. IV. c. 14.

them, and of such motions and rules as were not necessarily connected with any suit, has been divided; and its contents transferred to the *twentieth* and *last* chapters in the present edition. The *thirty-fifth* and *thirty-sixth* chapters also, of the last edition, have been divided, and now constitute *three* chapters, being the *thirty-fourth*, *thirty-fifth*, and *thirty-sixth*, in the present edition; one of which treats of the record of *nisi prius*, jury process, common and special juries, and views; another, of the brief, evidence, and witnesses; and the third, of entering the cause for trial, and references to arbitration.

The insertion of the new statutes, rules of court and cases, has necessarily occasioned considerable alterations throughout the work; and particularly in the *first*, *second*, *sixth*, *tenth*, *twelfth*, *fifteenth*, *twentieth*, *twenty-third*, and *thirty-fourth* chapters. In the *first* chapter, several new statutes have been referred to, respecting the mode of bringing actions by *parish* officers, and by or against *trustees*, and public *companies*, &c., the *limitation* of actions for wrongs, and *notices* of action, &c.; and the cases decided on the statutes of *limitations* have been newly arranged. In the *second* chapter, a full account is given of the *offices* and *officers* of the courts of King's Bench and Common Pleas, with their appointment and duties, as regulated by the statutes 6 Geo. IV. c. 82, 3, and 89. And, in the *sixth* chapter, the mode of proceeding against *traders* having privilege of *parliament*, by the statute 6 Geo. IV. c. 16, is pointed out; and also the remedy by action against *huddlers*, on the statute 7 & 8 Geo. IV. c. 31, for damages occasioned by persons riotously and tumultuously assembled, with the summary mode of proceeding on that statute, before two justices, where the damage does not exceed *thirty* pounds.

The law of *arrest* is fully treated of in the *tenth* chapter, as depending on the statute 7 & 8 Geo. IV. c. 71; and in this chapter the several cases are considered, in which *bankrupts* and *insolvent debtors* are privileged from arrest, by the statutes 6 Geo. IV. c. 16, and 7 Geo. IV. c. 57. With regard to the former, their privilege from arrest is considered in a threefold point of view: First, in coming to surrender, and during the time allowed for finishing their examination; secondly, after the time allowed them for these purposes is expired, and *before* they have obtained their certificates: and thirdly, *after* their certificates have been signed and allowed by the Lord Chancellor. And the bankrupt being discharged from all debts *provable* under the commission, it was thought that it might not be deemed an improper digression, to consider what debts may or may not be *proved* under it. The privilege of *insolvent debtors* from arrest is also considered in this chapter, first, under *occasional* insolvent acts; secondly, under the earlier *permanent* acts; and thirdly, under the last general insolvent act, 7 Geo. IV. c. 57.

The *twelfth* chapter, on the subject of *bail*, has been carefully revised and corrected; and a new arrangement is made therein, of the cases relative to the means of discharging them from liability on their recognizance. In the *fifteenth* chapter, a view is taken of the several acts of parliament for the relief of *insolvent debtors*; and particularly of that to which they are entitled under the last general insolvent act, with the mode of proceeding thereon: In the *twentieth* chapter, the *annuity* acts and the decisions thereon are introduced, under the head of *staying* proceedings; and, in the *twenty-third* chapter, some material alterations have been made in the arrangement of the cases respecting the *inspection* and *copies* of written instruments, books, court rolls, &c.

In the *thirty-fourth* chapter, the qualifications, disqualifications, and exemptions of *jurors* are considered; with the mode of returning and impanelling *common* juries, and of striking *special* juries, as it existed before, and is now regulated by

the statute 6 Geo. IV. c. 50, and also the time and mode of *summoning* jurors in general, and obtaining a *view*; and, in the *thirty-seventh* chapter, the method of *balloting* for and *swearing common* jurors, at the trial, is pointed out, and the adding of *talesmen*, &c.

Besides the additions and alterations that have been noticed, and which were occasioned by the new statutes, rules and cases, there are others, in the *thirty-seventh*, *fortieth*, and *last* chapters, which depend on former statutes and decisions. In the *thirty-seventh* chapter, the author has carefully collected and arranged all the cases which have been determined on the measure of *damages*, in actions upon *contracts*, and for *wrongs*, immediate and consequential; and, as incident to the consideration of damages, in actions upon contracts for the non-payment of money, there is a collection of the cases in which *interest* is or is not recoverable. In the *fortieth* chapter, the principal court of *requests* acts have been referred to, and the acts by which their jurisdiction is extended to sums not exceeding *five* pounds, or to sums of larger amount, with the decisions thereon: and, in a previous chapter, (a) there are references to the acts by which the decree or judgments may be removed from courts of *requests*, to obtain execution thereon, in the *superior* courts.

In the *last* chapter, a *practical* view is taken of the action of *ejectment*, which is treated of under the following heads: First, the general nature and object of the action: Secondly, by and against whom it may be brought: Thirdly for what things an *ejectment* will lie, and how they should be described: Fourthly, the title necessary to support it, and herein of the legal estate, and right of entry: Fifthly, within what time an *ejectment* must be brought: Sixthly, the remedy by *entry*, without suit; and in what cases an actual entry, and demand of rent, were formerly necessary, and must now be made: Seventhly, the ancient mode of proceeding in *ejectment*, and in what cases it is still necessary: with the method of proceeding in the case of a *vacant* possession; Eighthly, the present mode of proceeding against the *casual* ejector, to judgment by default and execution, when the tenant or his landlord, does not appear: Ninthly, the appearance of the *tenant*, or his landlord; and the subsequent proceedings thereon to trial, final judgment, and execution: And lastly, the mode of reviving the judgment by *scire facias*, or of reversing it by writ of *error*.

But that which chiefly distinguishes the present from all former editions, is the marginal notes, or abstracts of the contents of the work. The making of these notes has been attended with considerable trouble; but it is hoped they will be found useful in facilitating research.

Amid such a variety of new and important matter, making altogether more than a *tenth* part of the whole work, some errors must necessarily have occurred: These the author trusts will be viewed by a liberal profession with their accustomed candor; especially when the difficulty is considered, of altering the text of a work already composed, and that a great part of his time has been necessarily occupied with the business of his clients.

The whole work has been *re-paged*, and references made throughout to the proposed new edition of the *Practical Forms*, which is in a state of considerable forwardness, so as to make them correspond with the present edition of the *Practice*, to which they are intended as an *Appendix*. The tables of *statutes*, and general *rules* of court, *orders* and *notices*, prefixed to the work, have been carefully revised, corrected, and re-paged; with the tables of the principal reports of *printed* cases referred to therein. By these tables it will appear, that there are

(a) Chap. XVI. pp. 402, 3.

nearly *five hundred statutes* referred to in the following work, and more than that number of general *rules* of court, *orders* and *notices*. The whole number of *printed* cases amounts to upwards of *ten thousand*, besides those which have been published since the last edition ; and the *original*, or MSS. cases are nearly *five hundred*. The *Index* also, in which the new matter has been introduced, has been carefully revised, altered, and repaged ; and some of the principal titles have been new modelled and enlarged, particularly those relating to *Affidavits of the cause of Action, Bail, Bankrupt, Court of Requests, Acts, Damages, Ejectment, Evidence, Great Sessions, Hundredors, Insolvent Debtors, Interest, Jury, Limitation of Actions, Officers, Offices, and Staying Proceedings, &c.*

Upon the whole, no pains have been spared, to improve the present edition ; and it is now submitted to the profession, as exhibiting in a connected point of view, the Practice of the courts of King's Bench and Common Pleas, in *personal* actions, and *ejectment* ; with the rules, and modern decisions, on the plea side of the court of *Exchequer* ; particularly noticing the changes it has undergone during the reigns of his late and present Majesty : of which it may with truth be affirmed, that in no period of our history has the law been better administered, or the courts of justices filled with more able and upright judges.

TEMPLE,

6th June, 1828.

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INTRODUCTION.

BY way of introduction to the following work, it may not be improper to take a cursory view of the proceedings in *personal* actions, in the courts of King's Bench and Common Pleas; and the *practice* by which they are regulated, from the commencement of the suit, to the obtaining of final judgment and execution; and to give some account of the origin and progress of the work, and the changes it has undergone in the different editions.

The general nature of an action is thus given by an elegant writer on the law and constitution of *England*.* "A person, (let us suppose,) who has a cause of action, either in a right detained, or an injury done, is determined to bring his action; and, by his attorney, takes out *process* against the party complained of; in consequence of which, the party complained of (whom we call the defendant,) either puts in common or special *bail*, as the case requires. The defendant being thus secured, the plaintiff *declares*, in proper form, the nature of his case. The defendant answers this declaration; and the charge and defence, by due course of *pleading*, are brought to one or more plain, simple facts. These facts, arising out of the pleadings, and thence called *issues*, come next to be tried by a jury. The jury having heard the *evidence* upon the issue before them, find (we will suppose,) a *verdict* for the plaintiff. On that verdict, *judgment* is afterwards entered. The plaintiff's *costs* of suit are then taxed, by the officer of the court; and the judgment is put in *execution*, by levying on the defendant's effects, the damages given by the jury, and the costs allowed by the court; which being done, there is an end of the suit, and both parties are once more out of court."

* Wynne's *Eunomus*, Dial. II. 2 V. p. 131.

The principal proceedings in an action are first, the *warrant of attorney*, to prosecute or defend; secondly, the *process* used for bringing the defendant into court; thirdly, his *appearance* and *bail*; fourthly, the *pleadings*, beginning with the declaration; fifthly, the *issue*; sixthly, the *trial*, or determination of the issue; seventhly, the *judgment*; and eighthly, the *execution*: To which may be added the proceedings in *scire facias* to revive the judgment, or in *error* to reverse it; though these are rather to be considered as distinct actions, or proceedings, arising out of, than as parts of the original suit. The above proceedings are from time to time entered on the *rolls* of the court; which thence take their denomination of the *warrant of attorney* roll, the *process* roll, the *recognizance* roll, the *imparlance*, *plea*, or *issue* roll, the *nisi prius* roll or *record*, the *judgment* roll, (on which latter is entered the award of *execution*,) the *scire facias* roll, and the roll of proceedings on writs of *error*, and *false judgment*.

Subordinate to these *principal* proceedings, there are others of an *auxiliary* nature, which occur in the course of a suit; such as, in bailable actions, the arrest and bail-bond, with the proceedings thereon, or against the sheriff, to compel him to return the writ, and bring in the body. These happen before the plaintiff has declared absolutely. After declaration and before plea, the defendant, in order to prepare for his defence, is, under circumstances, allowed to crave *oyer* of deeds, &c. or copies of written instruments, call for the particulars of the plaintiff's demand, or claim inspection of public books, court rolls, &c.; or he may move the court to change the venue, consolidate actions, strike out superfluous counts, or bring money into court. After issue and before trial, the plaintiff should give notice of trial, sue out the jury process, and make up and pass the record of *nisi prius*: and each party should prepare a brief for counsel, and *subpœna* his witnesses. After trial and before judgment, the unsuccessful party may move the court for a new trial, or in arrest of judgment; or for judgment *non obstante veredicto*, a replender, or *venire facias de novo*.

The *variations* in the proceedings are occasioned, first, by the nature of the *action*, and the parties by or against whom it is brought; as whether it be founded in *contract* or *tort*, or be brought by or against one or more plaintiffs or defendants, by the assignees of a bankrupt or insolvent debtor, or by or against baron and feme, surviving partners, executors or administrators, heirs or devisees, &c.: Secondly, by the mode of *commencing* the action; as whether it be commenced originally in the King's Bench or Common Pleas, or removed thither from an inferior court: and, in the former case, whether it be commenced by original writ, bill of *Middlesex* or *latitat*, *capias quare clausum fregit*, or attachment of privilege, or by bill exhibited to the court, and brought against common persons, or peers of the realm, members of the House of Commons, corporations, hundre-

dors, attorneys, officers of the court, or prisoners in the actual custody of the sheriff or marshal: Thirdly, by the nature of the *process* used for bringing the defendant into court; which is either a mere summons, an attachment or *distringas* against his property, or a *capias* against his person; which latter process, in point of form, is common or special, and in effect is bailable or not bailable; and upon a bailable *capias*, the defendant is either taken, or stands out to process of outlawry: Fourthly, by the *appearance* of the parties; and whether they prosecute or defend the action in person or by attorney, or, in case of infancy, by *prochein amy* or guardian: Fifthly, by the *course* which the proceedings take; and whether the action be prosecuted, or abate by the death of the parties; or the plaintiff voluntarily abandon it by a discontinuance, *nolle prosequi*, *stet processus*, or *cassetur billa vel breve*; or make default, and suffer judgment of *non pros* for not declaring, replying, or entering the issue, or judgment as in case of a nonsuit for not proceeding to trial; or the defendant compromise or compound the action, confess it or let judgment go by default.

If the action be prosecuted, the variations in the proceedings are occasioned, Sixthly, by the nature of the *declaration*, and subsequent *pleadings*; as whether the declaration be common or special, and consist of one or more counts, and whether it be in chief or by the bye, and delivered or filed absolutely or *de bene esse*, and whether the defendant plead or demur thereto; and, if he plead, whether it be to the jurisdiction of the court, in abatement, or in bar; and if the latter, whether he plead one or more pleas, and whether they be general or special; and if special, whether the replication thereto be in denial, or confession and avoidance, or by way of estoppel, or new assign the injury complained of; and whether there be any rejoinder, surrejoinder, rebutter, or surrebutter, and of what it consists: Seventhly, by the nature of the *issue*, joined upon the pleadings; as whether it be an issue in fact or in law; and if in fact, whether it be triable by the court, upon *nul tiel record*; by a jury, upon pleadings concluding to the country; or by the bishop's certificate, upon a plea of *ne unques accouple*, &c.: Eighthly, by the mode of *trial*, and the proceedings in the course of it; as whether it be at bar or *nisi prius*, or by a common or special jury, or the defendant at the trial plead *puis darrein continuance*, or the parties agree to withdraw a juror, or refer the cause to arbitration, or there be a nonsuit or verdict, and if a verdict, whether it be general or special, or there be a special case, bill of exceptions, or demurrer to evidence: Ninthly, by the nature of the *judgment*; which is either for the plaintiff or defendant; for the former by confession, *non sum informatus*, or *nihil dicit*, for the latter on a *non pros*, discontinuance, *nolle prosequi*, *cassetur billa vel breve*, *retraxit*, nonsuit, or as in case of a nonsuit, and for either party upon demurrer, *nul tiel record*, verdict, or the bishop's certificate: Lastly, by

the species of *execution* ; as whether it be by *feri facias* against the defendant's goods, by *capias ad satisfaciendum* against his person, by *elegit* against his goods and a moiety of his lands, or by *extendi facias*, or *extent*, against his body, lands and goods, or in some cases against his lands and goods, or lands only.

The *practice* of the court, by which the proceedings in an action are governed, is founded on ancient and immemorial usage, (which may not improperly be termed the common law of practice,) regulated from time to time by rules and orders, acts of parliament, and judicial decisions. The practice is the law of the court, and as such, is a part of the law of the land ;* and it has been so strictly adhered to, that in the case of *Bewdley*,† a practice of seven years only was allowed to prevail against the express words of an act of parliament.‡ The rules and orders of the court are either such as are made for the regulation of its general practice, or such as apply only to the proceedings in particular causes. The general rules are confined in their operation to the court in which they are made ; and for the most part respect the mode of conducting the proceedings. Hence we find, that acts of parliament are sometimes necessary, to introduce regulations extending to all the courts, or creating some changes or alteration in the proceedings themselves. And as questions arise respecting the regularity of the proceedings, the courts are called upon to settle, by judicial decisions, the course of their own practice, or to fix the construction of the rules or acts of parliament which have been made respecting it.

Such is the nature of *practice* : upon which it is observable, that as the actions and proceedings in general are the same, in all the superior courts of common law, there must necessarily be a great uniformity in the practice of each ; and especially when it is considered, that the courts have in many instances adopted the same general rules, and are governed by the same acts of parliament, in the construction of which their decisions are for the most similar. The principal differences arise from the original *constitution* of each particular court, its jurisdiction and officers, and the peculiar *rules* laid down for regulating its proceedings ; and they consist for the most part in the nature of the *process* used for bringing in the defendant, &c. and the manner in which it is returnable, the *times* prescribed or allowed for particular purposes, and the *modes* of transacting business by the court, or its officers.§

* Jenk. Cent. 295. 2 Co. 17. 4 Co. 93, (b). Hard. 98, 2 Ses. Cas. 342. 1 Wils. 162. 4 Bur. 2572.

† 1 P. Wms. 207, 223.

‡ 2 Str. 755 ; and see 3 Bur. 1755. But this doctrine does not seem to be tenable. See 1 Blac. Com. 76, 7. 1 Chit. Rep. 299. (a.)

§ It were to be wished that many of these differences were abolished, in order to render the practice more simple and uniform.

In the following work, it is the author's intention to treat of *personal* actions, and the various means of commencing, prosecuting, and defending them, in the courts of King's Bench and Common Pleas, and occasionally in the court of Exchequer of Pleas: And with that view, he has considered the proceedings, in the order in which they present themselves, and follow one another, in the course of the suit; and has endeavored to explain, not only the principal proceedings, but also such as are of a subordinate nature, with all the variations attendant upon each, by a methodical arrangement of the several acts of parliament, rules of court, and judicial decisions respecting them. In stating the mode of commencing the suit, he has attended to the jurisdiction of the courts, as it is exercised by original writ, bill, or attachment of privilege. The proceedings against *peers* of the realm, *corporations* and *hundredors*, are classed under the head of proceedings by *original writ*, to which *outlawry* is considered as an incident; and the proceedings against *members* of the House of Commons, on the statute 12 & 13 W. III. c. 3, as well as against *attorneys* and officers of the court, and, in the King's Bench, against *prisoners* in the actual custody of the sheriff or marshal, under that of proceedings by *bill*.

The doctrine of *pleas* and *pleading*, and of demurrers, amendments and jeofails, is considered, with reference to the different actions, so far as appeared to be necessary for understanding the practice of the courts: And the reader will here find a full account of the practice on *motions*, and the cases in which the courts will set aside or stay the proceedings, the subject of *arbitration*, and the law of *damages* and *costs*, the doctrine of *extents*, in chief and in aid, with the proceedings in *scire facias*, and *error*. The proceedings in *criminal* cases in general, and in *real* and *mixed* actions, being foreign to the purpose of this work, are only incidentally mentioned in the course of it. The doctrine of *attachments*, however, is considered, as it arises out of, and is connected with, the proceedings in civil suits. A collection will be found, towards the end of the first volume, of all the cases determined by the court of Common Pleas, on the amendment of *finis* and *recoveries*: And the practice in the action of *ejectment* is fully treated of in the last chapter.

This work was originally published in three parts: The first part made its appearance in *November*, 1790; and was received by the profession, in a manner highly flattering to its author. This part contained the whole of the proceedings in *personal* actions, in the court of King's Bench, previous to the plea; together with all that was peculiar to the proceedings by and against *attorneys* and officers of the court, against *peers* of the realm, and *members* of the house of commons, upon the writ of *habeas corpus*, and against *prisoners* in the actual custody of the sheriff, or marshal, &c. In the second part, which was published in *November*, 1794, the

proceedings at large were continued, from the demand of plea, to final judgment and execution; and the third part, which treated of the proceedings in *scire facias* and *error*, was published in *November*, 1798.

In the following year, a *second* edition of the whole work was called for: in which some parts of it were considerably enlarged, particularly those which treated of *actions* and *declarations*; of the doctrine of *arrest*: of the proceedings against the *sheriff*, to compel him to return the writ, and bring in the body: of *attorneys*, and the mode of their admission, with their duties, privileges, and disabilities; of the practice on *motions*; and the judgment and execution against *heirs* and *tertenants*.

In the *third* edition, which was published in *October*, 1803, a new Chapter was inserted, on the *removal* of causes from inferior courts; by writ of *certiorari* and *habeas corpus*, from such as were of record, and by writ of *pone*, *recordari facias loquelam*, or *accedas ad curiam*, from such as were not of record: And this edition was not confined altogether to the practice of the court of King's Bench; but contained an account of the means of commencing actions in the court of Common Pleas; and references were occasionally made to the rules of that court, and more frequently to the cases of practice determined therein, as reported by Lord Chief Justice *Willes*, and other subsequent reporters.

The *fourth* edition was published in *January*, 1808. In this was comprised the substance of all the rules and orders of the court of King's Bench, on the subject of practice, from the beginning of the reign of *James* the 1st, down to that period; and in addition to those of the Common Pleas, which were before referred to, from the printed collection, ending in 1743, it contained all the subsequent rules of that court, many of which were never before published.

Still, however, the publication related principally to the practice of the court of King's Bench. The author had originally intended to treat of the practice of both courts: but was deterred from the execution of his design, by the difficulty of the undertaking, and a fear of failure from attempting too much. Encouraged, however, by the success he met with, he afterwards inserted some of the more recent rules and decisions of the court of Common Pleas; and in the *fifth* edition, published in *November*, 1812, he endeavoured to incorporate the whole of its practice with that of the King's Bench. For this purpose, and with a view to the differences between the practice of the two courts, which will be noticed hereafter, particular attention was paid to the constitution of the court of Common Pleas, its jurisdiction and officers, and the process used for bringing in the defendant, &c. And besides some of the earlier cases of practice, most of those reported by Sir *George Cooke*, the author of the *Practical Register*, and Mr. Secondary *Barnes*, were referred to; and all that were to be

found in the reports of Lord Chief Justice *Willes*, Mr. Serjeant *Wilson*, Mr. Justice *Blackstone*, Mr. *Henry Blackstone*, Messrs. *Bosanquet & Puller*, and Mr. *William Pyle Taunton*: And lastly, so much of the official practice was added, as the Author could collect from the books upon the subject, or was suggested by his own experience and observation.

In the *sixth* edition, which appeared in *January*, 1817, the proceedings in actions by and against *attorneys*, and against *prisoners* in custody of the sheriff, &c. and for the *removal* of causes from inferior courts, were placed before the *declaration*, and time for *pleading* in ordinary cases; and some other transpositions were made, for the sake of perspicuity, and in order more clearly to connect the different parts of the subject. The law and practice of *arrest* were treated of altogether, in the *ninth* Chapter; and the *motions* and *rules* of the courts were newly arranged, in the *eighteenth*; which also included the doctrine of *attachments*, with the mode of proceeding thereon, and some addition to the practice by *summons* and *order*. In a subsequent Chapter, a general view was taken of the *rolls* of the courts, on which issues and other matters of record are entered, with the entries thereon, and by whom, and in what manner they are made, and the time and mode of bringing in and docketing them; and, in the Chapter on *executions*, the writ of *retorno habendo* in *replevin* was treated of, as well as the writ of *habere facias possessionem* in *ejectment*. The *stamp duties* on legal proceedings, which have been since abolished, were also carefully stated in that edition, from the last general stamp act.

In the *seventh* edition, which was published in *January*, 1821, besides other important alterations and additions, which are particularly noticed in the preface thereto, the execution by *levari facias*, and the law and practice of *extents*, in *chief* and in *aid*, with the proceedings thereon, for the crown or its debtor to obtain execution, or for the defendant or a third person to resist them, were made the subject of a separate Chapter; and, in the following one, the writ of *scire facias* for the *king* was treated of, with the proceedings thereon, for the recovery of his debts, or obtaining a repeal of letters patent.

In the *eighth* edition, which was published in *June*, 1824, besides bringing down the acts of parliament, rules of court, and practical decisions, to the end of *Michaelmas* term preceding, some further important alterations and additions were made. The *third* Chapter was divided, and confined, in that edition, to the admission, enrolment, certificates, and re-admission of *attorneys*; their privileges, disabilities, and duties, with the consequences of their misbehaviour. The remainder of that Chapter, consisting of the proceedings in actions by and against *attorneys*, &c. and for the recovery and taxation of their costs, was made the subject of a

separate one, being the *fourteenth*. The numerous decisions respecting *attorneys* and *bail*, occasioned considerable alterations and additions in the *third* and *twelfth* Chapters; and in the *nineteenth*, there was a new and copious arrangement of the cases in which *attachments* for contempt might be moved for. The Chapter in the former additions, on “motions and rules, &c. and the practice by summons and order, &c.” was also divided; and an additional one formed out of it, being the *twentieth* in the *eighth* addition, on “motions and rules, &c. peculiar to the action of *ejectment*, and affidavits in support of them, and such motions and rules as were not necessarily connected with any suit;” in which Chapter was included a full account of the motion and rule for setting aside an *annuity*, and delivering up the securities to be cancelled, &c. with the decisions of the courts, on the statutes 17 Geo. III. c. 26, 53 Geo. III. c. 141, and 3 Geo. IV. c. 92. And, in the *thirty-fifth* Chapter, an outline was given of *written* evidence, referring to the different books in which the subject was more fully treated of. That edition too was greatly improved by the insertion of some very valuable notes, and references to MSS. cases of practice, never before published, which were kindly communicated to the Author by Mr. Justice *Holroyd*. Some references were also made therein to the reports of Sir *Orlando Bridgman*, and to the first volume of those of the late Lord *Kenyon*. Of the alterations and improvements in the present edition, a full account is given in the *Preface*.

The general order of the proceedings is the same in the courts of King’s Bench and Common Pleas: and the reader will observe, that, without breaking in upon that order, the author has first of all treated of the practice that is common to both, and then of what is peculiar to each, or different in one from the other of them. When the practice is the same in both courts, it is in general so stated, by using the word “courts” in the plural number; and where the peculiarity or difference between them is considerable, it is commonly made the subject of a distinct paragraph; but otherwise it is noticed in the same paragraph, and most frequently at the end of it. In referring to the *rules*, they are marked with the initials of the courts to which they belong; and in citing the *cases*, the court in which they were decided is in general mentioned. It should still be remembered, however, that the practice was originally written for, and confined to the court of King’s Bench: and hence, where the “court” is mentioned in the singular number, it must be understood to mean that court, unless the subject-matter appear by the context, or reference to the notes, to relate to the practice of both courts, or be confined to that of the court of Common Pleas. Whenever the practice of the *Exchequer* of Pleas is introduced, that court is always particularly mentioned.

For the original cases referred to in the course of the work, the profes-

sion are chiefly indebted to Mr. Justice *Holroyd*, the late Mr. Serjeant *Runnington*, the late Mr. *George Wilson*, one of his majesty's learned counsel, Mr. *Abbot*, (now Lord *Colchester*,) when at the bar, Mr. *William Elias Taunton*, and Messrs. *Maule & Selwyn*; whose initials are added in the *Table*, to the names of the cases they respectively furnished.* The few which are not marked, were communicated singly, by other friends, at different times.

* The cases of Mr. Justice *Holroyd* are from M. 16 to E. 37 Geo. III.; those of Mr. Serjeant *Runnington*, from E. 18 to M. 37 Geo. III.; those of Mr. *Wilson*, from M. 22 to T. 31 Geo. III.; those of Mr. *Abbot*, from E. 32 to E. 39 Geo. III.; those of Mr. *Taunton*, from H. 40 to M. 49 Geo. III.; and those of Messrs. *Maule & Selwyn*, from E. 56 to T. 57 Geo. III. inclusive.

CHAPTER I.

Of ACTIONS, and the TIME limited for their COMMENCEMENT; and of NOTICES of ACTION, &c.

ACTIONS are commonly divided into *criminal*, or such as concern pleas of the crown, and *civil*, or such as concern common pleas.^(a) And these latter are again divided into *real*, *personal*, and *mixed* actions. In a *real* action, the proceedings are *in rem*, for the recovery of real property only; in a *personal* action, they are *in personam*, for the recovery of specific chattels, or of some pecuniary satisfaction or recompence; and in a *mixed* action, they are *in rem et personam*, for the recovery of real property, and damages for withholding it. Again, in *real* actions, there is a distinction between those founded on the *possession*, and those founded on the absolute *property* or *right*.^(b)

Personal actions are *ex contractu*, *vel ex delicto*; being founded upon *contracts*, or for *wrongs* independently of contract.^(c) Actions upon *CONTRACTS* are *Account*, *Assumpsit*, *Covenant*, *Debt*, *Annuity*, and *Scire facias*.

ACCOUNT lies, at common law, against a *guardian* in socage, *bailiff*, or *receiver*, to compel an account of profits, or moneys received by the defendant;^(d) and by the statute 4 & 5 Anne, c. 16, § 27, it may be maintained against the executors and administrators of every guardian, bailiff, and receiver, and also by one joint-tenant and tenant in common, his executors and administrators, against the other, as *bailiff*, for receiving more than comes to his just share or proportion, and against his executors and administrators. The proceedings in this action being difficult, *dilatatory, and expensive, it is now seldom used, especially as [*2] the party has in general a more beneficial remedy, by action for money had and received, &c.; or, if the matter be of a complicated nature, by resorting to a court of equity. It has been ruled at *Nisi Prius*, that an action of *assumpsit* cannot be maintained on a running account between merchants, or a merchant and his broker; the proper

(a) Co. Lit. 284, b. Cowp. 391.

(b) Steph. Pl. 3, and see Com. Dig. tit. *Action*, D. 2.

(c) 1 Bac. Abr. 26. Gib. C. P. 5. The outline here given of personal actions is not intended to point out the particular cases in which they are, or are not maintainable; but merely to exhibit a general view of them, and the form they assume in pleading, to which the practice of the courts more immediately relates. To fill up this outline, and obtain full information on the doctrine of personal actions, and the facts necessary to support them, see, besides the more elementary works of Mr. Justice *Blackstone*, *Reeves*, and *Wooddeson*, the appropriate titles in the *Abridgements* of *Rolle*, *D'Anvers*, *Viner*, and *Bacon*; *Comyn's Digest*; Lord Chief Baron *Gilbert's* treatises on the actions of *debt* and *replevin*; Mr. *Wilkinson's* Practice in the latter action; the law of *Nisi Prius*, by Mr. Justice *Buller*, *Espinasse*, and *Selwyn*; Mr. Serjeant *Williams's* Notes on *Saunders*; *Chitty* on Pleading, 1 V. Chap. II., and Mr. Serjeant *Stephen's* Principles of Pleading, 12, &c. In the action of *assumpsit* in particular, the contracts on which it is founded are very fully treated of by Mr. *Comyn*, and the pleadings therein by Mr. Serjeant *E. Laves*. See also Mr. *Roscoe's* treatise on the law of actions relating to real property.

(d) Co. Lit. 172, a.

remedy being by action of *account*; (a) but, in a subsequent case, it was holden, that whatever doubt might have existed on the subject a century back, the action of *assumpsit*, for the balance due on the result of numerous transactions, had been so long maintained, that it was now much too late to make any objection to it; (b) and it seems to be now settled, that *assumpsit* will lie for the balance of an account, however voluminous it may be, and that the plaintiff is not obliged to bring an action of *account*. (c) [1]

ASSUMPSIT, which is now become the most common action of any upon contracts, (d) lies for the recovery of *damages*, upon promises, express or implied, without deed. These promises are various, according to the subject matter of them, and the considerations upon which they are founded. In general, they are to pay or repay money, or to do or forbear some other act. Promises to pay money are by far the most numerous of any, and may be classed in the following order: First, the *indebitatus assumpsit*, on a promise to pay a precedent debt, for the sale, exchange or hire of cattle or goods, necessaries, works and services, or moneys; for the sale, assignment, or use of lands, &c.: Secondly, the *quantum meruit*, or *valebant*, on a promise to pay the plaintiff, for the like considerations, as much money as he deserved to have, or, for goods, &c., as much as they were reasonably worth: Thirdly, the *insimul computassent*, on a promise to pay the sum due on an account stated between the parties. The above are usually denominated *common assumpsits*: Fourthly, the *assumpsit* on a promise to pay money, in consideration of a *legal liability* to pay it, which may be termed the *liability assumpsit*; (e) as upon a bill of exchange, (inland or foreign,) banker's draft, promissory note, bye-law, or foreign judgment; or for a fine on admission to copyhold premises, legacy charged on land, toll, port-duty, contribution to party-walls, &c.: (f) Fifthly, *mutual promises*, which are either to pay money, as on wagers or feigned issues, or to do some other act, as to marry, &c., or to perform special agreements, charter-parties, policies of assurance, or awards; the breach of which may consist either in the non-payment of money, or the

[*3] *non-performance of some other act: Sixthly, *special assumpsits*, on promises to pay money, founded on some consideration executed or executory; as in consideration of marriage, the sale, exchange or

(a) 2 Campb. 238, and see Gilb. Evid. 192. 2 Keb. 781. Tri. *per pais*, 401.

(b) *Arnold v. Webb*, 5 Taunt. 432. (a.)

(c) 5 Taunt. 431. 1 Marsh. 115, S. C., and see 2 Chit. Rep. 10, in which two principal officers of the court were appointed *auditors*, on motion, in an action of *account*. 3 Dowl. & Ry. 596.

(d) The action of *assumpsit*, though founded upon contract, is properly an action upon the case. 1 Bac. Abr. 30. Gilb. C. P. 6.

(e) The difference between the *indebitatus* and *liability assumpsit* is, that in the former, the promise is founded on a pre-existing debt, the consideration for which is stated generally; but in the latter, the circumstances which induce the defendant's liability, are set forth specially in the declaration.

(f) The promises that have been hitherto mentioned, are for the most part *implied*: those which follow are generally *express*.

[1] In England, to avoid the necessity of bringing this form of action, and at the same time, to retain the business involving the settlement of mercantile accounts in the common law courts, actions on the case for not accounting were introduced, which received judicial sanction when founded on the breach of an express promise to account. Carthew, 89. 1 Salk. 9. 1 Shower, 71. 2 Binney, 330. But it has been made a question whether the law raises a promise by *implication* to account, where there has been no express promise given by an agent to account. See 2 Binney, 325.

hire of cattle or goods, necessities, forbearance, work and services, or indemnity; or for the sale, assignment, or use of lands, &c.: which promises may be made either by the party benefited, or by third persons. Promises to *repay* money are express or implied; the latter may in general be given in evidence, under the common count for money had and received.

Special assumpsits, on promises to do or forbear some other act, may be considered as they relate to persons, personal property, or real property; and are first, to marry, or do some personal service: Secondly, upon a sale or exchange of cattle or goods, to accept, deliver, take back, or return them; or upon a warranty, as to their title, quality, or value: Thirdly, upon a bailment of cattle or goods, to be kept, either generally or by way of pledge; concerning cattle or goods lent or let to hire; or against carriers, wharfingers, farriers, &c.: Fourthly, to provide necessities, for the plaintiff, or for third persons: Fifthly, to forbear to sue, or give time for the payment of a debt: Sixthly, to perform works; under which may be classed promises made by professional persons, as attorneys, surgeons, &c.; or respecting personal or real property: Seventhly, upon a retainer, to serve or employ: Eighthly, to sell, assign, or exchange lands, &c.; or by or against landlord or tenant, to take, let, hold, repair, cultivate, or quit them: Ninthly, respecting real or personal securities: Tenthly, to account for the profits of lands, or for money or goods, &c.: And lastly, on promises of indemnity.

COVENANT lies for the recovery of *damages*, upon contracts by deed. This action is founded upon articles of agreement, awards, charter-parties of affreightment, policies of insurance, indentures of apprenticeship, leases, mortgages, &c.; and is either for the non-payment of money, or for not doing or forbearing some other act.

DEBT lies for the recovery of a *sum certain*: First, on *records*; as judgments, or recognizances: Secondly, on *specialties*; as single bills or bonds, by or against the parties or their personal representatives, or against heirs or devisees; or upon articles of agreement to pay money, leases, mortgages, &c.: Thirdly, upon *simple contracts*; as for services and works, moneys, &c., it being a rule, that whenever *indebitatus assumpsit* lies, *debt* will also lie; or, by the payee against the drawer, on bills of exchange, bankers' drafts, or promissory notes, expressed to be for value received, or on bye-laws, or foreign judgments, or for fines or amerciaments, &c.: Or lastly, it is founded in *maleficio*: and lies against sheriffs, &c., for escapes after judgment; or upon acts of parliament, by the parties grieved or common informers.[1]

ANNUITY is an action which lies for the recovery of an annuity, or yearly payment of a certain sum of money, granted to another in fee, for

[1] It was formerly holden, in England, that an action of *debt* would not lie against an *executor* or *administrator*, upon a simple contract made by the testator, or intestate, (Barry v. Robinson, 1 New Rep. C. P. 293, and the authorities there cited,) except in *London*, where such an action was maintainable by the custom; (City of London's case, 8 Co. 126. Bohun Priv. Lond. 147, 149, 151;) but where the contract was made by the executor or administrator, an action of *debt* might have been maintained against him: (*Riddell v. Sutton*, 5 Bing. 200. 2 Moore & P. 345, S. C.) And now, by the late act for the further amendment of the law, and better advancement of justice, (3 & 4 W. IV, c. 42, § 14, and see the third Report of the Common Law Commissioners, pp. 17, 18, 74,) "an action of *debt* on simple contract shall be maintainable, in any court of common law, against any executor or administrator." It should also be observed, as connected with this subject, that, by another clause of the same statute, (3 & 4 W. IV, c. 42, § 13,) "no wager of law shall be hereafter allowed."

life or years, charging the person of the grantor only; and it may be brought by the grantee or his heirs, or his or their grantee, [*4] against the *grantor or his heirs. (a) This action is at present out of use, being superseded by the action of *debt* or *covenant*. But *debt* does not lie at common law, nor by stat. 8 Anne, c. 14, § 4, for the arrears of an annuity or yearly rent, devised to A. payable out of lands, during the life of B., to whom the lands are devised for life, B. paying the same thereout, so long as the estate of freehold continues. (b) *SCIRE FACIAS* lies by or against the parties or their representatives, to have execution on a judgment, statute or recognizance, for the sum recovered, or acknowledged to be due.

ACTIONS for WRONGS are *Case*, *Detinue*, *Replevin*, and *Trespass vi et armis*.

ACTIONS on the *case* are founded on the common law, or given by act of parliament; and lie to recover *damages*, for consequential wrongs or torts, to persons individually or relatively; or to real or personal property, or some right or privilege incident thereto. These actions are either *ex delicto*, or *quasi ex contractu*: and they are said to arise from *mal-feazance*, or doing what the defendant ought not to do; *non-feazance*, or not doing what he ought to do; and *mis-feazance*, or doing what he ought to do, improperly; and they are commonly for doing or omitting something contrary to the general obligation of law, the particular rights or duties of the parties, or some implied contract between them. To persons *individually*, *ex delicto*, they are for some consequential hurt or damage, arising from public nuisances, or keeping mischievous animals; (c) in nature of conspiracy; for malicious prosecutions, of civil suits or criminal charges; libels, *scandalum magnatum*, or defamation of common persons; against justices, or other officers, for refusing bail, &c.: or, *quasi ex contractu*, against surgeons, &c., for improper treatment. To persons *relatively*, *ex delicto*, they are for seducing, enticing away, or harbouring wives or servants, *per quod consortium vel servitium* [*5] *amisit*. (d) *To *personal* property, *ex delicto*, they are actions of *trover* and conversion; for *negligence*, in riding horses,

(a) Co. Lit. 144, b.

(b) 4 Maule & Sel. 113, and see 6 Moore, 335. 3 Brod. & Bing. 130, S. C., where the annuity was created by *grant*. See also M'Clel. 495.

(c) This and some other of the wrongs here mentioned, as affecting *persons*, may and do frequently affect *personal* property. And, on the other hand, some of the wrongs hereafter referred to, as affecting *personal* property, may and do sometimes affect *persons*, as negligence in riding horses, and driving carriages, &c.

(d) In the former editions of this work, actions for criminal conversation, debauching daughters, and beating or imprisoning wives or servants, *per quod consortium vel servitium amisit*, were classed under the head of actions on the *case*; and in principle they seem to be so, for the following reasons: First, that the wrongs complained of therein are not immediate, but consequential: Secondly, that the plaintiff may declare for them by bill, with a *quod cum*, which is not allowed in *trespass*: 2 Salk. 636. 1 Str. 621. Thirdly, that in these actions, the plea of the statute of limitations is not guilty within *six* years; 2 Wils. 85. 2 Bur. 753. 2 Ken. 371. Bul. Ni. Pri. 28, S. C. 6 East, 387, S. P. *semb.*, and not, as in *trespass* and assault, within *four* years; 2 Salk. 420. And lastly, that though the plaintiff should not recover *forty* shillings *damages*, he is nevertheless entitled to full *costs*. 1 Salk. 206. 2 Ld. Raym. 831, S. C. 3 Wils. 319. 2 Blac. Rep. 854, S. C.; and see 2 Durnf. & East, 167. 5 Durnf. & East, 361. 5 East, 45. 6 East, 251, 387. 4 Dowl. & Ry. 215. But as these actions, in point of *form*, are laid, *vi et armis* and *contra pacem*, it has been determined, that they are to be considered as actions of *trespass*: 2 New Rep. C. P. 476. And, accordingly, it is holden that a count may be joined therein for breaking and entering the plaintiff's house, or other *trespass, vi et armis*: *Id. Ibid.*, 2 Maule & Sel. 436. 3 Campb. 526, n. S. C.; and see Cro. Jac. 501; in like manner as *trespass* and *rescue* may be joined, 2 Lutw. 1249. 1 Ld. Raym.

driving carriages, navigating vessels, or performing works; against sheriffs and other officers, for escapes, false returns, or taking insufficient pledges, &c.: for excesses or irregular distresses, pound breach and rescue of distresses for rent or damage feasant; rescue of prisoners; unlawfully exercising trades, or infringing patents, copyrights, &c.; false and deceitful representations; or on the statute 7 & 8 Geo. IV., c. 31, &c.: or *quasi ex contractu*, for deceit on the sale of cattle or goods, or immoderate use of them, when lent or let to hire; and against innkeepers, carriers, by land or by water, wharfingers, farriers, &c. To real property *corporeal, ex delicto*, they are for nuisances of a private nature, to houses, lands, &c., to the prejudice of the plaintiff's possession or reversion; or on the statute 7 & 8 Geo. IV., c. 31, &c.: or *quasi ex contractu*, against tenants, in nature of waste; for not repairing fences, or for not carrying away tithe, &c. And to real property *incorporeal, ex delicto*, they are for disturbance of common of pasture, &c., ways, offices, franchises, tolls, ferries, and seats in churches.

DETINUE lies upon a purchase, bailment, or finding, for the recovery of goods *in specie*, or damages for detaining them. And in this action, when the goods are alleged to have come to the defendant by finding, it is sufficient for the plaintiff to prove that they came to him by wrong; at least, unless the finding be traversed. (a) REPLEVIN lies to recover damages for an immediate wrong, without force, in taking and detaining cattle or goods, under a distress for rent, or damage feasant, &c.; and answers to the action of trespass *de bonis asportatis*. It seems, that a writ of *replevin* may be properly brought, not merely where there has been a distress, as is generally imagined, but in all cases where a person takes goods out of the possession of the party who applies for the writ, upon his giving security, until it shall appear whether the goods are rightfully taken; [A] but if A.

83; though the consequences of a rescue seem to be properly the subject of an action on the case.

(a) 1 New Rep. C. P. 140.

[A] "In an action of replevin, the plaintiff may recover the specific chattels of which he has been unlawfully dispossessed, and not merely damages, as in trespass or trover. It is now the settled doctrine in England, that replevin lies in all cases where the goods have been taken out of the actual possession of the owner, and in Pennsylvania, it lies in all cases where one man claims goods in the possession of another, without regard to the manner in which the possession was obtained. And as the doctrine of market overt does not obtain in this State, the plaintiff may follow his property through successive transfers, and replevin it in whose possession soever he may find it. The action is usually grounded on a tortious taking, but, if the detention only is unlawful, replevin lies. It sounds in damages like an action of trespass, to which it is extremely analogous, if the sheriff has made a return, and the plaintiff goes only for damages. It may be resorted to at any time within six years after the cause of action has accrued, but not afterwards.

It is not in this state a proceeding altogether in rem, but is against the defendant in the writ personally, with a summons to appear; and it is a mistake to suppose that, because the defendant's conduct prevents the replevying and delivering of the property to the plaintiff, a recovery cannot therefore be had by him, for the value of the property so eloiigned.

Though this action, like all personal actions at common law abated by the death of the plaintiff, yet it did not die with the person; the executor might bring a new one. The act of 13th April, 1791, in Pennsylvania, enabled the representative, (where the action by law survived) if the plaintiff should die before final judgment, to prosecute the action; so that it does not abate; and to compel the defendant to appear, the plaintiff may make himself party by substitution, without citation, and he may compel the defendant by scire facias to defend. So the defendant can, by scire facias, compel the representative of a deceased plaintiff to appear, for this action survives the death of the plaintiff. Nor does the action abate by the death of the defendant whilst the action is pending, though it is held otherwise in England and Massachusetts, where it is founded on tort, and does not survive

be in possession of goods, in which B. claims a property, *replevin* is not the proper writ to try that right. (b) *TRESPASS vi et armis* lies to recover damages for immediate wrongs, accompanied with force; to the *person*, by menaces, assault, battery, wounding, mayhem, or false imprisonment; to *real* property, as houses, lands, fisheries, or watercourses; and to *personal* property by destroying, damaging, taking away, detaining, or converting cattle or goods.

[*6] *Upon *contracts*, the action should be brought by the party with whom the contract was made, if living; or, if dead, by his executors or administrators: And it should be brought against the party who made the contract, or, if he be dead, against his executors or administrators; (a) or, upon a bond, against his heirs and devisees. Where there are *several* parties to a contract, the action should be brought by or against all of them, if living: (b) or, if some are dead, by or against the survivors: (c) And an action may be brought by or against a surviving partner, for his own debt, as well as for that which was contracted in the life-time of the deceased. (d) If an action be brought upon a joint contract, *by* one of several partners, (e) or assignees of a bankrupt, (f) the plaintiff will be non-

(b) 1 Scho. & Lef. 320, 21, n. 327, and see 2 Stark. Ni. Pri. 288, where, in an action of *trover* for books of account, Lord *Ellenborough* intimated, that the bringing an action of *trover* was not the most convenient remedy in a case of this nature; and said, that he had heard Mr. *Wallace* express his surprise, that the remedy by *replevin* was not more frequently resorted to, by means of which the party might obtain possession of the specific chattel of which he had been deprived, instead of an action of *trover*, in which he would recover damages only. [1]

(a) 1 Wms. Saund. 5 Ed. 216, a. (1).

(b) *Id.* 291, b. (4) and see 4. Barn. & Ald. 437. 6 Moore, 322. 3 Barn. & Cres. 353. 5 Dowl. & Ry. 152. S. C. 7 Dowl. & Ry. 144.

(c) 2 Wms. Saund. 5 Ed. 121, c. (1).

(d) *Golding v. Vaughan*, E. 22 Geo. III. K. B. 2 Chit. Rep. 436, S. C. 5 Durnf. & East, 493, 1 Esp. Rep. 47, S. C. 6 Durnf. & East, 582.

(e) 2 Str. 820. 1 Wms. Saund. 5 Ed. 291, g.

(f) 1 Chit. Rep. 71. 2 Stark. N. Pri. 424. S. C.

[1] In England, however, the action of *replevin* can only be maintained where goods are tortiously taken, and not where they are delivered upon a contract. 4 Bingham, 299. In Pennsylvania, this form of action is extensively used to try questions of property in chattels, and for the want of a court of chancery, is adopted as the vehicle of equitable claims and rights. See the note of the editor to the last edition of Stephen on Plead. *App. No. 2. note I.* See also 3 Wharton, 369. In the state of New York, the action of *replevin* is grounded on a tortious or unlawful taking, whether taken under pretence of a distress or not. 10 Johns. Rep. 369; 7 *Id.* 140; 17 *Id.* 116. It does not lie, in that state, when the original taking was justifiable. 14 *Id.* 84; 15 *Id.* 401. So, in the state of North Carolina, 2 Taylor, 98. In the state of Massachusetts, *replevin* lies for goods wrongfully detained, though the original taking was justifiable, and though the plaintiff never had possession of them, until delivered to him on the service of the writ. 15 Mass. Rep. 359; 16 *Id.* 147; 17 *Id.* 610. In the state of Maryland, as in Pennsylvania, it appears to lie wherever one man claims goods in the possession of another. 1 Har. & Johns. 147. In the state of South Carolina, it appears to be unsettled whether *replevin* will lie in any other case than of a distress for rent. 1 Rep. Con. Ct. 401. In Illinois, to maintain this action, there must be an unlawful taking from the actual or constructive possession of the plaintiff. 1 Breese, 130.

against the executor or administrator. In our practice, it is an action which is much resorted to, and has undergone material change. It possesses many advantages over any other form of action, and the inclination of the courts is to make it as complete as possible. To expose the plaintiff to the loss of his remedy by the death of the defendant, would be in some cases to destroy his chance of justice; for unless the property remained in specie in the hands of the executor, he would be remediless. The reason of the rule, that personal actions die with the person, does not apply to cases involving a right of property. Where one receives the property of another, his estate should answer it; for that swells the assets in the hands of the representatives. The exception to this rule will not be extended beyond the case of *trover*, which has been held to abate by the defendant's death." 2 Trou. & Hal. Pr. 161, 3d Edition. Morris on *Replevin*, Ch. 1, p. 17; Ch. 2, p. 87.

suited, or have a verdict against him: But if one of several plaintiffs be mis-named, this is the subject of a plea in abatement, and not in bar: (g) And if an action be brought *against* one of several partners, or assignees, he can only plead in abatement; though the plaintiff knew, and even contracted with the other partners. (h) In *assumpsit*, by one of two surviving partners, the fact of the plaintiff's being a surviving partner, must be stated in the declaration; and, therefore, a count for goods sold by the plaintiff to the defendant, is not supported by proof that the goods were sold by the plaintiff and his deceased partner: (i) But under a declaration containing only one set of counts, charging the defendant in his own right, the plaintiff may recover one demand due from the defendant individually, and another due from him as surviving partner. (k) It is also a rule, that, as a man cannot sue himself, an action cannot be maintained by several plaintiffs, on a joint contract, where one or more of them are liable, with the defendants, to the performance of it. (l) A contract, being a *chose in action*, was not assignable at common law, so as to entitle the assignee to an action in his own name: (m) but there was an exception to this rule, in the case of foreign bills of exchange, upon which an action might have been maintained, in the name of the indorsee: And the same doctrine was afterwards applied to inland bills; (n) and extended to promissory notes, by the statute 3 & 4 Anne, c. 9: and, by other acts of parliament, actions may be maintained by the assignee of the reversion, or against the assignee of a lease, where the covenants run with the land; (o) *or by the assignees of a bail, (a) or replevin, (b) bond; [*7] or of the effects of a bankrupt, (c) or insolvent debtor: (d) But a trustee under the *Scotch* bankrupt act, (54 Geo. III. c. 137,) cannot sue, for a *chose in action*, in his own name; (e) and upon the contract of a bankrupt, or insolvent debtor, an action does not lie against his assignees.

By statute 54 Geo. III. c. 170, § 8, "all securities given or received or indemnifying any district, parish, township, or hamlet, for the maintenance of any *bastard* child or children respectively, or any expenses in any way occasioned by such district, &c., by reason of the birth or support of any bastard child or children born within such district, &c., or chargeable thereunto, are declared to be vested in the *overseers* of the poor of such district, &c. for the time being; who are authorized to sue for the same, as and by their description of overseers, of such district, &c.: And such action, so commenced by such overseers, shall in no wise abate, by reason of any change of overseers of such district, &c. pending the

(g) 6 Maule & Sel. 45.

(h) 2 Atk. 510. 5 Bur. 2611. 2 Blac. Rep. 947. 5 Durnf. & East, 649. 1 Wms. Saund. 5 Ed. 291, c. d.

(i) 4 Barn. & Ald. 374, and see 6 Moore, 332; but see *id.* 579.

(k) 1. Barn. & Ald. 23, and see 7 Moore, 158. 3 Brod. & Bing. 302, S. C.

(l) 2 Bos. & Pul. 120, 124. (c). 6 Taunt. 597. 2 Marsh. 319. S. C. 6 Moore, 334. 7 Barn. & Cres. 419. 1 Man. & Ryl. 238, S. C.

(m) For the doctrine as to the assignment of choses in action, see Chitty on bills, p. 7, &c.

(n) *Id.* 11.

(o) Stat. 32 Hen. VIII. c. 34.

(a) Stat. 4 & 5 Ann. c. 16, § 20.

(b) Stat. 11 Geo. II. c. 19 § 23.

(c) Stat. 1. Jac. I. c. 15, § 13. 5 Geo. II. c. 30, § 2. 6 Geo. IV. c. 16, § 63. And see stat. 3 Geo. IV. c. 81, § 11, 6 Geo. IV. c. 16, § 89, authorizing the assignees of one or more members of a firm, to use the names of partners in suits; indemnifying them against the payment of costs.

(d) Stat. 54 Geo. III. c. 28, § 17. 7 Geo. IV. c. 57, § 24.

(e) 6 Maule & Sel. 126.

same; but shall be proceeded in by such overseers for the time being, as if no such change had taken place." On this statute it has been holden, that an action on a bond, to indemnify a parish against the expenses of a bastard child, must be brought in the names of the overseers for the time being, and not of those to whom the bond was given.^(f) Also, by statute 59 Geo. III. c. 12, § 17, "in all actions, suits, indictments, and other proceedings, for or in relation to any buildings, lands, or hereditaments, purchased, hired, or taken on lease, by the *churchwardens* and *overseers* of the poor of any parish, by the authority and for any of the purposes of that act, or for the rent thereof, or for or in relation to any other buildings, &c. belonging to such parish, or the rent thereof; and in all actions and proceedings upon or in relation to any bond, to be given for the faithful execution of the office of an assistant overseer, it shall be sufficient to name the churchwardens and overseers of the poor for the time being, describing them as the churchwardens and overseers of the poor of the parish for which they shall act, and naming such parish; and no action or suit, &c. shall cease, abate, or be discontinued, quashed, defeated, or impeded, by the death of the churchwardens and overseers named in such proceeding, or any of them, or by their removal from, or the expiration of their respective offices." On this statute, where a declaration in *ejectment*, by churchwardens and overseers, contained two sets of counts, one describing them by their *office*, without [*8] their *names*, and the other by *their *names*, without their *office*, the court held, after verdict, that the objection, if any, was cured.^(a)

In the case of *friendly societies*,^(b) the *trustees* of the institution for the time being are authorized, by the statutes 33 Geo. III. c. 45, § 11, and 59 Geo. III. c. 128, § 7, "to bring and defend, or cause to be brought or defended, any action, suit, or prosecution, criminal as well as civil, in law or equity, touching or concerning the property, right or claim, of or belonging to, or had by such institution; and such person or persons so appointed shall and may, in all cases concerning the property, right or claim aforesaid, of such institution, sue and be sued, plead and be impleaded, in his, her or their proper name or names, as trustee or trustees of such institution, without other description: And no such suit, &c. shall be discontinued or abate, by the death of such person or persons, or his or their removal from the office of trustee or trustees; but the same shall and may be proceeded in, by the succeeding trustee or trustees, in the proper name or names of the person or persons commencing the same: And such succeeding trustee or trustees shall pay or receive like costs, as if the action or suit had been commenced in his, her or their name or names, for the benefit of, or to be reimbursed from, the funds of such institution." In an action of *debt*, on bond given to the plaintiff as *treasurer* of a friendly society, the defendant pleaded, that the rules of the society had not been confirmed at the quarter-sessions pursuant to 33 Geo. III. c. 54; and the court held, upon demurrer, that the plea was bad, the bond being a good bond at common law.^(c)

(f) 3 Moore, 21. 8 Taunt. 691, S. C. and see 6 Dowl. & Ry1. 122.

(a) 2 Dowl. & Ry1. 708.

(b) And see stat. 57 Geo. III. c. 130, § 8, as to bringing and defending actions, &c. by or against trustees of *Savings Banks*.

(c) 5 Barn. & Ald. 769. 2 Chit. Rep. 322. 1 Dowl. & Ry1. 393, S. C.

In actions by or against *public companies*, as the *West India*,^(d) *London Dock*,^(e) or *Insurance*^(f) companies, &c., the plaintiffs or defendants are frequently authorized and required to sue, or be sued, by or in the name of their *treasurer*, or clerk: And, by the general *turnpike act*,^(g) "the trustees and commissioners of every turnpike road may sue, and be sued, in the name or names of any one such trustees or commissioners, or of their clerk or clerks for the time being; and that no action or suit to be brought or commenced by or against any trustees or commissioners of any turnpike road, by virtue of that or any other act or acts of parliament, in the name or names of any one of such trustees or commissioners, or their clerk or clerks, shall abate or be discontinued, by the death, removal or act of such trustee, &c. without the consent of the said trustee or commissioners, but by any other of such trustees, &c. shall always be deemed to be the plaintiff or plaintiffs, defendant or defendants, (as the case may be,) in every such action or suit: Provided always, that every such trustee, &c., shall be reimbursed and paid out *of the moneys belonging to the turnpike road for which he or they [*9] shall act, all such costs, charges, and expenses, as he or they shall be put unto, or become chargeable with or liable to, by reason of his or their being so made plaintiff or plaintiffs, defendant or defendants." In *Ireland*, by the statutes 5 Geo. IV. c. 73, and 6 Geo. IV. c. 42, § 10, societies or partnerships, formed under the authority of those statutes, may sue and be sued, in the name of any one of their public officers. And by the statute 6 Geo. IV. c. 131, joint stock societies or partnerships in *Scotland* may sue and be sued, in the name of the firms severally used by such societies or partnerships, or in the name of the manager, cashier, or principal officer of such society or partnership.

For *wrongs*, independently of contract, the action must be brought by the party to whom the injury is done, against the party doing it. And if either of the parties die, the action is gone; for it is a rule, that *actio personalis moritur cum personâ*.^(a)[A] But there are some exceptions to

(d) 39 Geo. III. c. lxxix. § 184.

(e) 39 & 40 Geo. III. c. xlvii. § 150.

(f) 53 Geo. III. c. cxxvi. 3 Barn. & Cres. 178, and see 4 Barn. & Cres. 962. 7 Dowl. & Ry. 376. S. C.

(g) 3 Geo. IV. c. 126, § 74.

(a) 1 Wms. Saund. 5 Ed. 216, a. (1).

[A] "The personal representatives are, as a general rule, entitled to sue on all covenants broken in the life-time of the covenantee; as for rent then due, or for breach of covenant for quiet enjoyment, or to discharge the land from incumbrances. A distinction must, however, be remarked between a covenant running with the land, and one purely collateral. In the former case, where the formal breach has been in the ancestor's life-time, but the substantial damage has taken place since his death, the real, and not the personal representative is the proper plaintiff; whereas, in the case of a covenant not running with the land, and intended not to be limited to the life of the covenantee, as a covenant not to fell trees, excepted from the demise, the personal representative is alone entitled to sue. In a recent case, *Ricketts v. Weaver*, 12 M. & W., 718, it was held, that the executor of a tenant for life may recover for a breach of a covenant to repair committed by the lessee of the testator in his lifetime, without averring a damage to his personal estate; and, in this case, the rule was stated to be, that, unless the particular covenant be one for breach whereof, in the lifetime of the lessor, the heir alone can sue, the executor may sue, unless it be a mere personal contract, to which the rule applies, that *actio personalis moritur cum personâ*."

"The personal representative, moreover, may sue, not only for the recovery of all debts due to the deceased by speciality or otherwise, but on all contracts with him, whether broken in his life time or subsequently to his death, of which the breach occasions an injury to the personal estate, and which are neither limited to the life-time of the deceased, nor, as in the instance of a submission to arbitration containing no special clause to the

this rule, chiefly arising from an equitable construction of the statute 4 Edw. III. c. 7, by which *executors* shall have an action of *trespass*, for a

contrary, revoked by his death. An administrator's title, moreover, relates back to the time of the intestate's death, so that he may sue for goods sold and delivered between the death and the taking out letters of administration.

"An action, however, is not maintainable by an executor or administrator for a breach of promise of marriage made to the deceased, where no special damage is alleged; and, generally, with respect to injuries affecting the life or health of the deceased,—such, for instance, as arise out of the unskilfulness of a medical practitioner, or the negligence of an attorney, or a coach proprietor,—the maxim as to *actio personalis* is applicable, unless some damage done to the personal estate of the deceased be stated on the record. But, where the breach of a contract relating to a person occasions a damage, not to the person only, but also to the personal estate; as, for example, if in the case of negligent carriage or cure there was consequential damage—if the testator had expended his money, or had lost the profits of a business, or the wages of labour for a time; or if there were a joint contract to carry both the person and the goods, and both were injured; it seems a true proposition, that, in these cases, the executor might sue for the breach of contract, and recover damages to the extent of the injury to the personal estate."

"It is, however, to actions in form *ex delicto*, that the rule *actio personalis moritur cum persona* is peculiarly applicable; indeed, it has been observed that this maxim is not applied in the old authorities to cases of action on contracts, but to those in tort which are founded on malfeasance or misfeasance to the person or property of another; which latter are annexed to the person, and die with the person, except where the remedy is given to the personal representative by the statute law; it being a general rule that an action founded in tort, and in form *ex delicto*, was considered as *actio personalis*, and within the above maxim."

"For a tort committed to a person, it is clear, then, that at common law no action can be maintained against the personal representatives of the tort-feasor, nor does it seem that the recent Stat. 9 & 10 Vict. c. 93, supplies any remedy against the executors or administrators of the party who, by his 'wrongful act, neglect, or default,' has caused the death of another; for the first section of this act renders that person liable to an action for damages, 'who would have been liable if death had not ensued,' in which case, as already stated, the personal representatives of the tort-feasor would not have been liable." Broom's Legal Maxims, pages 702, 706, 710, 2d edition.

But the strictness in this maxim has been most materially modified by recent legislation, in both England and America.

The act commonly called Lord Campbell's act, is given below, together with the acts of several of the states, of a like character.

"A further most important alteration, says Williams on Ex'rs., p. 674, 4th Am. Ed., in this part of the law has been effected by the stat. 9 & 10 Vict. c. 93, (entitled, An Act for compensating the families of persons killed by accidents,) which, after reciting, that 'no action at law is now maintainable against a person who, by his wrongful acts, neglect, or default, may have caused the death of another person, and it is oftentimes right and expedient, that the wrong-doer in such case should be answerable in damages for the injury so caused by him:' enacts, whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued,) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

II. "Every such action shall be for the benefit of the wife, husband, parent, and child, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action, the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought; and the amount so received, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, in such shares as the jury by their verdict shall find and direct."

III. "Not more than one action shall lie for and in respect of the same subject-matter of complaint; and every such action shall be commenced within twelve calendar months after the death of such deceased person."

IV. "In every such action, the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant or his attorney, a full particular of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which, damages shall be sought to be recovered."

V. "The following words and expressions are intended to have the meanings hereby

wrong done to their testator.(b) [1] Where several parties are jointly concerned in interest, or have suffered a joint injury(c), they may and

(b) 2 Bac. Abr. 444, 5, and see Cowp. 375. 1 Wms. Saund. 5 Ed. 217. 4 Moore, 532. 2 Brod. & Bing. 102, S. C.

(c) 2 Wms. Saund. 5 Ed. 115. 1 Vent. 167. 2 Lev. 27, S. C. 1 Ld. Raym. 127. 2 Wils. 414. 2 Wms. Saund. 5 Ed. 116, (2).

[1] And now, by the law amendment act, 3 & 4 W. IV. c. 42, § 2, and see 3 Rep. C. L. Com. 17, 74, reciting that there is no remedy provided by law for injuries to the *real* estate of any person deceased, committed in his life time; nor for certain wrongs done by a person deceased in his life time to another, in respect of his property, *real or personal*; it is enacted, that "an action of *trespass*, or *trespass on the case*, as the case may be, may be maintained, by the executors or administrators of any person deceased, for any injury to the *real* estate of such person, committed in his life time, for which an action might have been maintained by such person, so as such injury shall have been committed within *six* calendar months before the death of such deceased person; and provided such action shall be brought within *one* year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person: And further, that an action of *trespass*, or *trespass on the case*, as the case may be, may be maintained *against* the executors or administrators of any person deceased, for any wrong committed by him in his life time to another, in respect of his property, *real or personal*, so as such injury shall have been committed within *six* calendar months before such person's death, and so as such action shall be brought within *six* calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration, as the simple contract debts of such person." But if an action be brought by a *termor*, upon 7 & 8 Geo. IV. c. 31, for an injury done to his house, within *three* calendar months from the offence committed, and that action abates by the death of the *termor*, after the *three* months have expired, his executor cannot bring a fresh action: *Till-Adam (or Adam) v. Inhabitants of Bristol*, 4 Nev. & M. 144. 2 Ad. & E. 389, S. C. And it is doubtful, whether an executor of a *termor* can in *any* case bring an action upon the 7 & 8 Geo. IV. c. 31, for any injury sustained in the life time of his testator. By the statute 11 Geo. IV. & 1 W. IV. c. 47, for consolidating and amending the laws for facilitating the payment of debts out of *real* estate, (Sir *Eduard Sugden's* act,) "all wills and testamentary limitations, dispositions, or appointments, made by any person or persons, of or concerning any manors, messuages, lands, &c., whereof any person or persons, at the time of his, her or their decease, shall be seised in fee simple, in possession, reversion, or remainder, or have power to dispose of the same by his, her or their last wills or testaments, shall be deemed or taken (only as against such person or persons, with whom the person or persons making such wills, &c., shall have entered into any bond, covenant, or other specialty, binding his, her or their heirs,) to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect:" § 2, and see stat. 3 W. & M. c. 14. § 2, made perpetual by 6 & 7 W. III. c. 14. These statutes, however, are repealed by 11 Geo. IV. & 1 W. IV. c. 47, § 1. And for enabling such creditors to recover upon such bonds, covenants, and other specialties, it is thereby enacted, that "in the cases before mentioned, every such creditor shall and may have and maintain his, her and their action and actions of *debt* or *covenant*, upon the said bonds, covenants, and specialties, against the heir and heirs at law of such obligor or obligors, covenantor or covenantors, and such devisee and devisees, or the devisee or devisees of such first mentioned devisee or devisees jointly, by virtue of that act; and such devisee and devisees shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been, for any false plea by him pleaded, or for not confessing the lands or tenements to him descended: Stat. 11 Geo. IV. & 1 W. IV. c. 47, § 3, and see stat. 3 W. & M. c. 14, § 3. And if in any case there shall not be any heir at law, against whom, jointly with the devisee or devisees, a remedy is thereby given, in every such case, every creditor, to whom by that act relief is so given, shall and may have and maintain his and their action and actions of *debt* or *covenant*, as the case may be, against such devisee or devisees solely; and such devisee or devisees shall be liable for false plea as aforesaid." Stat. 11 Geo. IV. & 1 W. IV. c. 47, § 4.

assigned to them respectively so far as such meanings are not excluded by the context or by the nature of the subject-matter: that is to say, words denoting the singular number are to be understood to apply also to a plurality of persons or things; and words denoting the masculine gender, are to be understood to apply also to persons of the feminine gender; and the word 'person' shall apply to bodies politic and corporate; and the word 'parent' shall include father and mother; and grand-father and grand-mother; and step-father and step-mother; and the word 'child' shall include son and daughter, and grand-son and grand-daughter, and step-son and step-daughter."

ought to join in the same action; and if they do not, the defendant may plead in abatement, but cannot otherwise take advantage of the objec-

NEW HAMPSHIRE ACT.

SECT. 66. If the life of any person not in the employment of the corporation, shall be lost by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, or by the unfitness or gross negligence, or by the carelessness of their servants or agents in this State, such proprietor or proprietors, shall be liable to a fine not exceeding five thousand dollars, nor less than five hundred dollars, to be recovered by indictment, to the use of the executor or administrator of the deceased person, for the benefit of his widow and heirs, one moiety thereof to go to the widow, and the other to the children of the deceased; but if there shall be no children, the whole shall go to the widow, and if no widow, to his heirs according to the law regulating the distribution of intestate personal estates among heirs. (Laws of 1850, chap. 953, sec. 7.) New Hamp. Comp. Stat. 364, Ed. 1853. Tit. Of Rail Road Corporations, Chapter 150.

MASSACHUSETTS ACT.

An Act Concerning Passenger Carriers.

Liability of carriers when life of a passenger is lost by reason of their negligence, &c.

If the life of any person being a passenger shall be lost, by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, steamboat, stage-coach, or of common carriers of passengers; or by the unfitness or gross negligence or carelessness of their servants or agents in this commonwealth, such proprietor or proprietors and common carriers, shall be liable to a fine not exceeding five thousand dollars nor less than five hundred dollars, to be recovered by indictment, to the use of the executor or administrator of the deceased person, for the benefit of his widow and heirs; one moiety thereof to go to the widow, and the other to the children of the deceased; but if there shall be no children, the whole to the widow, and if no widow, to the heirs according to the law regulating the distribution of intestate personal estate among heirs. [March 23, 1840.] Supp. to Rev. Stat. Mass. vol. 1 p. 165, Ch. 80, Ed. 1834.

VERMONT ACT.

SECT. 16. Whenever the death of a person shall hereafter be caused by the wrongful act, neglect, or default of any person, either natural or artificial, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person or corporation who would have been liable to such action, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as shall amount in law to a felony. (Sect. 1 of No. 8, of 1849.)

SECT. 17. Every such action shall be brought in the name of the personal representative of such deceased person, and the amount recovered in such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, who shall receive the same proportions as provided by law for the distribution of the personal estate of persons dying intestate. (Sect. 2 of No. 8, of 1849.)

SECT. 18. In every such action as hereinbefore provided, the court or jury, before whom such issue shall be tried, may give such damages as they may deem just with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person. Provided, that every such action shall be commenced within two years from the decease of such person. (Sect. 3 of No. 8, of 1849.) Comp. Stat. of Verm. p. 342, tit. 14, ch. 51, ed. 1851.

NEW YORK ACTS.

An act requiring compensation for causing death by wrongful act, neglect, or default. Passed December 13, 1847. Chap. 450, p. 575.

SECT. 1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default, is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

SECT. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall

tion.(d) And, as wrongs are of a joint and several nature, the plaintiff may proceed against all, or any of the parties who committed them; and

(d) 6 Durnf. & East, 766. 7 Durnf. & East, 279. 5 East, 420. 1 Wms. Saund. 5 Ed. 291, k.

be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action, the jury may give such damages as they shall deem a fair and just compensation, not exceeding five thousand dollars, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, provided, that every such action shall be commenced within two years after the death of such person; but nothing herein contained shall affect any suit or proceeding heretofore commenced and now pending in any of the courts of this state. (As amended by chap. 256 of 1849.)

Section 3. This act shall take effect immediately.

An Act to amend "An Act requiring compensation for causing death by wrongful act, neglect or default," passed December 13, 1847. Passed April 7, 1849, Chap. 256, p. 388. [Sect. 1 amends sect. 2 of chap. 450 of 1847, *supra*.]

Sect. 2. Every agent, engineer, conductor, or other person in the employ of such company, or persons through whose wrongful act, neglect or default, the death of a person shall have been caused as aforesaid, shall be liable to be indicted therefor, and upon conviction thereof, may be sentenced to a state prison for a term not exceeding five years, or in a county jail not exceeding one year, or to pay a fine not exceeding two hundred and fifty dollars, or both such fine and imprisonment.

Sect. 3. This act shall take effect immediately. Gen. Stat. of N. Y., Blatchford's edition, pages 205, 206.

NEW JERSEY ACT.

An act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act, neglect, or default.

Sect. 1. Be it enacted by the Senate and General Assembly of the State of New Jersey, That whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Sect. 2. And be it enacted, That every such action shall be brought by and in the names of the personal representatives of such deceased person; and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person; provided, that every such action shall be commenced within twelve calendar months after the death of such deceased person.

Sect. 3. And be it enacted, That on request by the defendant, or the defendant's attorney, the plaintiff on the record shall be required to deliver to the defendant, or to the defendant's attorney, a particular account in writing of the nature of the claim in respect to which damages shall be sought to be recovered.

Sect. 4. And be it enacted, That this act shall take effect immediately. Approved March 3, 1848. P. L. 151, Nixon's Elmer's N. J. Digest, p. 193, 2d Ed. 1855.

PENNSYLVANIA ACTS.

Sect. 1. No action hereafter brought to recover damages for injuries to the person by negligence or default, shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction.

Sect. 2. Whenever death shall be caused by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives, may maintain an action for, and recover damages for the death thus occasioned. Act April 9, 1852. P. L. p. 361. Purd. Dig. 608, Ed. 1853.

Sect. 1. The persons entitled to recover damages for any injury causing death, shall be the husband, widow, children, or parents of the deceased, and no other relative; and

it is no plea in abatement,(e) or ground of nonsuit,(f) that there are other partners not named. In bringing actions, by or against *husband* and *wife*, the rule is, that whenever the cause of action would survive to or against the wife, they ought in general to sue or be sued jointly;(g) and this rule holds as well with regard to contracts as wrongs. But sometimes, and particularly where the cause of action arises during coverture, the husband is allowed to bring the action in his own name, or in the joint names of himself and his wife.(h)

The plaintiff has in some cases his *election*, to bring one species of action or another for the same cause; as in actions upon contracts, he may bring *assumpsit* or *debt* upon a simple contract, or *debt* or *covenant* upon a specialty, for the non-payment of money: Or, if the breach [*10] of a simple *contract consists in *mis-feazance*, he may declare in *assumpsit*, or in *case* on the special circumstances;(a) as for *deceit* on the sale of cattle or goods, or immoderate use of them, when

(e) Durnf. & East, 649. 2 Chit. Rep. 1, and see 6 Moore, 141. 3 Brod. & Bing. 54. 9 Price, 408, S. C. but see 2 New Rep. C. P. 365. 6 Durnf. & East, 369. 1 Wms. Saund. 5 Ed. 291, *c. semb. contra.*

(f) 3 East, 62. 6 Moore, 141. 2 Brod. & Bing. 54. 9 Price, 408, S. C. and see 3 Campb. 29. 1 Bing. 143, but see 12 East, 89, 452. 2 Marsh. 485. *semb. contra.*

(g) 1 Wils. 224. 2 Wils. 227.

(h) For a more particular account of the *parties* to the action, whether upon *contracts* or for *wrongs*, see 1 Wms. Saund. 5 Ed. 291, *b.* (4). 2 Wms. Saund. 5 Ed. 116, (2), and 1 Chit. Pl. 4 Ed. Chap. I.

(a) 2 Wils. 319. 3 Wils. 348. 1 Durnf. & East, 274. But where the substantial ground of action is *contract*, the plaintiff cannot, by declaring in *case*, render a person liable, who would not have been liable on his promise: Therefore, where the plaintiff declared that, having agreed to exchange mares with the defendant, the latter, by falsely warranting his mare to be sound, well knowing her to be unsound, falsely and fraudulently deceived the plaintiff, &c.; it was holden, that *infancy* was a good plea in bar to the action. 2 Marsh. 485.

the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors.

Sect. 2. The declaration shall state who are the parties entitled in such action; the action shall be brought within one year after the death, and not thereafter. Act April 26, 1855. P. L. 309. Purd. Dig. p. 1138.

OHIO ACT.

An act requiring compensation for causing death by wrongful act, neglect, or default. Passed March 25, 1851.

Sect. 1. Damages recoverable for causing death. Be it enacted, &c., That whenever the death of a person shall be caused by wrongful act, neglect, or default; and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, in respect thereof; then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter.

Sect. 2. Action brought by personal representative. Every such action shall be brought by, and in the name of, the personal representatives of such deceased persons; and the amount recovered in every such action, shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal estates, left by persons dying intestate; and in every such action, the jury may give such damages as they shall deem fair and just, not exceeding five thousand dollars, with reference to the pecuniary injury resulting from such death to the wife and next of kin to such deceased person; provided, that every such action shall be commenced within two years after the death of such deceased person. Curwen's Laws of Ohio in Force, p. 961.

Consult *Armworth v. The South-Eastern Railway*, 11 Jurist, 758. *Blake v. The Midland Counties Railway*, 15 Jurist, 562; 10 Eng. Law and Eq., 437, S. C. *Canning v. Williamstown*, 1 Cushing, 451. *Pennsylvania Railroad Company v. McCloskey's Administrators*, 11 Harris, 526; 3 Am. Law Reg., 412. *Hodges on Railw.* 623, 2d Ed. *Shelford on Railw.* 503, 3d Ed.

lent or let to hire; and against attorneys, carriers, wharfingers, innkeepers, &c. And where cattle or goods are wrongfully taken and detained, he may bring *trespass vi et armis*, *replevin*, *trover*, or *detinue*; or, if they are converted into money, he may waive the tort, and bring *assumpsit* for money had and received.^(b) But the plaintiff, having once made his election, cannot afterwards bring another species of action for the same cause, either whilst the former is depending, or after it has been determined. And it is a rule, that the party applying for an *information* shall be understood to have made his election, and waived his remedy by *action*, whatever may be the fate of the motion for the *information*, unless the court think fit to give him leave to bring an *action*.^(c)

The law is said to abhor *circuity* of action: and therefore if the obligee of a bond covenant generally not to sue upon it, this shall operate as a release, and may be pleaded in bar of the action; for if it operated only as a covenant, it would produce two actions.^(d) So where, to *debt* on bond for 200*l.*, the defendant pleaded, that after the making of the bond, the plaintiff by indenture covenanted, that if the defendant should at such a day pay 100*l.*, the obligation should be void, and alleged that he paid the money at the day; and upon demurrer, it was insisted for the plaintiff, that the indenture, being made after the bond, could not be pleaded in bar; but all the court held, that the defendant might well plead it in bar, without being put to the action of *covenant*, by *circuity* of action.^(e) But if A. and B. are jointly and severally bound to C., who covenants with A. only, that he will not sue him, this is not construed to be a release, for there is still a remedy on the bond against B.:^(f) And so where a man becomes bound to another, who covenants not to put the bond in suit before *Michaelmas*, and the obligee nevertheless brings *debt* on the bond before that time, the defendant cannot plead the covenant in bar, but must have recourse to an action upon it.^(g)

It is a rule, that several counts may be *joined* in the same declaration, *for different causes, *provided they are of the same* [*11] *nature*.^(a) Thus, in actions upon *contract*, the plaintiff may join as many different counts as he has causes of action, in *account*, so likewise in *assumpsit*, or in *covenant*, *debt*, *annuity*, or *seire facias*: And there is a case where it was holden, that *debt* and *detinue* might be joined in the same action.^(b) In like manner, in actions for *wrongs* independently of contract, the plaintiff may join as many different counts as he has causes of action in *case*, or in *detinue*, *replevin*, or *trespass*: And he may join *trespass* and *battery* of his servant, *per quod servitium amisit*,^(c) or

(b) Com. Dig. tit. *Action*, M. And see Petersdorff on Bail, 40, 41, as to the expediency of adopting particular forms of action, in order to obtain the security of bail.

(c) *Rex v. Sparrow and another*, H. 28 Geo. III. K. B. And see further, as to the *election* of actions, Com. Dig. tit. *Action*, M. 1 Chit. Pl., 4 Ed. 188.

(d) 1 Durnf. & East, 446.

(e) Cro. Eliz. 623.

(f) 2 Salk. 575. 1 Ld. Raym. 690. 12 Mod. 551, S. C. 8 Durnf. & East, 168.

(g) And. 397, pl. 316. Cro. Eliz. 352, S. C., and see further, as to *circuity* of action, 2 Wms. Saund. 5 Ed. 149. (2.) 4 Durnf. & East, 470.

(a) 2 Wms. Saund. 5 Ed. 117, a.

(b) Bro. Abr. tit. *Joinder in action*, 97, Gilb. C. P. 6. 1 Bac. Abr. 30. But *trover* and *detinue* cannot be joined. Willes, 118. And in order to join *debt* and *detinue*, it seems they must be both founded on *contract*.

(c) Cro. Jac. 501. Aleyu, 9. 1 Bac. Abr. 30. 2 New Rep. C. P. 476, ante, 4.

trespass and *rescue*,^(d) in the same declaration. But, with the exceptions before mentioned, counts in action upon *contract* cannot be joined with counts for *wrongs* independently of contract;^(e) nor can counts in any one species of these actions, be joined with counts in another. In a declaration on the *case*, one count stated, that the plaintiff, at the request of the defendant, had caused to be delivered to him certain swine, to be taken care of, for reward, by defendant for plaintiff; and in consideration thereof, defendant undertook and *agreed* with plaintiff, to take care of said swine, and *re-deliver* the same on request; and the court held, on motion in arrest of judgment, that this was a count in *assumpsit*, and could not be joined with counts in *case*.^(f)

Wherever several counts may be joined in the same declaration, for different causes of action, there is always the same *process* by original writ, and in general the same *plea* or general issue, and the same *judgment*. And hence, rules have been framed, in order to determine what different counts may or may not be joined in the same declaration, from the similarity of the process, the plea, and the judgment. In one case, it was said by *Lee*, Ch. J. that the true way to judge of this matter is, that whenever the process and judgment are the same on two counts, they may be joined; otherwise they cannot.^(g) But it being found that the similarity of the process afforded but a very fallible criterion, there being the same process of summons, attachment and distress, in actions of *account*, *covenant*, *debt*, *annuity*, and *detinue*, and the same process of attachment and distress in actions of *assumpsit*, *case*, and *trespass*, none of which can be joined, it was said in a subsequent case, by *Wilmot*, Ch. J. that the true test to try whether two counts can be joined in the same declaration, is to consider and see whether there be the same judgment on both; and if there be, he thought they might be well joined.^(h) But in a later case,

the court of Common Pleas were of opinion, that the rule or test [*12] to try whether two counts can be joined, as laid down in the *former one, was rather too large, and not universally true:^(a) and the reason for this opinion probably was, that there is the same judgment, for damages and costs, in actions of *assumpsit*, *covenant*, *case* and *trespass*, and the same entry of a *misericordiâ* in the three first of these actions, and yet no two of them can be joined. Therefore, in a still later case, a new criterion was substituted; and it was said by *Buller*, J. to be universally true, that wherever the same plea may be pleaded, and the same judgment given, on two counts, they may be joined in the same declaration.^(b) But even this rule is not altogether unexceptionable; for it is clear that *case* and *trespass* cannot in general be joined, although the same plea of not guilty of the premises will serve for both, and there is the same judgment in each, for damages and costs: and though in general the judgment in *trespass* is *quod capiatur*, and in actions upon the *case*, *quod sit in misericordiâ*,^(c) yet sometimes there is an entry of a *capiatur* in *case*, as well as in *trespass*.^(d) It should also be observed, that this rule is merely affirm-

^f (d) 2 Lutw. 1249. 1 Ld. Raym. 83. There is also a writ in the register, *de uxore abductâ cum bonis viri*. F. N. B. 89. But this writ has been said to be against law. 2 Salk. 637.

(e) 5 Barn. & Ald. 652. 1 Dowl. & Ry. 282, S. C.

(f) 6 Barn. & Cres. 268.

(g) 1 Wils. 252.

(h) 2 Wils. 321.

(a) 3 Wils. 354.

(b) 1 Durnf. & East, 276, and see 2 Wms. Saund. 5 Ed. 117, *e. f.*

(c) 1 Ld. Raym. 273. 2 Wms. Saund. 5 Ed. 117, *c.*

(d) 1 Rol. Abr. tit. *Amercement*, E.

ative; and it does not hold *é converso*, that different counts cannot be joined, unless there be the same plea and judgment on all of them; for it is holden, that *debt* on record, specialty and simple contract, may be joined, although they require different pleas;(e) and in *debt* and *detinue*, which may also be joined, not only the pleas, but the judgments are different.(f) The *nature* of the causes of action therefore should be attended to, in order to determine whether different counts may or may not be joined in the same declaration: and, with the exceptions which have been noticed, it may safely be laid down as a general rule, that wherever the causes of action are of the same nature, and may properly be the subject of counts in the same species of action, they may be joined, otherwise they cannot.

In order to join several counts however, in the same declaration, it is necessary that they should be all of them *in the same right*;(g) and upon that ground it is holden, that a plaintiff cannot join in the same declaration, a demand as *executor*, with another which accrued in his own right;(h) and such misjoinder of action is a defect in substance, and therefore bad on a general demurrer, or in arrest of judgment, or on a writ of error.(i) But a count for money had and received by the defendant to the use of an executor,(k) or for money paid by the plaintiff as such, to the use of the defendant,(l) may be joined with a count on a promise to the testator. So, a count upon a promise to the plaintiff as administratrix, for *goods sold and delivered by her after the [*13] death of the intestate, may be joined with a count upon an account stated with her as administratrix; for the damages and costs when recovered with the assets:(a) and it is a rule, that where the transaction has been entirely with executors or administrators in their representative character, and not in their personal character, or altogether in their personal character, the counts may be joined.(b) Three executors having ordered goods to be sold as the goods of their testator, afterwards sued for the amount, without styling themselves executors, and without joining a fourth executor, who was named in the will; and the court held they might recover.(c)

An *executor* or *administrator* may declare as such, on an account stated by the defendant, with the testator or intestate, or with the plaintiff, of moneys due to him in his representative character.(d) And where a testator or intestate has stated an account, it is usual to declare for the balance, against his executor or administrator. Or, if an executor or administrator state an account of moneys due from the *testator* or *intestate*,(e) or, as it seems, of moneys due from himself in his representative

(e) Cro. Car. 316. 1 Vent. 366. 1 Lutw. 43. 1 Wils. 248.

(f) 5 Mod. 9.

(g) 2 Wms. Saund. 5 Ed. 117, c. d. e.

(h) 1 Salk. 10. 2 Ld. Raym. 841. 2 Str. 1271. 1 Wils. 171, S. C. 3 Durnf. & East, 659. 4 Durnf. & East, 277. 3 Bos. & Pul. 7. 2 Wms. Saund. 5 Ed. 117 c.

(i) 4 Durnf. & East, 347. 1 H. Blac. 108. 2 Bos. & Pul. 421. 5 Barn. & Ald. 652. 2 Chit. Rep. 343. 1 Dowl. & Ryl. 282, S. C. but see 1 New Rep. C. P. 43. 6 East, 333, S. C. in Error.

(k) 3 Durnf. & East, 659, but see 2 Wms. Saund. 5 Ed. 117, c.

(l) 3 East, 104.

(a) 6 East, 405. 2 Smith R. 410, S. C., and see 5 Price, 412. 7 Price, 591, S. C. in error.

(b) *Per Le Blanc*, J. 2 Smith R. 416. (c) 2 Bing. 177, 9 Moore, 340, S. C.

(d) 2 Lev. 165. 1 Durnf. & East, 487. 6 East, 405. 1 Taunt. 322. 6 Taunt. 453. 2 Marsh. 147, S. C. 8 Moore, 146. 1 Bing. 249, S. C. Forrest, 98, accord.

(e) 1 H. Blac. 102.

character, (f) he may be declared against as such, for what appears to be due. And, in any of the above cases, other causes of action, in the same right, may be joined in the declaration. [1] But a count upon an account stated with the plaintiffs, *executors*, &c., not saying *as executors*, &c., cannot be joined with counts on promises to the testator; for it is no allegation that the promises were made to the plaintiffs in their representative capacity; and, under such a count, proof might be given of an account stated with them individually. (g) And a count in *assumpsit* against *husband* and *wife*, who was *administratrix* with the will annexed, upon promises by the *testator* to pay rent, cannot be joined with counts upon promises by the husband and wife, as *administratrix*, for use and occupation by them after the death of the testator. (h)

In an action by the *assignees* of a bankrupt, the plaintiffs may join counts for money lent and advanced, and money paid by them, as assignees, with counts for money had and received to their use, and upon an account stated with them, in that character. (i) And the assignees under a joint commission against A. and B. may, in an action to recover a debt due to A., describe themselves in the declaration, as assignees of A. alone. (k) So, where the plaintiffs sued as assignees of A. and B. and also as assignees of C. for a joint demand, due to all the bankrupts, the declaration *was holden good, on a motion in arrest of judgment. (a) The assignees under a joint commission against two partners, may recover, in the same action, debts due to the partners jointly, and debts due to them separately. (b) But the assignees of A., a bankrupt, and also of B., a bankrupt, under separate commissions, cannot recover, in the same action, a *joint* debt due from the defendant to both the bankrupts, and also *separate* debts due to each; and if in such an action the jury have assessed the damages severally, on the separate counts, the court will arrest the judgment on those counts which demand the debts due to each bankrupt separately. (c) And the assignees of A. and B., bankrupts, under a joint commission, cannot maintain an action for money had and received to the use of the bankrupts, or to their own use, if it be proved that one of them only had committed an act of bankruptcy; neither are they entitled to recover the separate moiety of one, under such commission. (d)(A.)

(f) 7 Taunt. 580. 1 Moore, 305, S. C., but see 1 H. Blac. 108. 2 Bos. & Pul. 424. 2 Wms. Saund., 5 Ed. 117, d.

(g) 5 East, 150, and see 2 Bos. & Pul. 424. 5 Moore, 282. 2 Brod. & Bing. 460, S. C.

(h) 3 Barn. & Ald. 101, and see 1 Taunt. 212. 2 Chit. Rep. 697.

(i) 5 Maule & Sel. 205; 2 Chit. Rep. 325, S. C.

(k) 2 Stark, N. Pri. 27, and see 8 Taunt. 202.

(a) 3 Durnf. & East, 779.

(b) 4 Bing. 115.

(c) 3 Durnf. & East, 433, and see 2 Moore, 3. 8 Taunt. 134, S. C.

(d) 8 Taunt. 200. 2 Moore, 122, S. C. And see further, as to the *joinder* of actions, 2 Wms. Saund., 5 Ed. 117, a, b, c, d, e, f. 1 Chit. Pl., 4 Ed. 179. Steph. Pl. 279, 80. 3 Barn. & Ald. 208. 1 Chit. Rep. 619, S. C., and the cases there cited.

[1] But a count in *assumpsit*, for money had and received by defendant as executor, to the use of the plaintiff, cannot be joined with a count for money due to the plaintiff from defendant as executor, upon an account stated with him of money due from him as executor. 7 Barn. & Cres. 444. 1 Man. & Ryl. 180, S. C. But it seems that the latter count may be joined with a count for money paid by the plaintiff, to the use of the defendant as executor. *Id. Ibid.*

(A) As a general principle, the issuing or suing out of a writ is considered the commencement of an action. *Carpenter v. Butterfield*, 3 Johns. Cases. 145. *Lowry v. Lawrence*, 1

The limitation of personal actions is regulated by several statutes. By the 31 Eliz. c. 5, § 5, "all actions brought for any forfeiture upon a

Caines, 69. *Brace v. Morgan*, 3 Caines, 133. *Bird v. Carlat*, 2 Johns. 342. *Cheetham v. Lewis*, 3 Johns. 42. *Fowler v. Sharpe*, 15 Johns. 326. *Ross v. Luther*, 4 Con. 158. *Hogan v. Cuyler*, 8 Con. 203. *Parker v. Colcord*, 2 N. Hamp. 36. *Society, &c. v. Whitecomb*, 1b. 227. *Ford v. Phillips*, 1 Pick. 202. *Reed v. Brewer*, Peck, Tenn. Rep. 276. *Thompson v. Bell*, 6 Monr. 560. *Day v. Lamb*, 7 Verm. 426. *Cox v. Cooper*, 3 Ala. 256. *Chiles v. Jones*, 7 Dana, 545. *Whitaker v. Turnbull*, 3 Harr. 172. *Teazle v. Simpson*, 1 Seam. 30. *Swift v. Crocker*, 21 Pick. 241. *Bunker v. Shed*, 8 Metef. 150. *Swisher v. Swisher*, Wright, 755. *Caldwell v. Heilshu*, 9 Watts & Serg. 51. *Pyndell v. Maydwell*, 7 B. Mon. 314. The date of a writ is, *prima facie*, the commencement of an action, though the date is only a day or two before the action would be barred by the statute of limitations, and though the writ is not served until several weeks after its date, and no reason is shown for the delay. *Bunker v. Shed*, 8 Metef. 150. The date of the writ is *prima facie*, but not conclusive evidence of the true time when the action was commenced. *Johnson v. Farwell*, 7 Greenl. 373. *Day v. Lamb*, 7 Verm. 426. To prevent the bar of the statute of limitations, filing the writ in good faith will be deemed a commencement of the action, although it is not served till several days afterwards. *Gardner v. Webber*, 17 Pick. 407. *Haughton v. Leary*, 3 Dev. & Batt. 21. *Boughton v. Bruce*, 20 Wend. 237. It is not necessary, in order to save the statute of limitations, to show that the writ was returned, or actually delivered to an officer; it is sufficient if it was sent to him with a *bona fide* intention that it should be served. *Burdick v. Green*, 18 Johns. 14. *Bunker v. Shed*, 8 Metef. 150. There may be some uncertainty or ambiguity in the term "suing out the writ," but there can be no doubt that the delivery of it to an officer, or leaving it at his house, for the purpose of being executed, is a commencement of the suit. *Bronson v. Earl*, 17 Johns. 63, 11 Johns. 473. *Fild v. Jacobs*, 12 Metef. 110. Where a writ bears *teste* of the day when it was actually made, the day of the *teste* must be considered as the day of the commencement of the action. But the time of the day of the *teste* when the writ is actually made, is not always to be considered as the true time of the commencement of the action. *Robinson v. Burleigh*, 5 N. Hamp. 225. Thus when a writ is made, in a case where a demand and refusal were necessary to give a right of action, and the demand is subsequently made, and the writ then served, the action is commenced when the plaintiff elected to use his writ, and directed the officer to serve it. *Graves v. Ticknor*, 6 N. Hamp. 537. The issuing of a writ of summons, although returned not served, is a suit brought; and would release the guarantor of a bond who had stipulated in consideration of total forbearance. *Caldwell v. Heilshu*, 9 Watts & Serg. 51.

A suit is not deemed commenced, under the code of procedure in New York, so as to institute a proceeding under the act to abolish imprisonment for debt, before the summons is served on the defendant, there being neither personal service nor publication. *Lee v. Averell*, 1 Sandf. Sup. Ct. R. 731. It seems, that a suit is commenced, so as to support the plea of *lis pendens* in another suit for the same cause of action, when the writ is sued out and an attachment of property made thereon. *Bennett v. Chase*, 1 Foster, N. H. 570.

As a general rule, a suit is not commenced, where the service of the summons is by publication, until the expiration of the time for publication prescribed by the code. Yet, where an attachment has been issued against the property of the defendant, and his goods have been taken under it, after which he dies, the court acquires sufficient jurisdiction to put the suit in such a condition that the plaintiff can enforce his lien, notwithstanding a summons has not been served; and has sufficient control over the action to substitute the personal representative of the deceased, as a party defendant, in order that the summons may be duly served. *More v. Thayer*, 10 Barb. Sup. Ct. 258. Where an action, brought in New York since the revised statutes, is instituted by *capias*, the suit is not considered as commenced until the issuing and serving of the *capias*; consequently, to charge a sheriff, in an action of debt for an escape, the writ must be actually served upon him while the debtor is off the limits. *Carruth v. Church*, 6 Barb. Sup. Ct. R. 504.

In Connecticut, however, the commencement of the action depends on the service of the writ. *Clark v. Helm*, 1 Root, 487; *Jenks v. Phelps*, 4 Conn. 149; *Spalding v. Butts*, 6 Id. 30; *Gates v. Bushnell*, 9 Id. 530. The return is evidence of the time. *Perkins v. Perkins*, Conn. 558. The law appears to be the same in Vermont; the writ must be served and returned. *Day v. Lamb*, 7 Verm. 426; *Dowens v. Garland*, 21 Verm. 362.

In Indiana, the delivery of the writ to the sheriff is the commencement of the suit. *Underwood v. Tatham*, 1 Smith, 152.

In Arkansas, the filing of a declaration alone is not the commencement of an action. *Bank v. Cason*, 5 Eng. 479. In respect to the statute of limitations, an action is to be

penal statute, whereby the forfeiture is limited to the king only, shall be brought within *two* years after the offence committed, and not after. And all actions brought for any forfeiture, upon a penal statute, except the statute of tillage, the benefit whereof is limited to the king and the informer, shall be brought within *one* year after the offence committed; and in default thereof, the same shall be brought for the king, at any time within *two* years after that year ended: And if any action shall be brought after the time so limited, the same shall be void. Provided, that where a shorter time is limited, the action shall be brought within that time." This statute extends to all actions brought upon penal statutes, whereby the forfeiture is limited to the king and the party, whether made before or since the 31 Eliz.(e) But it does not extend to actions brought by the party *grieved*.(f) And where the penalty is given to a common informer alone, different opinions have been entertained, whether it is within the statute. On the one hand it has been said, that this is not a case within the words of the act, which ought to be taken strictly, and not extended by an equitable construction. On the other hand, it has with more reason been contended, that as the informer is bound, when the king [*15] is joined with *him, much more should he be bound, when he sues by himself.(a) And accordingly, where an action was brought after a year, by a common informer, on the statute 9 Anne c. 14, the court of Common Pleas held this to be a case within the 31 Eliz., though the action was given in the first instance to the party *grieved*, and afterwards to a common informer; for such actions would have been within the 7 Hen. VIII., c. 3, and the 31 Eliz. was made to narrow the time given by that statute, and could never mean to leave any actions unrestrained in point of time: the latter part of the clause must therefore be construed to extend to them.(b)

By the statute 21 Jac. I. c. 16, § 3, it is enacted, that "all actions of *trespass quare clausum fregit*, &c., *detinue*, *trover*, and *replevin* for taking away goods or cattle; all actions of *account*, and upon the *case*, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants; all actions of *debt*, grounded upon any lending or contract without specialty, or for arrearages of rent; and all actions of *assault*, *menace*, *battery*, *wounding*, and *imprisonment*, shall be commenced and sued within the times hereafter expressed, and not after; that is to say, the said actions upon the *case*, (other than for *slander*,) *account*, *trespass quare clausum fregit*, &c., *debt*, *detinue*, and *replevin*, within *six* years next after the cause of such actions or suit, and not after; actions of *assault*, *battery*, *wounding*, or *imprisonment*, within *four* years; and actions upon the *case* for *words*, within *two* years next after the words spoken, and not after."

(e) 1 Marsh. 321, (a) 3 Maule & Sel. 434, &c., 440, &c., 444.

(f) 1 Show. Rep. 353; 4 Carth. 233. Comb. 194. 4 Mod. 129. 12 Mod. 27, S. C. Willes, 443, (a) *Speers v. Frederic*, T. 25 Geo. III., K. B.

(a) 1 Ld. Raym. 78.

(b) *Lookup v. Sir T. Frederic*, M. 6 Geo. III., Bul. Ni. Pri. 195.

deemed commenced when the writ is issued, and not by filing a declaration before the writ is issued. *Bank v. Bates*, Id. 120.

It has been held in Tennessee that the service of notice is the commencement of a suit, and if the time required to perfect the bar of the statute of limitations is not complete before service it arrests its operation. *Young v. Hare*, 11 Humph. 303.

"Nevertheless, if in any of the said actions, judgment be given for the plaintiff, and the same be reversed by error; or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill; or if any of the said actions shall be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry; that in all such cases, the party plaintiff, his heirs, executors or administrators, as the case shall require, may commence a new action, within a year after such judgment reversed, or given against the plaintiff, or outlawry reversed, and not after."

"And if any person or persons, entitled to any of the said actions, shall be, at the time of any such cause of action accrued, within the age of twenty-one years, feme covert, *non compos mentis*, imprisoned, or beyond the seas; then such person or persons shall be at liberty to bring the same actions, within such times as are before limited, after their coming to or being of full age, discoverd, of sane memory, at large, and returned from beyond the seas." [A]

These statutes are confined to the particular actions enumerated therein: and do not extend to actions of *annuity*, or for the recovery of a rent-charge; (c) nor to actions of *account* concerning the trade of *merchandise between merchant and merchant, where the [*16] accounts are open and current; nor to actions of *covenant*, or *debt* upon *specialty*, or other matter of a higher nature; but only to actions of *debt* upon a lending or contract without specialty, or for arrearages of rent reserved on parol leases. (a) A *seire facias* also, being founded on matter of record, is not within the statutes of limitations. [1] [B]

(c) 10 Ves. 453. M'Clel. 495.

(a) Ilut. 109. 1 Wms. Saund. 5 Ed. 38. 2 Wms. Saund. 5 Ed. 66.

[1] But now, by the law amendment act, 3 & 4 W. IV. c. 42. § 3, "all actions of *debt* for rent upon an indenture of demise, all actions of *covenant* or *debt* upon any bond or other specialty, and all actions of *debt* or *seire facias* upon any recognizance, and also all actions of *debt* upon any *award*, where the submission is not by specialty, or for any *fine* due in respect of any copyhold estates or for an *escape*, or for money levied on any *fieri facias*, and all actions for *penalties*, damages, or sums of money, given to the party *grieved*, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the then present session of parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of *debt* for rent upon an indenture of demise, or *covenant* or *debt* upon any bond or other specialty, actions of *debt* or *seire facias* upon recognizance, within *ten* years after the end of the then present session, or within *twenty* years after the cause of such actions or suits, but not after; the said actions by the party *grieved*, *one* year after the end of that session, or within *two* years after the cause of such actions or suits, but not after; and the said other actions, within *three* years after the end of that session, or within *six* years after the cause of such actions or suits, but not after: Provided, that nothing therein contained shall extend to any action given by any statute, where the time for bringing such action is, or shall be, by any statute specially limited."

And it is thereby further enacted, that "if any person or persons, that is or are or shall be entitled to any such action or suit, or to such *seire facias*, is or are, or shall be at the time of any such cause of action accrued, within the age of *twenty-one* years, *feme covert*, *non compos mentis*, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times, after their coming to or being of

(A) The statutes of limitation of the various States in the Union will be found collected in Mr. Angell's valuable Treatise on Limitations, Appendix, 3d Edition, by May.

(B) The student is referred for a brief but comprehensive discussion of the Statute of Limitations, to Professor Parsons's 2d vol. on the Law of Contracts, Ch. V. p. 341-379.

Suits in the Admiralty Court, for *seamen's wages*, not being provided for by these statutes, (b) it was enacted by the 4 Anne, c. 16, § 17, that "all suits and actions in the court of Admiralty, for *seamen's wages*, shall be commenced and sued within *six years* next after the cause of such suits or actions shall accrue, and not after;" with the like *proviso*, as before, in favour of persons within the age of twenty-one years, &c. [1]

(b) 2 Ld. Raym., 934. 3 Salk., 227. 6 Mod., 25, S. C. 2 Ld. Raym., 1204. 2 Salk., 424, S. C.

full age, discover, of sound memory, or returned from beyond the seas, as other persons, having no such impediment, should, according to the provisions of that act, have done; 3 & 4 W. IV. c. 42, § 4, and see 3 Rep. C. L. Com. 16, 73. And that if any person or persons, against whom there shall be any such cause of action, is or are, or shall be, at the time of such cause of action accrued, beyond the seas, then the person or persons entitled to any such cause of action, shall be at liberty to bring the same against such person or persons, within such times as are before limited, after the return of such person or persons from beyond the seas." 3 & 4 W. IV. c. 42, § 4, and see 3 Rep. C. L. Com. 16, 73.

"Provided always, that if any acknowledgment shall have been made, either by writing, signed by the party liable by virtue of such indenture, specialty, or recognizance, or his agent, or by part payment or part satisfaction, on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions, to bring his or their action for the money remaining unpaid, and so acknowledged to be due, within *twenty years* after such acknowledgment by writing, or part payment or part satisfaction, as aforesaid: or in case the persons or persons entitled to such action shall, at the time of such acknowledgment, be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then within *twenty years* after such disability shall have ceased as aforesaid, or the party shall have returned from beyond seas, as the case may be; and the plaintiff or plaintiffs in any such action on any indenture, specialty, or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute." 3 & 4 W. IV., c. 42, § 5, and see 3 Rep. Cl. Com. 16, 73.

"Nevertheless, if in any of the said actions, judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill; or if, in any of the said actions, defendant shall be outlawed, and shall after reverse the outlawry, that in all such cases, the party plaintiff, his executors or administrators, as the case shall require, may commence a new action or suit, from time to time, within a *year* after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after." § 6, and see 2 Rep. Cl. Com. 16, 37.

The statutes of limitations were construed to extend to persons in *Scotland*; so that if a plaintiff or defendant resided there, he must have sued, or been sued, within the time limited thereby; Tidd Prac. 9 Ed. 16, and see *King v. Walker*, 1 Blac. Rep. 286. *Du Belloix v. Lord Waterpark*, 1 Dowl. & R. 16. And now, by the law amendment act, 3 & 4 W. IV. c. 42, § 7. "no part of the united kingdom of *Great Britain* and *Ireland*, nor the islands of *Man*, *Guernsey*, *Jersey*, *Alderney*, and *Sark*, nor any islands adjacent to any of them, being part of the dominions of his Majesty, shall be deemed to be beyond the seas, within the meaning of that act, or of the 21 Jac. 1, c. 16." And where an action was brought in the King's Bench, on a written engagement entered into in *Scotland*, the court held that the case must be governed by the law of this country, where the statute of limitations had attached, although it was contended that the *Scotch* law must prevail, which would have allowed *forty years* for commencing the suit. *British Linen Company v. Drummond*, 10 Barn & C. 903. 1 Barn & Ad. 284, 5, S. C. cited; and see *Trimmer v. Vignier*, 4 Moore & S. 695. So, upon a promissory note given in *France*, the payee may sue the maker, if resident in *England*, during *six years* from the time it becomes due; although, by the law of *France*, all actions upon promissory notes are wholly barred after *five years* from the date of the protest thereon. *Huber v. Steiner*, 2 Bing. N. R. 202. 2 Scott, 304. 1 Hodges, 206, S. C. But *Ireland* is still considered as a place beyond the seas, within the statute 4 Ann c. 16, § 19, notwithstanding the act of Union, and the 3 & 4 W. IV. c. 42, § 7. *Lane v. Bennett*, 1 Meeson & W. 70. 1 Tyr. & G. 441. 1 Gale, 368. S. C., and see *Battersby v. Kirk*, 2 Bing. N. R. 584, 3 Scott, 11. 1 Hodges, 451, S. C.

[1] There is no limitation of time as regards suits in the Admiralty for *seamen's wages*. 2 Gallison, 477. The 17th section of the statute of Anne, quoted in the text, is not in force in *Pennsylvania*. See Angell on Lim., § 32, 33, 3d ed. by May.

In the case of a *defendant* beyond sea,^(c) it was enacted, by the same statute, § 19, that "if any person or persons, *against* whom there shall be any such cause of suit or action for seamen's wages, or any of the causes of action mentioned in the 21 *Jac.* I., shall be, at the time of any such cause of suit or action accrued, beyond the seas, then the person or persons entitled to any such suit or action, shall be at liberty to bring the said actions, against such person and persons, after their return from beyond the seas, within such times as are respectively limited for the bringing of the said actions by this act, and by the said other act of 21 *Jac.* I." And by the Lords' Act, 32 *Geo.* II., c. 28, § 17, "no advantage shall be had or taken in any action or suit against any prisoner discharged by virtue of that act, his heirs, executors or administrators, for that the cause of action did not accrue within *six* years next before the commencing thereof, unless the prisoner was entitled to take such advantage, before he stood charged in custody, by virtue of the original suit or action; and in such case, the same may be pleaded by any such prisoner, his heirs, executors or administrators."

In actions of *assumpsit*, if the plaintiff be in *England*, when the cause of action accrues, though he afterwards go abroad, the time of limitation begins to run, so that if he or his representatives do not sue within *six* years, the statute is a bar.^(d) And if one plaintiff be abroad, and others in *England*, the action must be brought within six years after the cause of action arises.^(e)[A] It has also been determined, that the statute of

(c) 2 *Salk.* 420.

(d) 1 *Wils.* 134.

(e) 4 *Durnf. & East*, 516.

[A] The statute of limitations of the state in which the action is brought is to govern, and not that of the place of the contract. *Graves v. Graves*, 2 *Bibb.*, 207. *Hankins v. Barney*, 5 *Pet.*, 457. *Ledy v. Boas*, 2 *Bailey*, 217. *Hinton v. Townes*, 1 *Hill*, S. C., 439. *McCluny v. Silliman*, 3 *Pet.*, 270. *Ward v. Hallam*, 2 *Dall.*, 217. *McElmoyle v. Cohen*, 13 *Pet.*, 312. *Ward v. Hallam*, 1 *Yeates*, 320. *Richards v. Bickley*, 13 *S. & R.* 395. *Leroy v. Crowninshield*, 2 *Mason*, 151. *Jones v. Hook*, 2 *Rand*, 303. *Nash v. Tupper*, 1 *Caines*, 403. *Ruggles v. Keeler*, 3 *Johns.* 263. *Lincoln v. Battelle*, 6 *Wend.* 475. *Williams v. Preston*, 3 *J. J. Marsh*, 600. *Bissell v. Hall*, 11 *Johns.* 168. *Cartier v. Page*, 8 *Verm.*, 150.

"One of the earliest cases in this country upon the subject, is *Nash v. Tupper*, 1 *Caines*, (N. Y.) R. 402, where to an action on a note, the plea of the statute of limitations of six years of New York, was pleaded, and the plaintiff replied, that the contract was made in Connecticut, where the limitation was seventeen years. Upon the demurrer to this replication, the court held it bad, and the plea in bar good. In this case, it will be observed, that the limitation fixed by the law of the place where the contract was made, had not expired. So, in an appeal from the court of sessions, in Scotland, to the House of Lords, one of the points decided was, that a solicitor in London suing a debtor in Scotland for costs of conducting an appeal in England, was a case, in which the triennial prescription of the law of Scotland prevailed, when the term of prescription or limitation in England by the statute of James, was twice that length of time. But a different case is presented from either of the foregoing, if the action has become barred entirely by the lapse of time prescribed by the law of the place where the contract was made. In such a case, where all remedies are barred by the *lex loci contractus*, Mr. Justice Story, in *Le Roy v. Crowninshield*, 2 *Mason*, (Cir. Co.) R. 151, stated the inclination of his mind to be, that "there is a virtual extinction of the right in that place, which ought to be recognized in every other tribunal, as of equal validity." He does not decide so, though he shows that it is not without countenance from the civilians; and though he reasons, that where no right of action subsists by the *lex loci contractus*, foreign courts do not enforce the original obligation, because it is gone. It resembled the case of bankruptcy. But the learned judge admitted that the current of authority was too strong against him to be resisted. In *Bulger v. Roche*, 11 *Mass.* R. 36, it is thus remarked by Chief Justice Shaw, "Whether the law of prescription or statute of limitations, which takes away every legal mode of recovering the debt, shall be considered as affecting the contract, like payment, release, or judgment, which in effect extinguish the contract, or whether they are to be considered as affecting the remedy, only by determining

limitations extends to persons in *Scotland*; so that if a plaintiff or defendant reside there, he must sue, or be sued, within the time limited

the time within which a particular mode of enforcing it shall be pursued, were it an open question, might be one of some difficulty. Judge Story, in his very learned work on the Conflict of Laws, seems to have arrived at a conclusion different from the inclination of his mind, as declared in *Le Roy v. Crowninshield*, 2 Mason, (Cir. Co.) R. 151, for he says, "It may be added, that as the law of prescription of a particular country, even in a case of a contract made in such a country, forms no part of the contract itself, but merely acts upon it *ex post facto* in a case of a suit, it cannot properly be deemed a right stipulated for or included in the contract." In confirmation of the position, he cites the language of Lord Brougham, in giving his judgment in the House of Lords, in *Doe v. Lippman*, 5 Clark & Finn. R. 1. "It is said, that the limitation is of the very nature of the contract. First, it is said that the party is bound for a given time, and for a given time only. That is a strained construction of the obligation. The party does not bind himself for a particular period at all, but merely to do something on a certain day, or on one or other of certain days. In the case at bar, the obligation is to pay a sum certain at a certain day; but the law does not suppose that he is at the moment of making the contract, contemplating the period at which he may be freed, by lapse of time, from performing it. The argument that the limitation is of the nature of the contract, supposes that the parties look only to the breach of the agreement. Nothing is more contrary to good faith than such a supposition, that the contracting parties look only to the period at which the statute of limitations will begin to run. It will sanction a wrong course of conduct, and will turn a protection against laches into a premium for evasiveness." The common law, beyond all doubt, has firmly fixed its own doctrine, (whatever views may be entertained to the contrary by the civilians,) that the limitation prescribed by the *lex fori*, in respect to remedies, must prevail in all cases of personal actions: though in all cases of real actions, and of actions touching things savouring of the realty, the *lex rei sitæ* prevails."

"There is, however, a distinction between statutes of limitation, to which Judge Story refers, in his Conflict of Laws, and which he there treats as deserving of consideration. It is this: suppose the statutes of limitation of a particular country to not only extinguish the right of action but the *claim* itself, and declare it a nullity after the lapse of the time prescribed; and the parties are resident within the jurisdiction during the whole of that period, so that it has fully operated upon the case. Then the question, says the learned writer, might properly arise, whether such statutes of limitation may not afterwards be set up in any other country, to which the parties may remove, by way of extinguishment, or transfer of the claim. That there are countries in which such regulations do exist in respect to real property, is unquestionable; and there are States, which have declared that all right to debts due more than a prescribed term of years, shall be deemed extinguished. It has been held, that where personal property is adversely held in a State for a period beyond that prescribed by the laws of that State, and after that period has elapsed, the possessor should remove into another State, which has a longer period of prescription or none at all, the title of the possessor cannot be questioned. Thus it has been held by the Supreme Court of the United States, that five years' possession of a slave constitutes a title by the laws of Virginia, which might be set up as a defence by the defendant in the courts of Tennessee. But other than in that court the principle does not seem, hitherto, to have obtained, in this country, any direct recognition. On the contrary, in *Bulger v. Roche*, in Massachusetts, where both parties resided during the whole period of the running of the statute in Nova Scotia, where the right of action was extinguished by the local law, it was held, that the right of action, after a change of domicile by the defendant, by a removal to Massachusetts, was not thereby extinguished in the State tribunals; but might be pursued within the period prescribed by the statute of limitations of Massachusetts. Lord Brougham, in delivering his opinion in *Doe v. Lippman*, in the House of Lords, refers to this distinction taken by Judge Story, and calls it an 'excellent' one. In that case it was said that by the law of Scotland, not the remedy alone was taken away, but that the debt itself was extinguished; but under the Scotch law of prescription, Lord Brougham said, there was no ground for the distinction, and that the debt was still supposed to be existing and owing, though the act of limitation of 1772, of Scotland, was strong with respect to the remedy to be enforced. The authority of Judge Story for the distinction, was likewise cited by the counsel in *Huber v. Steiner*, 2 Bing. N. C. 202, in the English Court of Common Pleas, and Chief Justice Tindal, in delivering the opinion, said, that undoubtedly the distinction, when taken with the qualification annexed to it by the author himself, appeared to be well founded. That qualification is, that the parties are resident within the jurisdiction all that period. 'With such restriction,' says Chief Justice Tindal, 'it does indeed appear but reasonable, that the part of the *lex loci contractus*, which declares the contract to be absolutely void at a certain limited time, without any intervening suit, should be equally rescinded by the foreign country, as the part of the *lex loci contractus*, which gives life to, and regulates the construction of the contract; both parts

by the statute.(f) But if the plaintiff be abroad, or beyond the sea, at the time when the cause of action accrues, the statute will not run against

(f) 1 Blac. Rep. 286. 1 Dowl. & Ry. 16.

go equally *ad valorem contractus*, both *ad decisionem litis*.' But in this case, which was in respect to a promissory note, the French law of prescription appertains only to the time and mode of instituting the remedy—*ad tempus et modum actionis instituenda*; and, therefore, the payee of promissory notes made in France, may sue the maker, if resident in England, during six years from the time they became due." Angell on Lim., § 66, 67.

The rule in the courts of the United States, in respect to pleas of the statutes of limitation has always been, that they strictly affect the remedy, and not the merits. In the case of *McElmoyle v. Cohen*, 13 Peters, 312, this point was raised and so decided. All of the judges were present and assented. The fullest examination was then made of all the authorities upon the subject, in connection with the diversities of opinion among jurists about it, and of all those considerations which have induced legislatures to interfere and place a limitation upon the bringing of actions.

"We thought then, and still think," says Mr. Just. Wayne, "that it has become a formulary in international jurisprudence, that all suits must be brought within the period prescribed by the local law of the country where the suit is brought,—the *lex fori*; otherwise the suit would be barred, unless the plaintiff can bring himself within one of the exceptions of the statute, if that is pleaded by the defendant. This rule is as fully recognized in foreign jurisprudence as it is in the common law. We then referred to authorities in the common law, and to a summary of them in foreign jurisprudence. Burge's Com. on Col. and For. Laws. They were subsequently cited, with others besides, in the second edition of the Conflict of Laws, 483, among them will be found the case of *Leroy v. Crowninshield*, 2 Mason, 151, so much relied upon by the counsel in this case.

"Neither the learned examination made in that case of the reasoning of jurists, nor the final conclusion of the judge, in opposition to his own inclinations, escaped our attention. Indeed, he was here to review them, with those of us now in the court who had the happiness and benefit of being associated with him. He did so with the same sense of judicial obligation for the maxim, *Stare decisis et non quieta movere*, which marked his official career. His language in the case in Mason fully illustrates it:—'But I do not sit here to consider what in theory ought to be the true doctrines of the law, following them out upon principles of philosophy and juridical reasoning. My humbler and safer duty is to administer the law as I find it, and to follow in the path of authority, where it is clearly defined, even though that path may have been explored by guides in whose judgment the most implicit confidence might not have been originally reposed.' Then follows this declaration:—'It does appear to me that the question now before the court has been settled, so far as it could be, by authorities which the court is bound to respect.' The error, if any has been committed, is too strongly engrafted into the law to be removed without the interposition of some superior authority. Then, in support of this declaration, he cites Huberus, Voet, Pothier, and Lord Kames, and adjudications from English and American courts, to show that, whatever may have been the differences of opinion among jurists, the uniform administration of the law has been, that the *lex loci contractus* expounds the obligation of contracts, and that statutes of limitation prescribing a time after which a plaintiff shall not recover, unless he can bring himself within its exceptions, appertain *ad tempus et modum actionis instituenda* and not *ad valorem contractus*. *Williams v. Jones*, 13 East, 439; *Nash v. Tupper*, 1 Caines, 402; *Ruggles v. Keeler*, 3 Johns. 263; *Pearsall v. Dwight*, 2 Mass. 84; *Deconche v. Savetier*, 3 Johns. Ch. 190, 218; *McCluny v. Silliman*, 3 Peters, 276; *Hawkins v. Barney*, 5 Peters, 457; *Bank of the United States v. Donnelly*, 8 Peters, 361; *McElmoyle v. Cohen*, 13 Peters, 312.

"There is nothing in *Shelby v. Guy*, 11 Wheaton, 361, in conflict with what this court decided in the four last-mentioned cases. Its action upon the point has been uniform and decisive. In cases before and since decided in England, it will be found there has been no fluctuation in the rule in the courts there. The rule is, that the statute of limitations of the country in which the suit is brought may be pleaded to bar a recovery upon a contract made out of its political jurisdiction, and that the limitation of the *lex loci contractus* cannot be. 2 Bingham, New Cases, 202, 211. *Doe v. Lippmann*, 5 Clark & Fin. 1, 16, 17. It has become, as we have already said, a fixed rule of the *jus gentium privatum*, unalterable, in our opinion, either in England or in the States of the United States, except by legislative enactment.

"We will not enter at large into the learning and philosophy of the question. We remember the caution given by Lord Stair in the supplement to his Institutes (p. 852), about citing as authorities the works and publications of foreign jurists. It is appropriate to the occasion, having been written to correct a mistake of Lord Tenterden, to whom no praise could be given which would not be deserved by his equally distinguished contem-

him, till his return to this country. (g) And if the plaintiff be a foreigner, and do not come to *England* for many years after the cause of [*17] action arises, he *still has *six* years after his coming hither, to bring his action: (a) And if he never come to *England* himself,

(g) 2 Str. 836. Fitzgib. 81, S. C.

(a) 3 Wils. 145. 2 Blac. Rep. 723, S. C.

porary, Judge Story. Lord Stair says,—“There is in Abbott’s Law of Shipping (5th edition, p. 365,) a singular mistake; and, considering the justly eminent character of the learned author for extensive, sound, and practical knowledge of the English law, one which ought to operate as a lesson on this side of the Tweed, as well as on the other, to be a little cautious in citing the works and publications of foreign jurists, since, to comprehend their bearings, such a knowledge of the foreign law as is scarcely attainable is absolutely requisite. It is magnificent to array authorities, but somewhat humiliating to be detected in errors concerning them;—yet how can errors be avoided in such a case, when every day’s experience warns us of the prodigious study necessary to the attainment of proficiency in our own law? My object in adverting to the mistake in the work referred to is, not to depreciate the author, for whom I entertain unfeigned respect, but to show that, since even so justly distinguished a lawyer fails when he travels beyond the limits of his own code, the attempt must be infinitely hazardous with others.”

“We will now venture to suggest the causes which misled the learned judge in *Leroy v. Crowninshield* into a conclusion, that, if the question before him had been entirely new, his inclination would strongly lead him to declare, that where all remedies are barred or discharged by the *lex loci contractus*, and have operated upon the case, then the bar may be pleaded in a foreign tribunal, to repel any suit brought to enforce the debt.

“We remark, first, that only a few of the civilians who have written upon the point differ from the rule, that statutes of limitation relate to the remedy and not to the contract. If there is any case, either in our own or the English courts, in which the point is more discussed than it is in *Leroy v. Crowninshield*, we are not acquainted with it. In every case but one, either in England or in the United States, in which the point has since been made, that case has been mentioned, and it has carried some of our own judges to a result which Judge Story himself did not venture to support.

“We do not find him pressing his argument in *Leroy v. Crowninshield* in the Conflict of Laws, in which it might have been appropriately done, if his doubts, for so he calls them, had not been removed. Twenty years had then passed between them. In all that time, when so much had been added to his learning, really great before, that by common consent he was estimated in jurisprudence *par summis*, we find him, in the Conflict of Laws, stating the law upon the point, in opposition to his former doubts, not in deference to authority alone, but from declared conviction.

“The point had been examined by him in *Leroy v. Crowninshield* without any consideration of other admitted maxims of international jurisprudence, having a direct bearing upon the subject. Among others, that the obligation of every law is confined to the State in which it is established, that it can only attach upon those who are its subjects, and upon others who are within the territorial jurisdiction of the State; that debtors can only be sued in the courts of the jurisdiction where they are; that all courts must judge in respect to remedies from their own laws, except when conventionally, or from the decisions of courts, a comity has been established between States to enforce in the courts of each a particular law or principle. When there is no positive rule, affirming, denying, or restraining the operation of foreign laws, courts establish a comity for such as are not repugnant to the policy or in conflict with the laws of the State from which they derive their organization. We are not aware, except as it has been brought to our notice by two cases cited in the argument of this cause, that it has ever been done, either to give or to take away remedies from suitors, when there is a law of the State where the suit is brought which regulates remedies. But for the foundation of comity, the manner of its exercise, and the extent to which courts can allowably carry it, we refer to the case of the *Bank of Augusta v. Earle*, 13 Peters, 519, 589; Conflict of Laws, Comity.

“From what has just been said, it must be seen, when it is claimed that statutes of limitation operate to extinguish a contract, and for that reason the statute of the State in which the contract was made may be pleaded in a foreign court, that it is a point not standing alone, disconnected from other received maxims of international jurisprudence. And it may well be asked, before it is determined otherwise, whether contracts by force of the different statutes of limitation in States are not exceptions from the general rule of the *lex loci contractus*. There are such exceptions for dissolving and discharging contracts out of the jurisdiction in which they were made. The limitations of remedies, and the forms and modes of suit, make such an exception. Confl. of Laws, 271, and 524 to 527. We may then infer that the doubts expressed in *Leroy v. Crowninshield* would have been withheld, if the point had been considered in the connection we have mentioned.

he has always a right of action while he lives abroad ; and after his death, his executors or administrators are in the same situation.

"We have found, too, that several of the civilians who wrote upon the question, did so without having kept in mind the difference between the positive and negative prescription of the civil law. In doing so, some of them—not regarding the latter in its more extended signification as including all those bars or exceptions of law or of fact which may be opposed to the prosecution of a claim, as well out of the jurisdiction in which a contract was made as in it—were led to the conclusion, that the prescription was a part of the contract, and not the denial of a remedy for its enforcement. It may be as well here to state the difference between the two prescriptions in the civil law. Positive, or the Roman *usucapio*, is the acquisition of property, real or personal, immovable or movable, by the continued possession of the acquirer for such a time as is described by the law to be sufficient. Erskine's Inst. 556. '*Adjectio domini per continuationem possessionis temporis legi definiti.*' Dig. 3.

"Negative prescription is the loss or forfeiture of a right, by the proprietor's neglecting to exercise or prosecute it during the whole period which the law hath declared to be sufficient to infer the loss of it. It includes the former, and applies also to all those demands which are the subject of personal actions. Erskine's Inst. 560, and 3 Burge, 26.

"Most of the civilians, however, did not lose sight of the differences between these prescriptions, and if their reasons for doing so had been taken as a guide, instead of some expressions used by them, in respect to what may be presumed as to the extinction or payment of a claim, while the plea in bar is pending, we do not think that any doubt would have been expressed concerning the correctness of their other conclusion, that statutes of limitation in suits upon contracts only relate to the remedy. But that was not done, and, from some expressions of Pothier and Lord Kames, it was said, 'If the statute of limitations does create, *proprio vigore*, a presumption of the extinction or payment of the debt, which all nations ought to regard, it is not easy to see why the presumption of such payment, thus arising from the *lex loci contractus*, should not be as conclusive in every other place as in the place of the contract.' And that was said in *Leroy v. Crowninshield*, in opposition to the declaration of both of those writers, that in any other place than that of the contract such a presumption could not be made to defeat a law providing for proceedings upon suits. Here, turning aside for an instant from our main purpose, we find the beginning or source of those constructions of the English statutes of limitation which almost made them useless for the accomplishment of their end. Within a few years, the abuses of such constructions have been much corrected, and we are now, in the English and American courts, nearer to the legislative intent of such enactments.

"But neither Pothier nor Lord Kames meant to be understood, that the theory of statutes of limitation purported to afford positive presumptions of payment and extinction of contracts, according to the laws of the place where they are made. The extract which was made from Pothier shows his meaning is, that, when the statute of limitations has been pleaded by a defendant, the presumption is in his favour that he has extinguished and discharged his contract, until the plaintiff overcomes it by proof that he is within one of those exceptions of the statute which takes it out of the time after which he cannot bring a suit to enforce judicially the obligation of the defendant. The extract from Lord Kames only shows what may be done in Scotland when a process has been brought for payment of an English debt, after the English prescription has taken place. The English statute cannot be pleaded in Scotland in such a case, but, according to the law of that forum, it may be pleaded that the debt is presumed to have been paid. And it makes an issue, in which the plaintiff in the suit may show that such a presumption does not apply to his demand ; and that without any regard to the prescription of time in the English statute of limitation. It is upon this presumption of payment that the conclusion in *Leroy v. Crowninshield* was reached, and as it is now universally admitted that it is not a correct theory for the administration of statutes of limitation, we may say it was in fact because that theory was assumed in that case that doubts in it were expressed, contrary to the judgment which was given, in submission to what was admitted to be the law of the case. What we have said may serve a good purpose. It is pertinent to the point raised by the pleading in the case before us, and in our judgment there is no error in the District Court's having sustained the demurrer.

"Before concluding, we will remark that nothing has been said in this case at all in conflict with what was said by this court in *Shelby v. Guy*, 11 Wheaton, 361. The distinctions made by us here between statutes giving a right to property from possession for a certain time, and such as only take away remedies for the recovery of property after a certain time has passed, confirm it. In *Shelby v. Guy*, this court declared that, as by the laws of Virginia five years' *bona fide* possession of a slave constitutes a good title upon which the possessor may recover in detinue, such a title may be set up by the vendee of such possessor in the courts of Tennessee as a defence to a suit brought by a third party in those courts. The same had been previously ruled in this court in *Brent v. Chapman*, 5 Cranch, 358 ; and

The statute cannot be a bar in any case, unless the time of limitation be expired after there hath been a complete cause of action :[B] as if a man

it is the rule in all cases where it is declared by statute that all rights to debts due more than a prescribed term of years shall be deemed extinguished, and that all titles to real and personal property not pressed within the prescribed time shall give ownership to an adverse possessor. Such a law, though one of limitation, goes directly to the extinguishment of the debt, claim, or right, and is not a bar to the remedy. *Lincoln v. Battelle*, 6 Wend. 475. Confl. of Laws, 582.

"In *Lincoln v. Battelle*, 6 Wend. 475, the same doctrine was held. It is stated in the Conflict of Laws, 582, to be a settled point. The courts of Louisiana act upon it. We could cite other instances in which it has been announced in American courts of the last resort. In the cases of *De la Vega v. Vianna*, 1 Barn. & Adol. 284, and the *British Linen Company v. Drummond*, 10 Barn. & Cres. 903, it is said, that, if a French bill of exchange is sued in England, it must be sued on according to the laws of England, and there the English statute of limitations would form a bar to the demand if the bill had been due for more than six years. In the case of *Doe v. Lippmann*, 5 Clark & Fin. 1, it was admitted by the very learned counsel who argued that case for the defendants in error, that, though the law for expounding a contract was the law of the place in which it was made, the remedy for enforcing it must be the law of the place in which it is sued. In that case will be found, in the argument of Lord Brougham before the House of Lords, his declaration of the same doctrine, sustained by very cogent reasoning, drawn from what is the actual intent of the parties to a contract when it is made, and from the inconveniences of pursuing a different course. In *Beckford and others v. Wade*, 17 Vesey, 87, Sir William Grant, acknowledging the rule, makes the distinction between statutes merely barring the legal remedy, and such as prohibit a suit from being brought after a specified time. It was a case arising under the possessory law of Jamaica, which converts a possession for seven years under a deed, will, or other conveyance, into a positive absolute title, against all the world,—without exceptions in favour of any one or any right, however a party may have been situated during that time, or whatever his previous right of property may have been. There is a statute of the same kind in Rhode Island. 2 R. I. Laws, 363, 364, ed. 1822. In Tennessee, there is an act in some respects similar to the possessory law of Jamaica; it gives an indefeasible title in fee simple to lands of which a person has had possession for seven years, excepting only from its operation, infants, feme covert, *non compos mentis*, persons imprisoned or beyond the limits of the United States and the Territories thereof, and the heirs of the excepted, provided they bring actions within three years after they have a right to sue. Act of November 16, 1817, ch. 28, §§ 1, 2. So in North Carolina, there is a provision in the Act of 1715, ch. 17, § 2, with the same exceptions as in the act of Tennessee, the latter being probably copied substantially from the former. Thirty years' possession in Louisiana prescribes land, though possessed without title and *malà fide*.

"We have mentioned those acts in our own States, only for the purpose of showing the difference between statutes giving title from possession, and such as only limit the bringing of suits. It not unfrequently happens in legislation, that such sections are found in statutes for the limitation of actions. It is in fact because they have been overlooked, that the distinction between them has not been recognized as much as it ought to have been in the discussion of the point, whether a certain time assigned by a statute, within which an action must be brought, is a part of the contract, or solely the remedy. The rule in such a case is, that the obligations of the contract upon the parties to it, except in well-known cases, are to be expounded by the *lex loci contractus*. Suits brought to enforce contracts, either in the State where they were made, or in the courts of other States, are subject to the remedies of the forum in which the suit is, including that of statutes of limitations." *Townsend v. Jamison*, 9 How. S. C. Rep. 413.

[B] "Where a debt due by specialty has been unclaimed, and without recognition, for twenty years, in the absence of any explanatory evidence, it is presumed to have been paid. The jury may infer the fact of payment from the circumstances of the case, within that period; but the presumption of law does not attach till the twenty years are expired. This rule, with its limitation of twenty years, was first introduced into the courts of law by Sir Matthew Hale, and has since been generally recognized, both in the courts of law and of equity. It is applied not only to bonds for the payment of money, but to mortgages, judgments, warrants to confess judgment, decrees, statutes, recognizances, and other matters of record, when not affected by statutes; but with respect to all other claims not under seal nor of record, and not otherwise limited, whether for the payment of money or the performance of specific duties, the general analogies are followed as to the application of the lapse of time, which prevail on kindred subjects. But in all these cases the presumption of payment may be repelled by any evidence of the situation of the parties, or other circumstance tending to satisfy the jury that the debt is still due." 1 Greenleaf on Evid. sec. 39. Matthews on Presump. Evid. ch. 19, 20. Best on Presump. Evid. p. 1, chaps. 2 & 3. 1 Phil. on Evid. p. 160, Cowen & Hill's notes.

promise to pay ten pounds to J. S. when he comes from *Rome*, or when he marries, and ten years after J. S. marries, or comes from *Rome*, the right of action accrues from the happening of the contingency, from which time the statute will begin to run, and not from the time of the promise.^(b) So in *assumpsit*, where the plaintiff declared that the defendant, in consideration that the plaintiff, at the defendant's request, would receive A. and B. into his house as guests, and diet them, promised, &c., the defendant pleaded *non assumpsit infra sex annos*, upon which the plaintiff demurred, and it was held no plea; for the defendant cannot in such case plead *non assumpsit infra sex annos*, but *actio non accrevit infra sex annos*; for it is not material when the promise was made, if the cause of action be within the six years, and the dieting might be long afterwards.^(c) So if the captain of a ship insured, barratrously carry her out of the course of the voyage, procure her to be condemned in a Vice-Admiralty court, sell her, and deliver her up to the purchaser, it is only from this last event that the statute of limitations begins to run, as between the assured and the underwriter.^(d) And no debt accrues on a bill payable at *sight*, until it be presented for payment: Therefore, the statute of limitations is no bar to an action on such a bill, unless it has been presented for payment six years before the action commenced.^(e) So, the statute is no bar to an action on a promissory note, payable *twenty-four* months after *demand*, if presented for payment within six years before the commencement of the action.^(f) But a promissory note, payable on *demand*, is payable *immediately*; and the statute of limitations runs from the date of the note, and not from the time of demand.^(g)[1] And where the breach of a contract is attended with special damage, the statute runs from the time of the breach, which is the gist of the action, and not from the time when it was discovered,^(h) or the damage arose.⁽ⁱ⁾ In an action by an *administrator*, upon a bill of exchange payable to the intestate, but accepted after his death, it was holden, that the statute of limitations begins to run from *the time of granting the letters [*18] of administration, and not from the time the bill becomes due; there being no cause of action, until there is a party capable of suing.^(a)[2]

There is no statute of limitations in an action of *debt* on bond.^(b)

(b) Godb., 437. 1 Lev., 48. 1 Blac. Rep., 354. 1 H. Blac., 631.

(c) 2 Salk., 422. 2 Ld. Raym. 838, S. C., and see Ballantine on the Statute of Limitations, p. 215, &c.

(d) 1 Camp., 539, and see 4 Esp. Rep. 18.

(e) 2 Taunt., 323.

(f) 1 Ry. & Mo., 388. 8 Dowl. & Ry., 347, S. C.

(g) *Christie v. Fosseck*, Sit. Lond. after M. T., 52 Geo. III., C. P., per *Mansfield*, Ch. J. Sel. Ni. Pri., 6 Ed., 136, 361. 1 Ves., 344, *accord.*, but see *Hardr.*, 36. 1 Mod., 89. 15 Vin. Abr. tit. *Limitation*, P. 14. M'Clk. & Y., 338.

(h) 3 Barn. & Ald., 626, and see 4 Moore, 508. 2 Brod. & Bing., 73, S. C. 5 Barn. & Cres., 259. 8 Dowl. & Ry., 14. 2 Car. & P., 238, S. C. *accord.*

(i) 3 Barn. & Ald., 288.

(a) 5 Barn. & Ald., 264.

(b) Cowp., 109.

[1] 7 Har. & Johns., 14. So, also, a receipt given for a sum of money borrowed, whereby the person borrowing undertook to return the money "when called on to do so," creates a cause of action from its date, bearing interest, and against which the act of limitations begins to run from that time. 1 Har. & Gill, 439.

[2] When the statute once begins to run, no subsequent circumstance stops its operation. It does not, however, begin to operate unless there is a person, *in esse*, competent to sue at the time the cause of action accrues. *Ruff's Adm'r v. Bull*, 7 Har. & J. 14. So, in trover, where the conversion of the property of the deceased was before letters of administration were granted, the statute runs only from the time a right vested in some one to demand it. *Haslett's Adm'r v. Glenn*, Id. lb. *Heppburn's Adm'r v. Sewell*, 4 Id. 393, 430. See Angell on Limitations, § 477, 478.

But where the bond has been given more than *twenty* years before the commencement of the action, and no interest has been paid upon it, nor any acknowledgment by the obligor of the existence of the debt, during that period, the law in general will presume it to be satisfied; (e) particularly if the debt be large, and the obligor has been all along in good circumstances. (d) And the defendant shall have the benefit of this presumption on the plea of *solvit ad diem*, unless interest appears to have been paid upon the bond, after the time mentioned in the condition; in which case he must plead *solvit post diem*. (e) So, where a bond has been given, or interest paid upon it, within twenty years, the law in some cases will presume it to be satisfied; as where it has been given eighteen or nineteen years, and in the mean time an account has been settled between the parties, without taking any notice of the demand; (f) but in that case the presumption must be fortified by evidence of some auxiliary circumstances; (g) though, after a considerable length of time, slight evidence is said to be sufficient. (h) The doctrine of presumption is said to have been first taken up by Lord *Hale*, (i) who thought the lapse of time a circumstance whence a jury might presume payment. [A] In this he was followed by Lord *Holt*, who held that if a bond be of twenty years standing, and no demand proved thereon, or good cause of so long forbearance shown, on *solvit ad diem*, he should intend it paid. (k) This doctrine was after-

(c) 6 Mod., 22. 11 Mod., 2. 1 Str., 652. 3 P. Wms., 395, &c. 1 Bur., 434. 1 Blac. Rep., 532. 4 Bur., 1963. Cowp., 109. 1 Durnf. & East, 270.

(d) 1 Durnf. & East, 271, 2.

(e) 1 Str., 652.

(f) 1 Bur., 434. 1 Durnf. & East, 271.

(g) Cowp., 214. 1 Durnf. & East, 270. 1 Camp., 27.

(h) 1 Durnf. & East, 272.

(i) *Id.*, 271, but see 1 Chan. Rep., 42, 47, and the cases referred to in Vin. Abr. tit. Length of Time, 52, &c.

(k) 6 Mod., 22. 11 Mod., 2.

[A] A debt once proved to have existed is presumed to continue, unless payment, or some other discharge, be either proved or established from circumstances. A receipt under hand and seal is the strongest evidence of payment, for it amounts to an estoppel, conclusive on the party making it; but a receipt under hand alone, or a verbal admission of payment, is in general only *prima facie* evidence of it, and may be rebutted. Of the presumptive proof of payment, the most obvious is that of no demand having been made for a considerable time; and previous to the 3 & 4 Will. 4, c. 42, § 3, the courts, by analogy to the Statute of Limitations, had established the artificial presumption, that, where payment of a bond or other specialty was not demanded for twenty years, and there was no payment of interest or other circumstance to show that it was still in force, payment or release ought to be presumed by a jury. By that statute it is enacted, that "all actions for debt, for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance that shall be sued or brought at any time after the end of that session of parliament, shall be commenced and sued within ten years after the end of that session, or within twenty years after the cause of action, but not after." Even though this statute be not pleaded, the fact of payment may still be presumed by a jury from lapse of time, or other circumstances which render the fact probable, as, for instance, the settlement of accounts subsequent to the accruing of the debt, and in which no mention is made of it. Where a landlord gives a receipt for rent due up to a certain day, all former arrears are presumed to have been paid; for it is likely that he would take the debt of longest standing first. Previous to the statute, it was laid down by Lord Ellenborough, in *Calsell v. Budd*, 1 Campb. 27, that, "after a lapse of twenty years, a bond will be presumed to be satisfied; but there must either be a lapse of twenty years, or a less time, coupled with some circumstance to strengthen the presumption." In *Brembridge v. Osborn*, 1 Stark, 374, also, the same learned judge told the jury, that, where there is a competition of evidence as to the question, whether a security has or has not been satisfied by payment, the possession of the uncanceled security by the claimant ought to turn the scale in his favour, since, in the ordinary course of dealing, the security is given up to the party who pays it. Best on Presump. sec. 127.

wards adopted by Lord *Raymond*, in the case of *Constable v. Somerset*.^(l) And it is not confined to actions of *debt* on bond; but the like presumption has been made, after twenty years, in an action of *debt*,^(m) or *seire facias*,⁽ⁿ⁾ on a judgment:[1] and in a modern case,^(o) where it appeared that the bond was not satisfied, the jury, under particular circumstances, and after a great lapse of time, presumed it to have been *released*. So, in *assumpsit*, where the statute of limitations is not pleaded or replied, the jury may presume, from length of time and other circumstances, that the debt has been satisfied.^(p)

*The presumption of payment, however, may in general be rebutted, by showing that interest has been paid on the bond within [*19] twenty years,[A] or that the obligor has acknowledged the existence of the debt within that period,^(a) or that he was in bad circumstances,^(b) or the demand trifling,^(c) or that he has ever since his acknowledgment resided abroad.^(d) But where there was no evidence of payment, or of any sort of acknowledgment, for more than thirty years, the presumption arising from lapse of time, of a judgment being satisfied, was holden not to be rebutted, by evidence of the defendant having been in embarrassed circumstances, and in the opinion of those who knew him, incapable of paying the debt secured by the judgment.^(e) In order to prove the payment of interest, or a part of the principal, an indorsement made by the obligee upon the bond, within twenty years, is allowed to be evidence;^(f) but an indorsement made after the presumption had taken place, is not admissible.^(g) And, by the statute 9 Geo. IV., c. 14, § 3, "no indorsement or memorandum of any payment, written or made after the time appointed for that act to take effect, upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of the statute of limitations."

In actions for *wrongs*, particular times of limitation are frequently appointed by statute, different from those in common cases. Thus, by the statute 24 Geo. II., c. 44, § 8, it is provided, that "no action shall be brought against any *justice* of the peace, for any thing done in the execu-

(l) Hil. 1 Geo. II., at Guildhall.

(m) 1 Str., 639.

(n) Peake's Evid., 5 Ed., 28. *Curtis v. Lord Grandison*, cor. Ld. Kenyon, Sit. Westm., after M., 37 Geo. III., S. P.

(o) *Washington and Brymer*, H. 42 Geo. III. K. B. Peake's Evid. 5 Ed. Appendix, xxv., S. C.

(p) 2 Stark. Ni. Pri. 497, and see 5 Esp. Rep. 22. 1 Taunt. 572, but see 1 Dowl. & Ry. 16.

(a) Cowp. 109. 1 Durnf. & East, 271, 2.

(b) Cowp. 109.

(c) *Id.* 214.

(d) 1 Stark. Ni. Pri. 101.

(e) 1 Campb. 217.

(f) 2 Str. 826. 2 Ld. Raym. 1370. 8 Mod. 278. Sel. Cas. Ev. 152. 3 Bro. P. C. 535, S. C.

(g) 2 Str. 827. 2 Vez. 43, *acc.* 1 Barnard, K. B. 432, *contra*.

[1] 14 Serg. & Rawle, 15. 2 Const. Rep. S. Car. 617, 146. 2 South. Rep. 721, *accord*. And satisfaction of a judgment after the lapse of twenty years, is a presumption of law upon the facts; if there are no facts or circumstances to account for the delay, it is not the duty of the court to submit the question, as an open one to the jury. 14 Serg. & R. 15. If the original judgment were against several defendants, and on a *seire facias*, the return as to one, is *nihil habet*, and judgment is entered against him by default, this is not a circumstance to affect the presumption of payment, as an implied confession of judgment. *Id. ibid*.

[A] See Best on Presump., § 137; 2 Greenl. on Ev., § 528.

tion of his office, or against any *constable*, *headborough*, or other officer, or person acting by his order and in his aid, unless commenced within *six* calendar months after the act committed." In the construction of this statute, it seems that the months are to be reckoned *inclusive* of the day of committing the act.^(h) And where a constable, acting under a warrant commanding him to take the goods of *A.*, takes the goods of *B.*, believing them to belong to *A.*, he is entitled to the protection of the statute; and an action therefore must be brought against him, within *six* calendar months.⁽ⁱ⁾ And, in like manner, where constables, under a warrant to search a house for black cloth which had been stolen, finding no black cloth, took cloth of other colours, and carried it before a magistrate, refusing at the same time to tell the owner of the house searched, whether they had any warrant or no; the court of Common Pleas held, that they were within the protection of the statute, and that an action against them ought to have been commenced within *six* months after the grievance complained of.^(k) So, where a constable, having a magistrate's warrant of distress, to levy a church rate, under the statute 53 Geo. III., c. 127, § 7, broke the door of, and entered the plaintiff's dwelling house; the

court held, that although he thereby exceeded his authority, yet [*20] that no action could be maintained, after the expiration of **three* calendar months.^(a) But, in the case of a continued imprisonment, the magistrate is liable to answer in an action for such part of the imprisonment suffered under his warrant, as was within *six* calendar months before the action commenced against him.^(b) And where an action of assault and false imprisonment was brought against a constable, who had exceeded his authority, it being objected that the plaintiff had not shown the action commenced within *six* months, according to the above statute, Lord *Kenyon* over-ruled the objection, on this distinction; that the defendant acted *colore officii*, and not *virtute officii*; and said, that it had often been held, that a constable acting *colore officii* was not protected by the statute, where the act committed is of such a nature that the office gives him no authority to do it: in the doing of that act he is not to be considered as an officer: but where a man doing an act within the limits of his official authority, exercises that authority improperly, or abuses the discretion placed in him, to such cases the statute extends: The distinction is, between the extent and the abuse of the authority.^(c)

By the statute 28 Geo. III. c. 37, § 23, "if any action or suit shall be brought or commenced against any person or persons, for any thing by him or them done in pursuance of that or any other act or acts of parliament then in force, or thereafter to be made, relating to his majesty's revenues of *customs* and *excise*, or either of them, such action or suit shall be commenced within *three* months next after the matter or thing done."^(d) And, by the statute 6 Geo. IV. c. 108, § 97, "if any action or suit shall be brought or commenced against any officer of the *army*, *navy*, *marines*, *customs* or *excise*, or against any person acting under the

(h) 4 Moore, 465.

(i) 3 Barn. & Ald. 330.

(k) 5 Moore, 322. 2 Brod. & Bing. 619, S. C., and see 7 Moore, 51. 3 Brod. & Bing. 239. S. C.

(a) 1 Barn. & Ald. 227.

(b) 12 East, 67.

(c) 2 Esp. Rep. 542, *in notis*, and see 2 Chit. Rep. 140. 6 Barn. & Cres. 351. 7 Barn. & Cres. 394. 1 Man. & Ry. 102, S. C. *Id.* 211. *Post*, 29, 31.

(d) See also the former statutes of 23 Geo. III., c. 70, § 34, 24 Geo. III., sess. 2, c. 47, § 35, 39, which latter statute, however, is repealed by 6 Geo. IV., c. 105. And for the construction of the former of these statutes, see 2 Dowl. & Ry. 9.

direction of the commissioners of his majesty's *customs*, for any thing done in the execution of or by reason of his office, such action or suit shall be brought or commenced within *six* months next after the cause of action shall have arisen, and not afterwards." On the former of these statutes, it has been holden, that the action must be commenced within *three* months from the time of the original seizure, notwithstanding the pendency of process in the Exchequer.^(e) And as the statute 28 Geo. III. c. 37, is not repealed by the 6 Geo. IV. c. 105, it seems that actions for any thing done in pursuance of the acts relating to the *customs* or *excise*, must still be commenced within *three* months after the matter or thing done. Also, by the acts relating to the *West India*,^(f) and *London*,^(g) *Dock* companies, actions against their *treasurer* must be brought within *six* calendar months after the fact committed.

*By the general *highway*,^(a) *turnpike*,^(b) and *building*^(c) [*21] acts, actions for things done in pursuance thereof, must be brought within *three* months next after the act committed, and not afterwards. But it has been determined, that if surveyors of highways, in the execution of their office, undermine a wall adjoining to the highway, which does not fall till more than *three* months afterwards, they are subject to an action on the case, for the consequential injury, within *three* months after the falling of the wall.^(d) By the statute 43 Geo. III. c. 99, § 70, for consolidating the provisions in the acts relating to the duties under the management of the commissioners for the affairs of *taxes*, "if any action or suit shall be brought against any person or persons, for any thing done in pursuance of that act, or any act for granting duties to be assessed under the regulations of that act, such action or suit shall be commenced within *six* calendar months next after the fact committed, and not afterwards." By the statute 6 Geo. IV. c. 16, to amend the laws relating to *bankrupts*,^(e) "every action brought against any person, for any thing done in pursuance of that act, shall be commenced within *three* calendar months next after the fact committed." By the statutes 7 & 8 Geo. IV. c. 29, § 75, and c. 30, § 41, "all actions and prosecutions against any person, for any thing done in pursuance of the acts for consolidating and amending the laws relative to *larceny*, &c., and *malicious* injuries to property, shall be commenced within *six* calendar months after the fact committed, and not otherwise." And, by the statute 7 & 8 Geo. IV. c. 31, for consolidating and amending the laws relative to remedies against the *hundred*,^(f) "no person shall be enabled to bring any action by virtue of that statute, unless he shall commence the same within *three* calendar months after the commission of the offence."

The statute of limitations is a bar to an action of *trover*, commenced more than *six* years after the conversion, although the plaintiff did not

(e) 2 H. Blac. 14. 2 East, 254, and see 1 Bing. 167.

(f) Stat. 39 Geo. III., c. lxi., § 184, and see 5 Taunt. 534.

(g) Stat. 39 & 40 Geo. III., c. xlvii., § 151, and see 1 Ry. & Mo. 161. 1 Car. & P. 541, S. C.

(a) 13 Geo. III., c. 84, § 85. 3 Geo. IV., c. 126, § 147, and see statutes 5 Geo. III., c. 105. 42 Geo. III., Chap. C. 56 Geo. III., c. li. And for decisions on these statutes, see 1 Marsh. 429. 6 Taunt. 29, S. C. 2 Barn. & Cres. 703. 4 Dowl. & Ryl. 195, S. C. 4 Barn. & Cres. 200.

(c) 14 Geo. III. c. 78, § 100, and see 4 Barn. & Cres. 269. 6 Dowl. & Ryl. 360, S. C.

(d) 16 East. 215, and see 5 Taunt. 537, S. 1 Marsh. 429. 6 Taunt. 29, S. C. 3 Maule & Sel. 580. 2 Barn. & Cres. 703. 4 Dowl. & Ryl. 195, S. C.

(e) § 44.

(f) § 3.

know of it until within that period; the defendant not having practised any fraud, in order to prevent the plaintiff from obtaining that knowledge at an earlier period.(g) And in an action on the *case* against an attorney, for misconduct, in laying out money on insufficient securities, the statute of limitations begins to run from the time when the defendant was guilty of such misconduct, and not from the time when it was discovered that the securities were insufficient.(h) To a declaration in an action [*22] on the **case*, founded in *tort*, the defendant, in pleading the statute of limitations, should allege that the cause of action did not accrue within *six* years next before the commencement of the suit; a plea of not guilty of the grievances mentioned in the declaration, within *six* years, being bad upon special demurrer.(a) And a subsequent admission by the defendant, of having committed a trespass, will not take the case out of the statute of limitations.(b)

To take a case out of the statute, it is usual, in *assumpsit*, to prove a promise to pay, or acknowledgment of the debt, within *six* years before the commencement of the action.[A] And a *conditional* promise has been holden sufficient for this purpose, as well as an *absolute* one; as where the defendant said to the plaintiff, *prove your debt, and I will pay it.*(c) But if an executor bring *assumpsit* on a promise made to his testator, and the defendant plead that he made no promise to the testator within six years: if issue be joined thereon, a promise to the executor within six years will not maintain the action.(d) So, where an action was brought against A. and B. and C., his wife, upon a joint promissory note made by A. and C. before her marriage, and the promise was laid by A. and C. while the latter was sole, and the defendants pleaded the statute of limitations, whereupon issue was joined; the court held, that an acknowledgment of the note by A., within six years, but after the intermarriage of B. and C., was not evidence to support the issue.(e) And, upon a replication that the defendant did promise within six years, to a plea of the statute of limitations, fraud in the defendants cannot be set up as an answer to the plea.(f)[1]

(g) 5 Barn. & Cres. 149. 7 Dowl. & Ry. 729, S. C., and see Ballentine, on the statute of limitations, 97, &c.

(h) 5 Barn. & Cres. 259. 8 Dowl. & Ry. 14. 2 Car. & P. 238, S. C., and see 3 Barn. & Ald. 288, 626. 4 Moore, 508. 2 Brod. & Bing. 73, S. C. (a) 3 Barn. & Ald. 448.

(b) 1 Barn. & Ald. 92. 2 Chit. Rep. 249, S. C., and see 2 Campb. 160. 3 Barn. & Ald. 626. 5 Moore, 105. 2 Brod. & Bing. 372, S. C., *Post*, 27.

(c) 1 Ld. Raym. 389, 422. 1 Salk. 29. Carth. 470. 5 Mod. 425, S. C., and see 2 Show. 126. 2 Vent. 151. 12 Mod. 224.

(d) 1 Salk. 28. 2 Ld. Raym. 1101. 6 Mod. 309, S. C. Bul. N^o. Pri. 150. 3 East, 409.

(e) 1 Barn. & Cres. 248. 2 Dowl. & Ry. 363, S. C.

(f) 2 Barn. & Cres. 149. 3 Dowl. & Ry. 322, S. C.

[1] In this case, each of the judges intimated an opinion that fraud would have been a good answer, if it had been specially stated in the replication. See 2 Barn. & Cres. 149, particularly what is said by Bayley and Best, Js. See also 5 Barn. & Cres. 149. In this country, the cases on this subject are as follows: when the statute is pleaded to an action founded on fraud, a replication which avers an ignorance of the fraud until within six years, is sufficient. 1 Pickering, 438. 3 *id.* 74. 2 McCord, 426, *contra*, 20 Johns. 33. And the ignorance so averred is traversable, and may be proved or disproved, like other traversable matters. 1 Pick. *ut supra*. Such replication is good, though the plaintiff aver generally that he did not discover the fraud until within six years, without stating the time when he discovered it, or any act of the defendant by which the knowledge of it was prevented. *Ibid.* Mr. Chitty, in his work on the Practice of the Law in all its Departments (vol. i. p. 766,) makes, upon this subject, the following observations: "It has been suggested that even *at law* a case might be taken

[A] See a full discussion of the subject and collection of authorities in Angell on Limitations, § 208, 235, 3d Ed.

It was formerly doubted, whether a bare *acknowledgment* of the debt, without a *promise* of payment, was sufficient to take the case out of the statute; such an acknowledgment being only considered as *evidence* of a promise; as in *trover*, where a demand and refusal are not holden to be a conversion, but only evidence of it. A bare acknowledgment, however, (g) and that of the slightest nature, (h) is now deemed sufficient to prevent the operation of the statute. [A] So, in an action brought by an administrator, an agreement for a compromise, executed between the intestate and the defendant, wherein the existence of the debt sued for was admitted, was deemed sufficient to take the case out of the statute of limitations. (i) And where the defendant, having entered into a guarantee in writing, and become liable upon it, at a period of more than *six* years before the *commencement of the suit, verbally promised, within six [*23] years, that the matter should be arranged; and afterwards, on an action being brought, pleaded *actio non accrevit*, &c. the court held, that the statute of frauds having been once satisfied, by the original promise being in writing, it was not necessary, in order to take the case out of the statute of limitations, that the latter promise should also be in writing. (a) If an agent has been employed to pay money for work done for the defendant, and the workmen are referred to him for payment, an acknowledgment or promise to pay by him, will take the case out of the statute of limitations. (b) So the admission of the wife, who was accustomed to conduct her husband's business, is sufficient to take the case out of the statute of limitations, in an action against the husband. (c) And, in an action against a husband, for goods supplied to his wife for her accommodation, while he occasionally visited her, a letter written by the wife, acknowledging the debt, within six years, was deemed admissible evidence for that purpose. (d)

An acknowledgment by one of several drawers of a joint and several promissory note, will take the case out of the statute, as against any one of the other drawers, in a *separate* action on the note against him. (e) So, in a *joint* action against several drawers of a promissory note, an acknowledgment within *six* years, by one of them, will revive the debt against another, although the latter has made no acknowledgment, and only signed the note as a surety. (f) [1] And where one of two drawers of a

(g) 2 Bur. 1099.

(h) 5 Bur. 2630, and see Cowp. 548. 4 Esp. Rep. 46. 1 Car. & P. 452, 3, 631, 675. 3 Bing. 119, but see the opinion of *Best*, Ch. J. *id.* 331.

(i) 9 Price, 122.

(a) 1 Barn. & Ald. 690.

(b) 5 Esp. Rep. 145.

(c) Holt *Ni. Pri.* 591.

(d) 1 Campb. 394.

(e) Doug. 652, 3.

(f) 2 Bing. 306. 9 Moore, 566, S. C.

out of the statute of limitations, by showing that the wrong-doer *by fraud*, concealed from the party injured the knowledge of the cause of action until after the limited time had elapsed. *Granger v. George*, 5 B. & C. 149, S. C. 7 D. & R. 729; *Howell v. Young*, 5 B. & C. 259; but the case appears to have been put rather as a possible than a positive exception, and in these cases it seems at least better to resort to a court of equity, or by an injunction in that court to prevent the defendant from setting up the lapse of time as a bar." *Whalley v. Whalley*, 3 Bligh's Rep. 2.

[1] So, in the State of Connecticut, it is held that the acknowledgment of one of several joint makers of a promissory note, will take it out of the statute as against the others. *Bound v. Lathrop*, 4 Conn. Rep. 336. So, in Massachusetts, the acknowledgment by one of several joint promisors, or debtors, even though the others be sureties. *Hunt v. Bridgham*, 2 Pick. 551. *White v. Hale*, 3 Id. 291. *Frye v. Baker*, 4 Id. 382. It is said, however, that this is true, only, where the acknowledgment is made under such circumstances, as to entitle it to its full weight. For, although such evidence is in all cases *admissible*, for such a pur-

[A] See Angell on Limitations, § 235, 240, 3d Ed.

joint and several promissory note having become a bankrupt, the payee received a dividend under the commission on account of the note, the court of Common Pleas held that this would prevent the other drawer from availing himself of the statute, in an action brought against him for the remainder of the money due on the note; the dividend having been received within six years after the action brought. (g) But in a subsequent case, where one of two joint drawers of a bill of exchange became bankrupt, and the indorsees proved a debt under his commission, beyond the amount of the bill, for goods sold, &c., and exhibited the bill as a security they then held for their debt, and afterwards received a dividend; the court of King's Bench held, in action by the indorsees of the bill against the solvent partner, that the statute of limitations was a good defence, although the dividend had been paid by the assignees of the bankrupt partner, within six years. (h) In an action against A. on the joint and several promissory note of himself and B., to take the case out of the statute of limitations, it is enough to give in evidence a letter written by A. to B., within the six years, desiring him to settle the money. (i) But it is not sufficient to show a payment by a joint maker of the note to the payee, within six years, so as to throw it upon the defendant to show that the payment was not [*24] made on account of the note. An acknowledgment by one drawer in such case, to bind the other, must be clear and explicit. (a) And where A. and B. made a joint and several promissory note, and A. died, and ten years after his death, B. paid interest upon the note; it was holden, in an action brought thereon against the executors of A., that the payment of interest by B. did not take the case out of the statute, so as to make the executors liable. (b) [1]

(g) 2 H. Blac. 340.

(h) 1 Barn. & Ald. 463, and see 1 Barn. & Cres. 248, 2 Dowl. & Ry. 363, S. C.

(i) Campb. 32.

(a) 1 Stark. Nl. Pri. 488.

(b) 2 Barn. & Cres. 23. 3 Dowl. & Ry. 200, S. C.

pose, it will not in all cases be sufficient. *Cott v. Tracy*, 8 Conn. Rep. 268. Therefore, where there was a joint indebtedness by A. & B. to C., growing out of an agency conducted by A. & B. joint; and more than twenty years after such agency was ended, B. made an acknowledgment of the debt, and then, at his own expense, and with a view to obtain an advantage to himself, by a recovery against A., procured a suit to be brought in the name of C., against A. and himself; it was held that the acknowledgment of B. under such circumstances, was not sufficient to remove the bar of the statute of limitations set up by A. *Ibid.* The same distinction between the *admissibility* and the *sufficiency* of evidence, was made in the case of *Peck v. Botsford*, 7 Id. 172; in which it was held, that an acknowledgment by a personal representative of a deceased person, that a demand against the estate of the deceased, barred by the statute, is due, will not take the case out of the statute.

An acknowledgment of debt, or a new promise, by the maker of a promissory note, takes it out of the statute of limitations only so far as he is concerned; but does not affect the rights or obligations of collateral parties. *Gardiner v. Nutting*, 5 Greenleaf, 140. Where the maker of a promissory note, of more than six years standing, died insolvent, and a collateral guarantor of the note was appointed a commissioner on his estate; the allowance of the note by the commissioner, as a valid claim against the estate, being an official act, was held, not to amount to a new promise on his part to pay the debt. *Id. Ibid.*

The acknowledgment of a debt by one partner, after a dissolution of the partnership, is not sufficient to take the case out of the statute, as to the other partners. *Arnold v. Dexter*, 4 Mason, 122. *Bell v. Morrison, et al.* 1 Pet. Rep. S. C. 351, 373. *Searight v. Craighead*, 1 Pennsylv. Rep. 135. *Lery v. Cudet*, 17 Serg. & Rawle, 126. *Contra*, in the State of Maryland, where it is held that, although the admissions of one partner, after the partnership is dissolved, are not sufficient to charge the other partners with a debt, they are sufficient to take a debt due from the partners out of the statute of limitations. *Ward v. Howell et al.* 5 Har. & J. 60. So, also, in the State of New York; *Patterson v. Choate*, 7 Wendell, 441; where the admission was made twelve years after the dissolution. But see *Cudy v. Shepherd*, 11 Pick. 400. *Van Kusen v. Parmelee*, 2 Comst. 523, and 2 Parsons on Contr. p. 360, note j, p. 364, note p.

[1] A payment of interest by A., on the joint and several note of A. and B., is evidence of

If a letter be written by a plaintiff to the defendant's attorney, on being served with a writ, couched in ambiguous terms, neither expressly admitting nor denying the debt, it should be left to the jury to consider whether it amounts to an acknowledgment of the debt.^(c)[A] And if there be a mutual account of any sort between the plaintiff and defendant, for any *item* of which credit has been given within six years, that is evidence of an acknowledgment of there being such an open account between the parties, and of a promise to pay the balance, as to take the case out of the statute.^(d) So, if a defendant admit the existence of a debt, which would otherwise be barred by the statute of limitations, but claim to be discharged by a written instrument, which does not amount to a legal discharge, he shall be bound by his admission.^(e) And where the acceptor of a bill of exchange acknowledged his acceptance, and that he had been liable, but said that "he was not liable then, because it was out of date, and that he would not pay it, and that it was not in his power to pay it," this was deemed sufficient to take the case out of the statute.^(f) So it is sufficient to prove, that a demand being made by a seaman on the owner of a ship, for wages which had accrued during an embargo, he said, "if others paid, he should do the same."^(g) So where A., by means of a misrepresentation, received of B. and several other persons, his tenants, various sums of money, to which he was not entitled: and B. having applied to him to have the money which he had so paid returned, saying, that he and the other tenants had been induced to pay more than was due, A. replied, that "if there was any mistake, it should be rectified;" it was holden, that this obviated the statute of limitations, as to payments made by the other tenants, as well as by B.^(h) So where, in a deed between the defendants and a third person, defendants acknowledged, within six years, the existence of a debt, and the plaintiffs were wholly strangers to the deed; the court held this was sufficient to take the case out of the statute of limitations.⁽ⁱ⁾ And a promise by a defendant, in embarrassed circumstances, to pay a debt by instalments, if time were given him, is sufficient to take a case out of the statute.^(k)

On the other hand, a note, written by a debtor to an executor, that **"the testator always promised never to distress him for the debt,"* is not evidence of a promise to pay it, made to the tes- [*25] tator within six years.^(a) And where the acknowledgment was, "I had the money, but the testatrix gave it to me;" the latter words

(c) 2 Durnf. & East, 769, and see 8 Moore, 180. 1 Bing. 266, S. C.

(d) 6 Durnf. & East, 189.

(e) 6 Esp. Rep. 66.

(f) 16 East, 420.

(g) 4 Campb. 185, and see 5 Maule & Sel. 75. 2 Stark. N. Pri. 98, but see 3 Dowl. & Ryl. 267. 4 Dowl. & Ryl. 179.

(h) 2 Barn. & Cres. 149. 3 Dowl. & Ryl. 322. S. C.

(i) 3 Barn. & Ald. 141.

(k) 2 Stark. N. Pri. 98.

(a) 6 Taunt. 210.

a promise by B., and takes the case out of the statute, though B. were a mere surety, and the payment was made without his knowledge. *Burleigh v. Scott*, 2 Man. & Ryl. 93, S. C. 8 Barn. & Cres. 36. And per *Holroyd, J.* The joint and several promises apply to the same sum of money. It was a joint debt, though there was a several promise by each to pay it. Such payment, therefore, operates as a new promise to the full extent of the original promise contained in the note. *Ibid.*

Payment within six years of interest due on a note beyond six years, where the note remains in the payee's hands, is sufficient to take the case out of the statute of limitations. *Bealy v. Greenslade*, 2 Crompt. & Jer. 61.

[A] See Angell on Limitations, §270, 285, 3d Ed.

were holden to qualify the generality of the first admission, and not to amount to a new promise or confession of the defendant, sufficient to take the case out of the statute.(b) So, where the defendant had said to the plaintiff, "I owe you not a farthing, for it is more than six years since;" the court held, that this was not to be left to the jury, as evidence of an admission, to take a debt out of the statute of limitations.(c) So, an acknowledgment by the acceptor of a bill of exchange, within *six* years, of his liability to the payee of the bill, there being no consideration for the acceptance, is not sufficient, in an action by the drawers against the acceptor, to take the case out of the statute of limitations.(d) So where, upon demand made of payment of two promissory notes, over-due ten years, the defendant said, "I cannot afford to pay my new debts, much less my old ones;" the court held, that the jury were warranted in negating this as evidence of a subsisting debt, to take the case out of the statute.(e) And where the defendant, on being arrested for a debt more than six years old, said, "I know than I owe the money, but the bill I gave you is on a *three-penny* receipt stamp, and I will never pay it;" the court of Common Pleas held, that this was not such an acknowledgment, as would revive the debt.(f)

In like manner, a qualified admission, by a party who relies on an objection, which would at any time have been a good defence to the action, does not take the case out of the statute.(g) So where a defendant, on being applied to by the plaintiff's attorney, for the payment of a debt, wrote in answer, that "he would wait on the plaintiff, when he should "be able to satisfy him respecting the misunderstanding which had occurred between them:" this was holden not to be such an acknowledgment of a debt, as would bar a plea of the statute of limitations; and that such evidence ought not to be left to a jury, as a ground to infer a new promise to pay.(h) So, in *assumpsit* by an executrix, where the defendant, on being applied to by the plaintiff for payment of interest, stated that he would bring her some on the following *Sunday*; the court held, that although this was an admission that something was due, still as it did not appear what the nature of the debt was, or that it was due to the plaintiff as executrix, or in her own right, or that it was one for which *assumpsit* would lie, the plaintiff was not entitled to recover even nominal damages, and a non-suit was entered.(i) And where, in an action against several executors, on a promise made by themselves, as well as by the testator, to which the defendants [*26] pleaded the general issue, and the *statute of limitations; it was holden, that neither a mere acknowledgment of the debt by all the executors, nor an express promise by one of them, would take the case out of the statute; but there must be an express promise by all.(a) So, in *assumpsit* by an attorney, to recover his charges relative to the grant of an annuity, evidence that the defendant said, "he thought it had been settled, when the annuity was granted, but he had been in so much trouble since, that he could not recollect any thing about it," was holden not to be a sufficient acknowledgment of the debt, to take the case out of the statute of

(b) 6 Esp. Rep. 67, 8.

(c) 3 Taunt. 380, and see 5 Esp. Rep. 81. 4 Maule & Sel. 457. 5 Price, 636, *accord*.

(d) 3 Stark. *Ni. Pri.* 186.

(e) 4 Dowl. & Ryl. 179.

(f) 3 Bing. 329, and see 4 Bing. 105.

(g) 1 Stark. *Ni. Pri.* 7.

(h) Holt *Ni. Pri.* 380, and see 4 Esp. Rep. 184, 5 Esp. Rep. 81, 1 New Rep. C. P. 20, 3 Dowl. & Ryl. 267.

(i) 4 Barn. & Cres. 235.

(a) 1 Ry. & Mo. 416. 9 Dowl. & Ryl. 40 S. C.

limitations, and ought not to be left to the jury, as evidence of an admission of such debt; although the plaintiff proved his bill was not paid at the time of granting the annuity.(b) So where, in *assumpsit* on a promissory note, it was proved that on the plaintiff's showing the note to the defendant within six years, the latter said, "you owe me more money; I have a set-off against it;" this was holden, by two of the judges, not to be a sufficient acknowledgment within six years, to take the case out of the statute of limitations.(c) And where a party, on being asked for the payment of his attorney's bill, admitted that there had been such a bill, but stated that it had been paid to the deceased partner of the attorney, who had retained the amount out of a floating balance in his hands; it seems that, in order to take the case out of the statute of limitations, evidence is inadmissible to show that the bill had never in fact been paid in this manner.(d)

In *assumpsit* for goods sold and delivered, and on the money counts, where the defendant had pleaded the general issue, with the statute of limitations, and paid money into court generally; the court held, that such payment did not take the case out of the statute.(e) And where a party revives a debt barred by the statute of limitations, by paying it into court, but at the same time refuses to pay interest, such payment of the principal does not revive the claim for interest. 4 Bing. 313. So, in an action by an executor for the balance of an account, a warrant of attorney given by the defendant to the testator, to confess a judgment for such balance, was holden not to be sufficient to take the case out of the statute of limitations.(f) And where the defendant, on being applied to for payment, said, "I think I am bound in honour to pay the money, and shall do it when I am able;" Lord *Kenyon* ruled, that it was a conditional promise[A] only, and that the

(b) 7 Taunt. 608. 1 Moore, 340, S. C.

(c) 2 Barn. & Ald. 759.

(e) 3 Barn. & Cres. 10. 4 Dowl. & Ryf. 632, S. C.

(d) 4 Barn. & Ald. 568.

(f) 2 Stark. N. Pri. 234.

[A] "The acknowledgment of a debt if accompanied with a promise to pay conditionally, is of no avail unless the condition to which the promise is subjected by the defendant is complied with, or the event has happened upon which the promise depends. It would be absurd to say that a conditional promise is the continuation of one which is unconditional. Therefore the cases wherein it has been held that if the condition accompanying the acknowledgment is complied with, it will avail and not otherwise, must be on the ground that the acknowledgment furnishes a new promise in the words of Mr. Justice Story in *Bell v. Morrison*, 1 Pet. 360, springing out of and supported by the original consideration." All those cases, according to Lord Chief Justice Tenterden, "proceed upon the principle, that under the ordinary issue of the statute of limitations, an acknowledgment is only an evidence of a promise to pay; and unless it is conformable to, and maintains the promises in the declaration, though it may show to demonstration that the debt has never been paid, and is still subsisting, it has no effect. The question, then, comes to this: is there any promise in this case, which will support the promises in the declaration? The promises in the declaration are absolute and unconditional to pay when thereunto afterwards requested. The promise proved here was, 'I will pay you as soon as I can;' and there was no evidence of ability to pay, so as to raise that, which was in its terms a qualified promise into one that was absolute and unqualified." *Tanner v. Smart*, 6 B. & C. 603. Chief Justice Marshall, in delivering the opinion of the Supreme Court of the United States, in *Wetzel v. Bussard*, 11 Wheat. 309, held that certain declarations could not be construed into a revival of the original cause of action, unless that was done on which the revival was made to depend. Says he, "It may be considered a new promise for which the old debt is a sufficient consideration." I know, says Carr, J., (in the case of the *Farmers' Bank v. Clark*, in the Court of Appeals of Virginia,) 4 Leigh, 603, "there are many old cases which consider the statute founded on the presumption of payment: that whatever repels that presumption is in legal effect, a promise to pay the debt; and that such acknowledgment, is accompanied with only a conditional promise, or even a refusal to pay, the law considers the condition or refusal void, and the acknowledgment itself as an unconditional answer to the statute. But," he continues, "the more recent, and, I think, the more rational decisions, take a

plaintiff was bound to show that the defendant was then of sufficient ability to pay; adding, that it had been so ruled before, by Lord Chief Justice *Eyre*.^(g) In a late case,^(h) the Court of Common Pleas were divided in opinion, whether, on a promise to pay *when of ability*, made *three* years after the original cause of action accrued, and within *six* years before the commencement of the action, it was necessary for the plaintiff to prove the defendant's ability. But, in a subsequent case,⁽ⁱ⁾ where it appeared that the defendant, being applied to to pay a debt barred by the statute of limitations, said "he should be [*27] happy to pay, *if he could;" the court held, that the plaintiff must show the defendant's ability to pay. So, in the King's Bench, where *assumpsit* was brought to recover a sum of money, and the defendant pleaded the statute of limitations, upon which issue was joined, and, at the trial, the plaintiff proved the following acknowledgment by the defendant, within *six* years, "I cannot pay the debt at present, but I will pay it as soon as I can;" the court held, that this was not sufficient to entitle the plaintiff to a verdict, no proof being given of the defendant's ability to pay. 6 Barn. & Cres. 603. If a cause of action arising from the breach of a contract to do an act at a specific time, be once barred by the statute of limitations, a subsequent acknowledgment by the party, that he broke the contract, will not it seems take the case out of the statute.^(a)[1]

(g) 4 Esp. Rep. 36, but see 2 Stark. *Ni. Pri.* 99, *in notis, semb. contra*; and see 2 H. Blac. 116. 3 Esp. Rep. 159.

(h) 3 Bing. 638.

(i) 4 Bing. 105.

(a) 2 Campb. 160, and see Peake's Evid. 5 Ed. 212, 271. 1 Barn. & Ald. 92. 2 Chit. Rep. 249, S. C. 3 Barn. & Ald. 626. 5 Moore, 105. 2 Broad & Bing. 372, S. C. *Ante*, 22.

[1] In order to prevent various questions which had arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence, for the purpose of taking the case out of the operation of the enactments of the statute 21 Jac. 1, c. 16, § 1, and to make provision for giving effect to the said enactments, and to the intention thereof; it is enacted by the statute 9 Geo. IV. c. 14, § 1, that "in actions of debt, or upon the *case*, grounded upon any simple contract, no acknowledgment or promise, by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby: And that where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executor or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise, made and signed by any other or others of them. Provided always, that nothing therein contained shall alter or take away, or lessen the effect of any payment of any principal or interest, made by any person whatsoever. Provided also, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise, that the plaintiff, though barred by either of the therein recited acts or that act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

different view of the case. They consider this a statute of repose, which ought to receive from the courts a firm and just support. They consider the acknowledgment a *new promise*, not a continuance of the old." Angell on Limitations, § 235.

Direct proof of an acknowledgment or promise, in any set form of words, is not required to take a case out of the statute. It may be inferred from facts without words. *Whitney v. Bigelow*, 4 Pick. 110. It is for the court to decide what kind of promise or acknowledgment is sufficient; and the evidence offered is proper to be submitted to the jury, under the

In order to show that the action was commenced in due time, a bill of *Middlesex* or *latitat* in the King's Bench,^(b) or a *capias quare clausum fregit* in the Common Pleas,^(c) is as effectual as an original writ:[1] and suing out a *testatum capias ad respondendum* is a good commencement of an action by original.^(d) In proceeding against a *peer* of the realm, *corporation*, or *hundredors* on the statute 7 & 8 Geo. IV. c. 31, an *original* writ must, in both courts, be sued out for avoiding the statute: and where a *member* of the House of Commons is defendant, the plaintiff must proceed for that purpose, either by suing out an *original* writ, and getting it returned *nihil*,^(e) or by *bill* and summons, &c., on the statute 12 & 13 W. III. c. 3, § 2.^(f) An *attachment* of privilege is holden to be a good commencement of the suit,^(g) at the suit of an *attorney*, even though it be informal:^(h) But an *attachment* of privilege, in the King's Bench, is not a continuance of a bill of *Middlesex*, so as to avoid the statute.⁽ⁱ⁾ And, in the Common Pleas, an original writ of *quare clausum fregit*, upon which no proceedings were had, cannot be connected with another writ of the same nature, subsequently issued.^(k) As against an *attorney* or officer of the court of King's Bench, or a *prisoner* in the actual custody of the marshal of that court, the statute can only be avoided, by filing a *bill* with the clerk of the declarations, in the King's Bench office; which bill

(b) Sty. Rep. 156, 178. 1 Sid. 53, 60. Carth. 233. 2 Ld. Raym. 883. 1 Str. 550. 2 Str. 736. 2 Ld. Raym. 1441, S. C. 2 Bur. 961. 1 Blac. Rep. 215, S. C. 3 Bur. 1241. 1 Blac. Rep. 312, S. C.

(c) 2 Ld. Raym. 880. Willes, 258. 2 Blac. Rep. 925.

(d) 5 Barn. & Ald. 452. 1 Dowl. & Ryl. 27, S. C. (e) 1 Lev. 111. 2 Ld. Raym. 1113.

(f) Append. Chap. VI. § 28.

(g) 1 Show. 366. 2 Salk. 420, S. C.

(h) 2 Blac. Rep. 1131.

(i) 3 Durnf. & East, 662, and see 6 Moore, 525. 3 Brod. & Bing. 212, S. C. 1 Bing. 324. 5 Barn. & Cres. 341. 8 Dowl. & Ryl. 270, S. C., as to the effect of entering continuances, on a writ of special *capias ad respondendum*, in K. B., in supporting a commission of bankrupt, for a debt that would otherwise have been barred by the statute of limitations.

(k) 3 Bos. & Pul. 330, but see Willes, 259.(c)

[1] A writ of *latitat* is considered as a continuance of a bill of *Middlesex*, 7 Barn. & Cres. 526. 1 Man. & Ryl. 232, 237, S. C.

direction of the court. *Oliver v. Gray*, 1 Har. & Gill. 204. Every acknowledgment must be taken altogether, and no evidence can be received to turn a denial of the existence of a debt into an acknowledgment of a subsisting liability, by proving that the party making the admission was mistaken in supposing the debt to have been paid. *Ib.* An acknowledgment, accompanied by a naked refusal to pay, or a refusal and an excuse for not paying, which in itself implies an admission that the debt remains due, and furnishes no real objection to the payment of it, is sufficient. *Ib.* An admission that the sum claimed has not been paid, is not sufficient, without some further admission, or other proof that the debt once existed. *Ib.*

The acknowledgment may be in whole or in part, and is sufficient after suit is brought; but there must be evidence of a promise, express or implied to pay the debt. *Alcock v. Guan*, 2 Hill, S. C. 326. *Lawrence v. Hopkins*, 13 Johns. 288. *Sands v. Gelston*, 15 ib. 511. *Moore v. Bank of Columbia*, 6 Pet. 86. *Mosher v. Hubbard*, 13 Johns. 510. *Guier v. Pierce*, 2 Browne. 35. *Young v. Monpoey*, 2 Bailey, 278. *Cohen v. Aubin*, ib. 283. *Lowry v. Dubose*, ib. 425. *Trammell v. Salmon*, ib. 308.

The acknowledgment must admit that the debt continues due at the time of the acknowledgment. *Bangs v. Hall*, 2 Pick. 368. *French v. Frazier*, 7 J. J. Marsh. 425. *Wetzell v. Bussard*, 11 Wheat. 310. *Oliver v. Gray*, 1 Har. & Gill, 204. *Ferguson v. Taylor*, 1 Hayw. 20. *Belles v. Belles*, 7 Halst. 339. *Purdy v. Austin*, 3 Wend. 187. *Russell v. Gass*, Mart. & Yerg. 270. *Barlow v. Bellomy*, 7 Verm. 54. *Mellick v. De Seethorst*, Breese, 171.

Such an acknowledgment as will satisfy a reasonable man that the defendant, at the time of making the acknowledgment, considered the debt then existing, is sufficient. *Harwell v. McCulloch*, 2 Overt. 275.

may be filed in vacation, as well as in term-time.(l) In the Common Pleas, the bill against an attorney is filed in the Prothonotaries' office; and to avoid the statute of limitations, it may, it seems, be filed in vacation.(m) If a plaint be levied in an *inferior* court, in due time, and then it be removed into the King's Bench by *habeas corpus*, and the plaintiff declare there *de novo*, and the defendant plead the statute of limitations, the plaintiff may reply, and show the plaint in the inferior court, and that will be sufficient to *avoid the statute.(a) In the Exchequer, [*28] the suing out of process is considered as the commencement of proceedings by information, within the statute of limitations.(b)

If an executor take out proper process in *assumpsit*, within a year after the death of his testator, the six years not being elapsed before, though they expire within that period, yet it will be sufficient to take the case out of the statute.(c) So, if *assumpsit* be brought in proper time, but the plaintiff or defendant die before judgment, and the six years run, his executor or administrator may notwithstanding bring a fresh action;(d) provided he does it recently, or within a reasonable time. What shall be deemed a reasonable time, in this case, is a matter of considerable doubt, and there are various opinions in the books upon the subject. In *Spencer's* case,(e) it is said to be entirely in the discretion of the court. In another case it is said, that heretofore they used to allow half a year, but that was held to be too long, and therefore they allowed but thirty days.(f) In a third case, a year was said to be a reasonable time:(g) And this opinion was adhered to in a subsequent case,(h) in analogy to that part of the statute, which authorizes the party to bring a new action within a year, after the reversal of the judgment, by writ of error,(i) &c. But whatever may be the precise rule upon this subject, it seems that if a new action be brought within a half a year after the abatement of the former, it would be sufficient to avoid the statute.(k)[A]

(l) Doug. 313, 14. 5 Durnf. & East, 173, 325, but see Peake's Cas. Ni. Pri. 3 Ed. 275.

(m) Imp. C. P. 7 Ed. 456, (a). 6 Taunt. 347, 8, 355. 2 Marsh. 50, 52, 56, S. C.

(a) 1 Sid. 228. 1 Lev. 143, S. C. 1 Ld. Raym. 553. 2 Salk. 424. 2 Ld. Raym. 881. 2 Str. 719. 2 Ld. Raym. 1427, S. C. (b) Forrest, 210, and see 2 Price, 116.

(c) Bul. Ni. Pri. 150.

(d) 2 Salk. 425. Bul. Ni. Pri. 150.

(e) 6 Co. 10.

(f) 1 Ld. Raym. 283. 1 Salk. 393, S. C., and see 1 Lutw. 297.

(g) 1 Ld. Raym. 434. 1 Lutw. 256, S. C., and see 6 Edw. III. 32, b. Willes, 257.(a)

(h) 2 Str. 997. Fitzgib. 170, 289. 1 Barnard, K. B., 335, S. C. (i) Cro. Car. 294.

(k) Cowp. 738, 740, and see Ballantine, on the statute of limitations, 156, 166.

[A] Under the statute of Limitations, a presumption arises that the defendant, from the lapse of time, has lost the evidence which would have availed him in his defence, if he had been seasonably called upon for payment; but, when this presumption is rebutted by an acknowledgment of the defendant within six years, the contract is not within the intent of the statute. *Baxter v. Penniman*, 8 Mass. 133. *Fiske v. Needham*, 11 ib. 452. *Grist v. Neuman*, 2 Bailey, 92. *McLean v. Thorp*, 3 Mis. 215. *Gailer v. Grinnell*, 2 Aik. 349. *Lyon v. Marclay*, 1 Watts, 271. *Bullock v. Perry*, 2 Stew. & Port. 319. *Beale v. Edmonson*, 3 Call. 514.

The statute of limitations does not run against a state, unless it is expressly named. *Lindsey v. Miller*, 6 Pet. 666. *State v. Arledge*, 2 Bailey, 401. *Weatherhead v. Bledroe*, 2 Overt. 352. *People v. Gilbert*, 18 Johns. 227. *State Treasurer v. Weeks*, 4 Verm. 215. *Stoughton v. Baker*, 4 Mass. 522, 528. *Ninmo v. Commonwealth*, 4 H. & M. 57. *Bayley v. Wallace*, 16 S. & R. 245. *Munshower v. Patton*, 10 ib. 334. *Commonwealth v. Baldwin*, 1 Watts, 54. *Wallace v. Miner*, 6 Ham. 366.

Where an act of the legislature allowed credits to be given to persons who had made payment by mistake to D., an officer whose term of office had expired, on their complying with certain requisitions, and a collector, on complying with those requisitions, obtained credits to a large amount, by fraud and collusion with D.; and, in an action by the Commonwealth to recover the amount, commenced in pursuance of a subsequent statute, the

Previous to the commencement of an action, it is sometimes necessary for the intended plaintiff to make a *request* or *demand*, or to give *notice* to the opposite party, for completing the cause of action; and after it is completed, some things are required to be done, before the action is brought. A formal demand is necessary, before an action can be maintained against overseers, for the surplus arising from a distress for poor's rates, under the statute 27 Geo. II. c. 20, § 2.(l) And, in order to maintain an action for the recovery of an attorney's bill for fees and disbursements, at law or in equity, it is in general necessary, by the statute 2 Geo. II. c. 23, § 23, that it should be signed by the attorney, and delivered to the party to be charged therewith, a month at least before the action is commenced.

(l) 4 Dowl. & Ry1. 181. 2 Barn. & Cres. 682, S. C.

defendant pleaded the statute of limitations, it was held, that the plea could not be sustained. *Commonwealth v. McGowan*, 4 Bibb, 62.

The general statute of limitations in Massachusetts does not apply to trusts. *Hemmingsway v. Gates*, 5 Pick. 321, and cases cited in note thereto. But held otherwise in Pennsylvania as to implied or constructive trusts. *Walker v. Walker*, 16 S. & R. 369. Except implied trusts in favour of infants, *Smilee v. Biffle*, 2 Barr, 52. To exempt a trust from the bar of the statute, it must be, first, a direct trust; secondly, it must be of a kind belonging exclusively to the jurisdiction of a court of equity, and, thirdly, the question must arise between the trustee and the *cestui que trust*, per Ross, J. in *Lyon v. Marelay*, 1 Watts, 275. *Rush v. Barr*, 1 Watts, 120. *Finney v. Cochran*, 1 Watts & Serg. 118.

It has been uniformly ruled in the United States, that in the case of an express continuing trust, the statute of limitations does not begin to run as against the *cestui que trust*, and in favour of the trustee, until there has been some open, express denial of the right of the former, and what amounts to an adverse possession on the part of the latter. *Decouche v. Savetier*, 3 J. C. R. 190. *Anstie v. Brown*, 6 Paige, 448. *Kane v. Bloodgood*, 7 J. C. R. 90. *Bohannon's Heirs v. Stiresley's Administrators*, 2 B. Monr. 438. *Fosse v. Fosse*, 2 Ired. Eq. 321. *White v. White*, 1 Johns. Mar. Ch. 53. *Pinson v. Grey*, 1 Yerg. 296. *Cook v. Williams*, 1 Green. Ch. 209. *Boone v. Chiles*, 10 Pet. 177. *Prevost v. Gratz*, 6 Wheat. 48. *Oliver v. Piatt*, 2 How. U. S. 333. *Zellers Lessee v. Eckart*, 4 Id. 289. *Johnson v. Humphries*, 14 S. & R. 394. *Finney v. Cochran*, 1 W. & S. 118. *Murdoch v. Hughes*, 7 Sm. & M. 219. *Starke v. Starke*, 3 Rich. 438. *Perkins v. Cartwell*, 4 Harring. 270. *Varick v. Edwards*, 11 Paige, 259. *Furnum v. Brooks*, 9 Pick. 212. *Smith v. Calloway*, 7 Blackf. 86. *McDonald v. Sims*, 3 Kelly, 383. *Wickliffe v. City of Lexington*, 11 B. Monroe, 161. And even in cases of adverse possession, the knowledge of, or notice to, the *cestui que trust* is necessary. *Fox v. Cash*, 11 Penn. St. R. 207. *Starke v. Starke*, 3 Rich. 438. Where a trustee for the sale of stock actually sells, and incurs a liability for the proceeds, the statute begins to run from that time. *White v. White*, 1 John. Mar. Ch. 56. So, in general, where the relation is terminated by a breach of trust. *Wickliffe v. City of Lexington*, 11 B. Monroe, 161. Where the trust, however, is merely implied or constructive, there has been some disagreement among the cases, but the better opinion appears to be that, as in general, the facts out of which such trust arises, from their very nature, presupposes an adverse claim of right on the part of the trustee by implication, from the beginning, the statute will commence to run against the *cestui que trust*, from the period from which he could have vindicated his right by action or otherwise; which, however it may be at law, where there has been a difference among the cases, (see Angell on Limit. Ch. 18.) in equity is considered to be when he has, or with reasonable diligence, could have made himself acquainted with that right. Angell on Limitation, Ch. 16, 35 and cases there cited; 19 Am. Jurist, 389. *Sheppard v. Turpin*, 3 Grat. 373. *Murdoch v. Hughes*, 7 Sm. & M. 219. *Gratz v. Prevost*, 6 Wheat. 481. *Cuyler v. Brant*, 2 Caines, Cas. 326, on the effect of lapse of time in equity. A resulting trust from the payment of purchase money is barred by the statute, *Strimpfler v. Roberts*, 18 Penn. St. R. 300.

An executor or administrator is a trustee for legatees, next of kin, or creditors, and the general rule applies, *Lindsay v. Lindsay*, 1 Desaus. 150, *Carr v. Bob*, 7 Dana, 417, *Blee v. Patterson*, 1 Dev. & Batt. Eq. 457, *Bird v. Graham*, 1 Ired. Eq. 196, (except where there is some statutory limitation, as there is indeed in most of the States,) though there will be a presumption of payment after a great lapse of time. *Bird v. Graham*, *ut sup.* *Graham v. Torrance*, 1 Ired. Eq. 210. *Shearin v. Eaton*, Id. 282. *Graham v. Davidson*, 2 Dev. & Batt. 155. *Tate v. Connor*, 2 Dev. Eq. 224. *Hudson v. Hudson*, 3 Rand. 117. *Hayes v. Good*, 7 Leigh, 452. *Skinner v. Skinner*, 1 J. J. Marsh. 594. Hill on Trustees, page 264, 2d Am. Ed. by Wharton.

A notice of action is also in some cases required to be given, to the party or parties against whom it is intended to be brought, in [*29] order to give them *an opportunity of tendering amends.(a) Thus, by the statute 24 Geo. II. c. 44, it is enacted, that "no writ shall be sued out against, nor any copy of any process at the suit of a subject shall be served on, any *justice* of the peace, for any thing by him done in the execution of his office, until *notice* in writing of such intended writ or process shall have been delivered to him, or left at the usual place of his abode, by the attorney or agent for the party who intends to sue or cause the same to be sued out or served, at least one calendar month before the suing out or serving the same; in which notice shall be clearly and explicitly contained the cause of action, which such party hath or claimeth to have against such justice of the peace: on the back of which notice shall be indorsed the name of such attorney or agent, together with the place of his abode; who shall be entitled to have the fee of *twenty* shillings for the preparing and serving such notice, and no more.(b) And no evidence shall be permitted to be given by the plaintiff, on the trial, of any cause of action, except such as is contained in the notice.(c)[A]

It has been deemed sufficient, to entitle a justice to the benefit of this statute, that he conceived himself to be acting as a justice, though what he did was not in the regular execution of his office.(d) And accordingly, the lord of the manor, who was also a justice of the peace, was held to be entitled to a month's notice of action against him, for taking away a gun in the house of an unqualified person.(e) So, *one* magistrate who had committed the mother of a bastard to prison, for not filiating the child, was holden to be entitled to the notice of action required by the statute, though by the 18 Eliz. c. 3, § 2, jurisdiction over the subject matter is given to *two* magistrates.(f) And where a justice of the peace does not act under colour of his office, though he exceed his jurisdiction, he is entitled to notice, before an action can be brought against him;(g) but where he does not act *colore officii*, a notice is unnecessary.(h) And no notice is necessary, to support an action against a person, for the penalty given by the statute 18 Geo. II. c. 20, for acting as a justice, without a proper qualification.(i) The notice to a justice of the peace must express the nature of the *writ* or *process* intended to be sued out, as well as of the *cause of action*:(k) And where the notice was not indorsed with the place of abode of the attorney, but concluded thus—"Given under my hand at *Durham*, this ——— day of ———," &c. it was deemed insufficient.(l) But a notice to a [*30] magistrate *need not specify the *form* of action intended to be brought: It is sufficient if it state the writ or process, and the

(a) Append. Chap. I. § 1, &c. N.B.—The references are to the *seventh* edition of the *Practical Forms*, which were originally intended as an *Appendix* to the *Practice*, and are referred to accordingly throughout.

(b) § 1.

(c) § 4.

(d) *Bird v. Gunston*, E. 24 Geo. III. K. B., 2 Chit. Rep. 459, S. C., and see 8 East, 113. 9 East, 365. 3 Campb. 242. 3 Maule & Sel. 580. 2 Price, 126. 10 Moore, 63. 2 Bing. 483, S. C. 3 Bing. 78. 10 Moore, 376, S. C. *Post*, 31.

(e) 2 H. Blac. 114.

(f) 9 East, 364. 2 Campb. 199, n.

(g) 1 Barn. & Cres. 129. 2 Dowl. & Ryl. 43, S. C., and see 1 Car. & P. 459, 466, n. 669.

(h) 2 Barn. & Cres. 729. 4 Dowl. & Ryl. 283, S. C. 6 Barn. & Cres. 351. *Ante*, 20.

(i) Holt Ni. Pri. 458.

(k) 7 Durnf. & East, 631.

(l) *Taylor v. Fenwick*, M. 23 Geo. III. K. B. 7 Durnf. & East, 635. 3 Bos. & Pul. 553.(a.) S. C. cited.

[A] See 2 Troubat & Haley's Pract. 515, 3d ed.

cause of action : (a) and in stating the cause of action, it is sufficient to inform the defendant substantially of the ground of complaint. (b) Where notice of action is given to a magistrate, under the 24 Geo. II. c. 44, it is sufficient, in indorsing the attorney's name, to put the initial only of his christian name, with his surname and place of abode, in words at length : (c) And where the notice was signed *T. and W. A. Williams*, the names of the attorneys for the plaintiff being *Thomas Adams Williams* and *William Adams Williams*, it was deemed sufficient. (d) The attorney giving the notice, may describe himself generally of the town in which he resides, as "of *Birmingham*," (e) or "*Bolt on en le Moor*:" (f) though where he described himself in the notice as of a place in *London*, which in fact was in *Westminster*, it was holden to be fatal. (g)

In like manner, by the statute 28 Geo. III. c. 37, § 25, (h) "no writ or process shall be sued out against any officer of the *customs* or *excise*, or against any person or persons acting by his or their order, in his or their aid, for any thing done in the execution or by reason of that or any other act or acts of parliament then in force, or thereafter to be made, relating to the said revenues, or either of them, until one calendar month next after notice in writing shall have been delivered to him or them, or left at the usual place of his or their abode, by the attorney or agent for the person or persons who intends or intend to sue out such writ or process as aforesaid; in which notice shall be clearly and explicitly contained the cause of action, the name and place of abode of the person or persons in whose name such action is intended to be brought, and the name and place of abode of the said attorney or agent : (i) and that a fee of *twenty* shillings, and no more, shall be paid for the preparing and serving of every such notice." And, by the statute 6 Geo. IV. c. 108, § 93, a similar notice is required to be given, previously to the commencement of an action against any officer of the *army*, *navy*, or *marines*, or against any person acting under the direction of the commissioners of his majesty's *customs*, for any thing done in the execution of, or *by reason of his office. On the former of these statutes it has been holden, that notice of action against a custom- [*31] house officer, for breaking the plaintiff's dwelling house in C—— street, in the Parish of G——, is not a sufficient notice of the plaintiff's place of abode. (a)

An *extra* man, not appointed by the board of excise, is holden to be entitled to the benefit of the statute 28 Geo. III. c. 37, § 25; or at least he is

(a) 2 Campb. 196.

(b) 5 Barn. & Ald. 837. 1 Dowl. & Ry. 497, S. C., and see McCl. & Y. 469, but see 2 Chit. Rep. 673.

(c) 7 Taunt. 63. 2 Marsh. 377, S. C. In *Crooke v. Curry*, Durham Sum. Assiz., 1789, *Thomson*, B. held, that the attorney's name and place of abode being in the body, instead of on the back of the notice, was sufficient, on the grounds of the intent of the statute being, that the justice might be able to tender amends to the party or his attorney, and of the case of *Rex v. Bigg*, (3 P. Wms. 419. 1 Str. 18,) in which a writing on the inside of a bank note, was holden to be properly described as an indorsement, even in an indictment for forgery. See *quare?* and see 7 Durnf. & East, 634, 5.

(d) 4 Barn. & Cres. 681. 6 Dowl. & Ry. 625. 2 Car. & P. 237, S. C.

(e) 3 Bos. & Pul. 551.

(f) *Crooke v. Curry*, Durham Sum. Assiz., 1789, but *Thomson*, B. there said, "*London*, *Manchester*, or other such large town, generally, would not be sufficient."

(g) 6 Esp. Rep. 138.

(h) And see the statutes 23 Geo. III., c. 70, § 30, 32, and 24 Geo. III., sess. 2, c. 47, § 35, which latter statute, however, is repealed by 6 Geo. IV., c. 105.

(i) Append. Chap. I., § 7, 8, 9.

(a) 3 Taunt. 127.

entitled to it, as a person acting under an excise officer, if he be sent to make a search, though no regular officer be present. (b) And an excise officer is entitled to notice, before an action is brought against him, for an act not warranted by his official capacity, if done *bonâ fide*, in the supposed, execution of his duty; such as the assaulting of an innocent person, whom he suspects to be a smuggler employed in running goods: (c) for otherwise, he would never be entitled to notice, except in cases where he did not need it. (d) But a constable detaining a person by direction of a custom-house officer, who had himself no power to detain him, is not within the protection of the act, there being no pretence that he was acting within the scope of his authority. (e) And where a revenue officer, having seized goods as forfeited, which were not liable to seizure, takes a sum of money of the owner to release them, an action for money had and received will lie to recover it back, though the officer has not had a month's notice previous to bringing the action. (f) The month begins the day on which the notice is served: (g) and the action, we have seen, (h) must be brought within *three* months (which are holden to be *lunar* months,) (i) after the cause of it accrued: so that the notice must be served one *calendar* month at least before the expiration of three *lunar* months from the time of the cause of action.

The statute 39 Geo. III. c. lxi. § 184, directs, that the *West India Dock Company* shall sue in the name of their *treasurer*, in all actions by or on behalf of the company, and that he shall be sued for the recovery of any claim or demand upon, or of any damages occasioned by the company; and § 185, after extending the protection of the statute 24 Geo. II. c. 44, for privileging justices of peace, in actions brought against them as such, to the Lord Mayor and Aldermen of *London*, acting under this act beyond the limits of the city, directs that "no action shall be commenced against any person or persons, for any thing done in pursuance or under colour of this act, until after fourteen days notice in writing, or after tender of amends, &c.:" upon which it has been holden, that the *treasurer* of the company is a person within the said clause; and being sued *for an act done by the company, which induced an injury to [*32] the plaintiffs, was entitled to such notice before the action brought. (a) And there are similar provisions in the act relating to the *London Dock* company. (b)

By the *building* act, (c) "no action or suit shall be commenced against any person or persons, for any thing done in pursuance of that act, until *twenty-one* days after notice in writing, of an intention to bring such action or suit, has been given to the person or persons against whom it shall be brought." And, by the statute 43 Geo. III. c. 99, § 70, for consolidating the provisions in the acts relating to the duties under the manage-

(b) 2 Smith R. 220.

(c) 5 Durnf. & East, 1. *Davy v. Hoskins*, M. 23 Geo. III., C. P. S. P., and see 1 Car. & P. 460, n. 4 Barn. & Cres. 200. 6 Dowl. & Ryl. 257, S. C. 4 Barn. & Cres. 269. But *per Heath*, J. he is not entitled to notice, for any collateral act.

(d) *Per Lawrence*, J., 2 Smith R. 223, and see 9 East, 365. 3 Camp. 242.

(e) 2 Chit. Rep. 140, and see 6 Barn. & Cres. 351.

(f) 4 Durnf. & East, 485, and see 5 East, 122. 1 Barn. & Ald. 42. 2 Barn. & Cres. 729. 4 Dowl. & Ryl. 283, S. C., *accord*, but see 4 Durnf. & East, 553, *semb. contra*.

(g) 3 Durnf. & East, 623.

(h) *Ante*, 20.

(i) 6 Durnf. & East, 224. 8 Moore, 265. 1 Bing. 307, S. C.

(a) 5 East, 115, and see *Holt* N. Pri. 27. 7 Taunt. 1.

(b) 39 & 40 Geo. III. c. xlvii. § 150, 51.

(c) 14 Geo. III. c. 78, § 100, and see 4 Barn. & Cres. 269. 6 Dowl. & Ryl. 360, S. C.

ment of the commissioners for the affairs of *taxes*, “no writ or process shall be sued out, for the commencement of any action or suit, against any person or persons, for any thing done in pursuance of that act, or any act for granting duties to be assessed under the regulations of that act, until *one* calendar month next after notice in writing shall have been delivered to, or left at the usual place of abode of such person or persons, by the attorney or agent for the intended plaintiff or plaintiffs; in which notice shall be clearly and completely contained the cause and causes of action, the name and place or places of abode of the intended plaintiff or plaintiffs, and of his or their attorney or agent: and no evidence shall be given, on the trial of such action or suit, of any cause or causes of action, other than such as is or are contained in such notice.” It is not necessary to give a notice of action on this statute, where *assumpsit* is intended to be brought, for money had and received, to recover the amount of an excessive charge made by the defendants as collectors, on a distress for arrears of taxes.^(d) And a sheriff, who levies arrears of taxes, under 48 Geo. III. c. 141,^(e) is not entitled to notice of an action to be brought against him, for any thing done under the provisions of that act.^(f)

By the statute 57 Geo. III. c. 99, § 40, “no writ shall be sued out against, nor any copy of any process, at the suit of any informer, be served upon any *spiritual* person, for any penalty or forfeiture incurred under any of the provisions of that act, until a notice in writing of such intended writ or process shall have been delivered to him, or left at the usual or last place of his abode, and also to the bishop of the diocese, by leaving the same at the registry of his diocese, by the attorney or agent for the party who intends to sue or cause the same to be sued out or served, one calendar month at the least before the suing out or serving of the same; in which notice shall be clearly and explicitly contained the cause of action, which such party hath or claimeth to have, and the penalty or penalties for which such person intends to sue; and on the back of which notices respectively shall be indorsed the name of such attorney or agent, together with the place of his abode; and no *such [*33] notice shall be given before the first day of *April*, in the year next after any such penalty or penalties shall have been incurred.” By the statute 6 Geo. IV. c. 16, § 41, “no writ shall be sued out against, nor copy of any process served on any *commissioner of bankrupt*, for any thing by him done as such commissioner, unless notice in writing, of such intended writ or process, shall have been delivered to him, or left at his usual place of abode, by the attorney or agent for the party intending to sue, or cause the same to be sued out or served, at least one calendar month before the suing out or serving the same; and such notice shall set forth the cause of action which such party has or claims to have against such commissioner; and on the back of such notice shall be indorsed the name of such attorney or agent, together with the place of his abode, who shall receive no more than *twenty* shillings for preparing and serving such notice.” And, by § 42, “no such plaintiff shall recover any verdict against such commissioner, in any case where the action shall be grounded on any act of the defendant as commissioner, unless it is proved upon the trial of such action, that such notice was given as aforesaid; but in default thereof, such commissioner shall recover a verdict and costs as thereafter

(d) 1 Barn. & Ald. 42.

(f) 8 Moore, 400. 1 Bing. 369, S. C.

(e) No. V. Rule, 2.

mentioned: (a) and no evidence shall be permitted to be given by the plaintiff, on the trial of any such action, of any cause of action, except such as is contained in the notice." And lastly, by the statutes 7 & 8 Geo. IV. c. 29, § 75, and c. 30, § 41, "notice in writing of an action, for any thing done in pursuance of the acts for consolidating and amending the laws relative to *larceny*, &c., and *malicious* injuries to property, and of the cause thereof, shall be given to the defendant, *one* calendar month at least before the commencement of the action."

A separate notice to each of several persons intended to be sued in *trespass*, has been deemed sufficient to found a joint action against all of them, for things done in pursuance of an act of parliament; although none of the other persons, who were afterwards joined in the action, were named in the notice to either of them. (b) But where one person acted as clerk to two public bodies, and a notice of action required by statute was given, addressed to him as clerk to one body, the cause of action arising under the authority of the other body, the court of Common Pleas held that the notice was insufficient. (c) And a notice of action, under an act of parliament against a toll-gate keeper, "for demanding and taking toll, for and in respect of certain matters and things particularly mentioned and exempted from the payment of toll, in and by a certain act of parliament, intituled, &c.," is too uncertain, and bad. (d)

For the protection of *constables*, &c., acting in obedience to the warrant of a magistrate, it is enacted by stat. 24 Geo. II. c. 44. § 6, that [*34] "no *action shall be brought against any constable, headborough or other officer, or against any person or persons acting by his order and in his aid, for any thing done in *obedience* to any warrant under the hand or seal of any justice of the peace, until *demand* hath been made, (a) or left at the usual place of his abode, by the party or parties intending to bring such action, or by his, her or their attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for the space of *six* days after such demand: And in case, after such demand and compliance therewith, by showing the said warrant to, and permitting a copy to be taken thereof, by the party demanding the same, any action shall be brought against such constable, &c., without making the justice or justices, who signed or sealed the said warrant, defendant or defendants, that on producing and proving such warrant at the trial of such action, the jury shall give their verdict for the defendant or defendants, notwithstanding any defect of jurisdiction in such justice or justices: And if such action be brought jointly against such justice or justices, and also against such constable, &c. then, on proof of such warrant, the jury shall find for such constable, &c. notwithstanding such defect of jurisdiction as aforesaid: And if the verdict shall be given against the justice or justices, in such case the plaintiff or plaintiffs shall recover his, her or their costs against him or them; to be taxed in such manner, by the proper officer, as to include such costs as the plaintiff or plaintiffs are liable to pay to the defendant or defendants, for whom such verdict shall be found."

The intent of these provisions was to prevent the constable or other

(a) See § 44.

(b) 2 Price, 126, and see 5 Price, 168.

(c) 1 Taunt. 383.

(d) 2 Chit. Rep. 673, and see 5 Barn. & Cres. 125. 7 Dowl. & Ryl. 810, S. C.

(a) For the form of the *demand*, see Append. Chap. I. § 10, 11.

officer, when acting in *obedience* to his warrant, *(b)* from being answerable, on account of any defect of jurisdiction in the justice: Therefore, if an officer seize goods, in obedience to the warrant of a magistrate, whether that warrant be legal or not, he cannot be sued, until a previous demand has been made of a copy of it. *(c)* And a constable, executing the warrant of a justice of peace, if sued in *trespass* without the magistrate, is within the protection of the statute, and entitled to a verdict, on proof of such warrant; having first complied with the plaintiff's demand of a perusal and copy of it, before the action brought, though not within six days after such demand, as the act directs. *(d)* But where a constable of one hundred took upon him to execute a warrant out of his own hundred, directed to the constable of another hundred by name, "and to all other peace officers in the county of *Kent*;" this was holden not to be a case within the protection of the statute. *(e)* So, where goods were taken under a *warrant [*35] of distress, granted by a justice of peace for the county of *Kent*, directed to the constables of the lower half-hundred of C. and G. in the county of *Kent*, if it turn out, that the warrant was executed within the jurisdiction of the cinque ports, and not in the county of *Kent*, the constables who executed it are not entitled to the benefit of the statute, but may be sued in *trespass*, without the magistrate being made a defendant. *(aa)* And where the defendants, in order to levy a poor's rate under a warrant of distress granted by two magistrates, broke and entered the plaintiff's house, and broke the windows, &c. the court held that they might be sued in *trespass*, without a previous demand of the perusal and copy of the warrant. *(b)*

It has been determined, that a *churchwarden* or *overseer* of the poor, taking a distress for a poor's rate, *(c)* or a *gaoler*, receiving and detaining a prisoner, *(d)* under a warrant of magistrates, is entitled to the protection of the statute, in having the magistrates made defendants with him, in an action of *trespass*. And a *constable*, who merely acts in aid of a parish officer, in levying a distress for poor rates; under a warrant of magistrates directed to such officer, is not liable to an action of *trespass*, although a demand was duly made on such constable, in pursuance of the statute. *(e)* But an action of *replevin* is holden not to be an action, within the meaning of the statute. *(f)* And the act extends only to actions of *trespass*, or *tort*: Therefore, where an action for money had and received was brought against an officer, who had levied money on a conviction by a justice of the peace, the conviction having been quashed, it was holden that a demand of a copy of the warrant was not necessary. *(g)* In cases to which the act applies, if the plaintiff's attorney make out two papers precisely similar, purporting to be demands of a copy of the warrant, pursuant to the statute, and sign both for his client,

(b) 3 Bur. 1742. 1 Blac. Rep. 555, S. C. 3 Esp. Rep. 226. 2 Maule & Sel. 259. 1 Car. & P. 41, *(a)*.

(c) 2 Bos. & Pul. 158. 3 Esp. Rep. 96, S. C.

(d) 5 East, 445.

(e) 1 H. Blac. 15, *n.* and see 3 Barn. & Ald. 330, but see stat. 5 Geo. IV. c. 18, § 6, which authorizes constables to execute warrants out of their precincts, provided it be within the jurisdiction of the justices granting or backing the same.

(aa) 5 East, 233.

(b) 2 Maule & Sel. 259, and see 2 Bos. & Pul. 158. 6 Barn. & Cres. 232.

(c) Bul. Ni. Pri. 24. 7 Durnf. & East, 270.

(d) 1 Gow, 97.

(e) 4 Moore, 465.

(f) 2 Blac. Rep. 1330, 6 East, 283, but see Willes, 663. 7 Durnf. & East, 270, *contra*.

(g) Bul. Ni. Pri. 24. *Ante*, 31, 2.

and then deliver one to the defendant, the other will be sufficient evidence at the trial. (*h*)

The benefit of the statute 24 Geo. II. c. 44, § 1, was extended to commissioners of bankrupt, by the statute 6 Geo. IV. c. 16, § 31, by which it is enacted, that "no action shall be brought against any person appointed by commissioners of bankrupt, for any thing done in obedience to their warrant, prior to the choice of assignees, unless demand of the perusal and copy of such warrant hath been made, or left at the usual place of abode, of such person or persons, by the party or parties intending to bring such action, or by his or their attorney or agent, in writing, signed by the party or parties demanding the same, and unless the same hath been refused or [*36] neglected for *six* days after such demand: and if, *after such demand and compliance therewith, any action be brought against the person so appointed as aforesaid, without making the petitioning creditor or creditors defendant or defendants, if living, on producing and proving such warrant at the trial of such action, the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction in the commissioners; and if such action be brought against the petitioning creditor or creditors, and the person so appointed as aforesaid, the jury shall, on proof of such warrant, give their verdict for the person so appointed, notwithstanding any such defect of jurisdiction; and if the verdict shall be given against the petitioning creditor or creditors, the plaintiff or plaintiffs shall recover his, her or their costs against him or them, to be taxed so as to include such costs as the plaintiff or plaintiffs are liable to pay to the person so appointed as aforesaid."

Having thus stated what is necessary to be done by the *plaintiff*, before the commencement of the action, it may be proper to add, that where it is meant to be defended on the ground of a *tender* of the debt, such tender should be made before the action is brought: And a tender of sufficient amends may be made, by the statute 21 Jac. I., c. 16, § 5, in an action for an involuntary trespass to *real* property. (*a*) [1]

(*h*) 2 Bos. & Pul. 39, and see 4 Esp. Rep. 203. Peake's Evid. 5 Ed. 104. 2 Campb. 110. 7 Moore, 112, 3 Brod. & Bing. 288, S. C. 1 Car. & P. 41. (*a*) 6 Barn. & Cres. 394. (*a*) 1 Str. 549.

[1] Before the statute 3 & 4 W. IV., c. 98, the tender should regularly have been made in lawful money of *England*; which is of two sorts, viz., *English* money, coined by the King's authority, or *foreign* coin, made current by his royal proclamation within the realm, Co. Lit. 207; the latter was considered as a good tender, *Wade's* case, 5 Co. 114, *b.*; and though bank notes were not made a legal tender, by the statute 37 Geo. III., c. 45, *Grigby v. Oakes*, 2 Bos. & P. 526, and see stat. 56 Geo. III., c. 68, § 11, by which gold coin was declared to be the only legal tender; yet a tender in Bank of *England*, or country bank notes, was good, unless specially objected to on that account at the time. *Wright v. Reed*, 3 Durnf. & E. 554. *Brown v. Saul*, 4 Esp. Rep. 267, *per* Ld. *Ellenborough*, Ch. J. *Saunders v. Graham*, Gow, 121, *per* Dallas, Ch. J. *Polglass v. Oliver*, 2 Crompt. & J. 15. 2 Tyr. Rep. 89. 1 Price N. R. 133, S. C. The same doctrine was applied to a draft on a banker, *per* Buller, J., in *Wilby v. Warren*, Sit. Md. after M. T. 28 Geo. III. K. B., Tidd Prac. 9 Ed. 187: (*m*) and in one case it was holden, that a tender in a *Liverpool* bank bill of exchange was good, if not specially objected to, *Lockyer v. Jones*, Peake Cas. Ni. Pri. 180, *n.*; but, in a subsequent case, the tender of a *Bristol* bank bill was holden not to be good, although the party made no objection as to the form of the tender, *Mills v. Safford*, *id. ib.*, and see *Polglass v. Oliver*, 2 Crompt. & J. 15. 2 Tyr. Rep. 89, S. C. And for the doctrine of tender in general, and in what cases it is, or is not allowed, at common law, or by statute; at what time, by and to whom, and in what manner it should be made; and when and how it should be pleaded, &c., see Tidd Sup. 1830, p. 10, &c. And now, by the statute 3 & 4 W. IV., c. 98, § 6, it is enacted, that "from and after the 1st day of *August*, 1834, unless and until parliament shall otherwise direct, a tender of a note or notes of the Governor and Company of the Bank of

*CHAPTER II.

Of the JURISDICTION of the COURTS of KING'S BENCH, COMMON PLEAS, and EXCHEQUER of PLEAS, in PERSONAL ACTIONS; and of the JUDGES, ADVOCATES, and OFFICERS of the COURTS.

THE Court of King's Bench has an original jurisdiction in actions for trespasses *vi et armis*, committed in *Middlesex*, or other county, where the court sits: (aa) and it has by degrees acquired a jurisdiction, which it exercises by *original writ*, against *peers* of the realm, and *members* of the house of commons: and against *corporations*, and *hundredors* on the statute 7 & 8 Geo. IV., c. 31; and in all personal actions, brought against any person not being a *prisoner* in the actual custody of the marshal, nor privileged as an *attorney* or officer of the court. It has likewise jurisdiction by *bill*, in all personal actions, brought against *prisoners* in the actual custody of the marshal, or persons who have put in bail upon a *cepi corpus*, or *habeas corpus*, and who are still for this purpose supposed to be in custody. (b) On which latter ground, the court is enabled, by a fiction, to hold plea by *bill*, in all personal actions whatever; for, by feigning a complaint of trespass, over which the court has an inherent jurisdiction, the plaintiff is allowed, when the defendant is brought in on such complaint, to waive or abandon it, and to exhibit his *bill* and declare against him as a prisoner, for any other species of injury. (c) This court has also jurisdiction in all personal actions, brought by or against its *attorneys* and *officers*; (d) who are entitled to sue therein by *attachment* of privilege, and must be sued by *bill*: And *members* of the house of commons may be sued therein by *bill* and summons, &c., in consequence of the statute 12 & 13 W. III., c. 3, § 2.

The court of Common Pleas has a *concurrent* jurisdiction with the court of King's Bench, in all personal actions. This jurisdiction is exercised, first, by *original writ*, issuing out of Chancery; which, however, is seldom issued, except where it is necessary in consequence of a writ of error, after *a judgment by default: Secondly, by writ of *capias* [*38] *quare clausum fregit*, which supposes an original to have issued,

(aa) Trye's *jus filiarum*, 28.

(b) *Id. ib.*

(c) R. E. 15 Geo. II., *reg.* 1. K. B. Cowp. 455. And, for an account of the jurisdiction in general of the court of King's Bench, and of that in particular which it exercises in civil actions by *bill*, see Sul. Lect. XXXII., p. 300, &c. 3 Blac. Com. 42. 2 H. Blac. 271, 299, 300. And see further, as to the jurisdiction of the King's Bench in personal actions, by *original writ*, Steph. Pl. 4, 5, by *bill*, *Id.* 52, &c., and by *attachment* of privilege, *Id.* 58.

(d) 4 Inst. 71, 72. 2 H. Blac. 270, 299.

England, expressed to be payable to bearer on demand, shall be a legal tender, to the amount expressed in such note or notes; and shall be taken to be valid, as a tender to such amount, or all sums above five pounds, on all occasions on which any tender of money shall be legally made, so long as the Bank of *England* shall continue to pay on demand their said notes in legal coin. Provided always, that no such note or notes shall be deemed a legal tender of payment, by the Governor and Company of the Bank of *England*, or any branch bank of the said Governor and Company: but the said Governor and Company are not to become liable, or be required to pay and satisfy, at any branch bank of the said Governor and Company, any note or notes of the said Governor and Company, not made specially payable at such branch bank; but the said Governor and Company shall be liable to pay and satisfy, at the bank of *England* in *London*, all notes of the said Governor and Company, or of any branch thereof."

and is the ordinary mode of commencing actions in this court: Thirdly, by *attachment* of privilege, at the suit of attorneys and officers of the court: and fourthly, by *bill* against attorneys and officers, or members of the house of commons.(a) This court has also jurisdiction, *exclusive* of the King's Bench in all *real*, and the greater part of *mixed* actions: and writs of *habeas corpus*, and *prohibition*, may be moved for therein, as well as in the King's Bench; though it is more usual to move for the writ of *habeas corpus* in the latter court.

It should also be observed, that personal actions are either commenced originally, by the means which have been stated, in the courts of King's Bench and Common Pleas; or are removed thither from inferior courts by writ of *certiorari* or *habeas corpus* before judgment, or by writ of *error* after judgment, from such as are of record; or by writ of *pone*, *recordari facias loquelam*, or *accedas ad curiam*, before judgment, or by writ of false judgment afterwards, from such as are not of record: and both courts have the power of punishing their own officers, or other persons, for a contempt, by *attachment*.

The court of Pleas, in the Exchequer, is holden before the barons;(bb) and has jurisdiction of all causes which concern the king's profit or revenue,(cc) as of debts or duties to the king;(dd) and of matters which relate to tenures of the king *in capite*, as of an honour or manor,(e) &c., or which concern the lands, rents, franchises, hereditaments, goods and chattels of the king.(f) So, one who is indebted to the king, may sue his debtor in the court of Pleas, in the Exchequer, upon a suggestion of *quo minus*, &c., or that he is thereby the less able to satisfy his majesty, the debts which he owes to him.(g) And the court of pleas has jurisdiction in all personal actions, where the plaintiff or defendant has privilege as an officer or minister,(h) or the defendant is a prisoner,(i) of the court. But the plaintiff cannot proceed in this court by *original* writ; and therefore the defendant cannot be outlawed therein.(k)

There are three sorts of privilege in this court: First, as debtor; secondly, as accountant; and thirdly, as officer of the court. Against the first of these, any man who hath a special privilege in another court, as an officer of the court or attorney, shall have his privilege. But if an accountant begin his suit here, no privilege shall be allowed elsewhere; because he has a special privilege, by reason of his attendance to pass his account, in which the king hath a particular concern. The same [*39] holds *with regard to an officer of the court: If he commence a suit here, no privilege in another court shall prevail against him; because his attendance here is requisite, and his privilege here is first attached by commencing his suit. But when the accountant has finished his account, and reduced it to a certainty, so that it is become a debt, then he is only privileged as a general debtor. So, a servant to an officer or minister of the court has no privilege against a privileged person elsewhere.(a) And, accordingly, where the plaintiff, as debtor to the king,

(a) See further, as to the jurisdiction of the Common Pleas in personal actions, by *original* writ, Steph. Pl. 4, 5, by *attachment* of privilege, *Id.* 58, and by *bill*, *Id.* 52, &c.

(bb) 4 Inst. 109.

(cc) *Id.* 112.

(dd) *Id.* 103, 110, 112. 2 Inst. 551.

(e) 4 Inst. 110.

(f) 4 Inst. 112. 2 Inst. 551, and see the statute 33 Hen. VIII., c. 39, § 56, 7.

(g) 2 Inst. 551. 4 Inst. 112. Plowd. 298, a.

(h) *Id.* *ibid.*

(i) 2 Inst. 551, and see Com. Dig. tit. *Courts*, D. 2.

(k) 1 Price, 309.

(a) Hardr. 365.

and treasurer of the navy, exhibited his bill in this court, and the defendant pleaded his privilege, as one of the six clerks in Chancery, under the great seal; *Hale*, chief baron, and the court held, that a general privilege as debtor, will not hold against a special privilege; but against a general privilege it will: and a privilege as accountant will hold against a special privilege in another court, as officer of the court or otherwise; though it be not alleged, that he has *entered* upon his account; and in this case the plaintiff, being treasurer of the navy, is *eo ipso* an accountant in the Exchequer: (b) But it must be averred, that he is present in court on his account. (c)

The judges of the courts of King's Bench and Common Pleas are, in each court, the Lord Chief Justice, created by writ, and three *puisne* judges, created by letters patent; who, by the statute 12 & 13 W. III. c. 2., hold their places *quamdiu bene se gesserint*, and not as formerly, *durante bene placito*. In the court of Pleas in the Exchequer, the judges are the Chief Baron, and three *puisne* barons, who are created by letters patent; (d) and were formerly barons and peers of the realm. (e) And, by the statute 1 Geo. III. c. 23., enacted at the earnest recommendation of the king himself from the throne, the judges are continued in their offices during their good behaviour, notwithstanding any demise of the crown, (which was formerly holden (f) immediately to vacate seats,) his majesty having been pleased to declare, that he looked upon the independence and uprightness of the judges, as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honour of the crown. (g)

Before the making of the statute 1 & 2 Geo. IV. c. 16. a practice had prevailed, for the judges of the court of King's Bench to sit in *Sergeants Inn Hall*, some days previous to the commencement of *Hilary*, *Easter*, and **Michaelmas* terms, and hear special arguments on [*40] demurrers, writs of error, special verdicts, special cases, and new trials, &c., upon which they delivered their opinions, except in cases reserved for further consideration, and judgment was afterwards formally pronounced in the following term. (a) By the above statute, the judges of the court of King's Bench were enabled and required, for the despatch of matters depending in the said court, to sit, at certain times therein mentioned, before *Hilary*, *Easter* and *Michaelmas* terms respectively: But that statute was repealed by the 3 Geo. IV. c. 102., which authorizes his majesty, "by warrant under his sign manual, directed to the judges of the said court, to direct and require the judges of the said court, or any two or more of them, to meet at *Sergeants Inn Hall*, *Westminster Hall*, or some other convenient place to be by them appointed, on such and so many days

(b) Hardr. 316, and see Bro. Abr. tit. *Privilege*, 16, 25. 1 Lutw. 44, 46. Sty. Rep. 339. W. Jon. 288. 2 Salk. 546.

(c) Bro. Abr. tit. *Brief*, 342, and see Man. Ex. Pr. 143, 4. Steph. Pl. 5, 53, 4, 59, 60.

(d) Mad. 582. 4 Inst. 117.

(e) 4 Inst. 103 *in marg.*, and see Com. Dig. tit. *Courts*, D. 10. (f) 2 Ld. Ryam. 747.

(g) Com. Journ. 3 m. r. 1761. And for the salaries of the chief justices of the King's Bench and Common Pleas, see stat. 6 Geo. IV. c. 82, 3, and for those of the Master of the Rolls, Vice-Chancellor, Chief Baron of the Exchequer, *puisne* judges and barons, see stat. 6 Geo. IV. c. 84. And for the salaries of the judges in *India*, &c., see stat. 6 Geo. IV. c. 85.

(a) 1 Maule & Sel. 304, (a). 2 Maule & Sel. 1, (a). 1 Barn. & Ald. 1, (a). 218, (a). 2 Barn. & Ald. 2, (a) and see 7 Taunt. 192.

in the vacation or interval between any terms, as to his majesty shall seem fit and proper, for the despatch of such matters as, at the end of the term mentioned in such warrant, may be depending in the said court, whether on the *crown* or *plea* side thereof: which warrant shall be made and issued *ten* days at the least before the end of the term preceding the vacation mentioned in such warrant, for the meeting of the judges for the dispatch of business as aforesaid; and the issuing of such warrant shall, *three* days before the end of the said term, be openly and publicly, in the said court of King's Bench, notified and declared, and be afterwards published in the *London Gazette*: And when and so often as any such warrant shall be made and directed to the judges of the said court, the same judges, or any two or more of them, are authorized and required, unless prevented by illness, public business, or other reasonable cause to meet, in pursuance of such warrant, for the dispatch of such matters as aforesaid, or of so much and such parts thereof as may appear to such judges chiefly to require dispatch, and as may be then most conveniently dispatched, and to hear, decide, and pronounce rules, orders, and judgments thereupon; which rules, orders and judgments, shall be drawn up and entered of record, either of the term last past before the pronouncing thereof, or as of the term then next ensuing, as the said judges shall direct: And that all enlarged rules to show cause, which may be pronounced or drawn up by, or by the direction of the said court, for showing cause in any term next after any of such sittings directed by such warrant as aforesaid, shall be deemed and taken to be rules to show cause, as well at such sittings, as in the term then next following, and may be heard and decided in such sittings accordingly: Provided, that nothing therein contained shall alter or affect the return of any writ, either *mesne* or judicial, or require any return of such writ, or appearance thereto, before the day therein mentioned.”(b) *This act of parliament is to be construed liberally,

[*41] for the dispatch of business; and therefore, it has been holden that an affidavit sworn during term, is sufficient to bring the subject matter before the court, “as a matter depending in the court,” within the terms of the act, and the king's warrant founded thereon.(a)

The judges, upon their *circuits*, sit by virtue of five several authorities: 1. the commission of the peace: 2. a commission of *oyer and terminer*: 3. a commission of general *gaol* delivery: 4. a commission of *assize*, directed to the justices and serjeants therein named, to take (together with their associates,) *assizes* in the several counties, that is, to take the verdict of a peculiar species of jury, called an *assize*, and summoned for the trial of *landed* disputes: 5. their authority at *nisi prius* is by the commission of *assize*,(bb) being annexed to the office of justices of assize, by the statute of Westm. 2, (13 Edw. I.) c. 30, which empowers them to try all questions of fact, issuing out of the courts at *Westminster*, that are then ripe for trial by jury.(c) And, by a late act of parliament,(d) “whenever it shall happen that the commissions, under which the judges sit upon their circuits, shall not be opened and read, in the presence of one of the *quorum* commissioners, at any place specified for holding the assizes, on the very day appointed

(b) For the first warrant issued on this statute, see 2 Dowl. & RyL. 439,(a) and see 1 Barn. & Cres. 288,(a). 657,(a). 2 Barn. & Cres. 112,(a). 3 Barn. & Cres. 178,(a). 738,(a). 5 Dowl. & RyL. 629,(a). 4 Barn. & Cres. 899,(a). 5 Barn. & Cres. 797,(a). 6 Barn. & Cres. 268,(a).

(a) 7 Dowl. & RyL. 382.

(bb) 2 Salk. 454.

(c) 3 Blac. Com. 59.

(d) 3 Geo. IV., c. 10.

for such purpose,, it shall and may be lawful to open and read the same, in the presence of one of the *quorum* commissioners therein named, on the following day, or, if such following day shall be a *Sunday*, or any other day of public rest, then on the succeeding day; and such opening and reading thereof shall be as effectual, to all intents and purposes, as if the same had been opened and read, in the presence of one of the *quorum* commissions, on the very day appointed for that purpose, and shall be deemed and taken to be an opening and reading thereof, on the day for that purpose appointed: and all records and other proceedings, under or relating to any commission, which may be opened and read by virtue of that act, shall and may be drawn up, entered, and made out, under the same date, and in the same form, in all respects, as if such commission had been opened and read on the day originally appointed for that purpose: Provided, that the judges and *quorum* commissioners are directed and required to have such commissions opened and read, on the very days appointed for that purpose, unless the same shall be prevented for the pressure of business elsewhere, or by some unforeseen cause or accident."

The *advocates*, or *counsel*, who next claim our attention, are of two species or degrees; barristers, and serjeants. Before a student can be called to the bar, it is requisite that he should be a member of *five* years standing, at one of the four principal inns of court; unless he has taken the degree of Master of Arts, or Bachelor of Laws, at one of the universities of *Oxford*, *Cambridge*, or *Dublin*; in which case *three* years standing will be sufficient; and he must keep at least *twelve* terms, by dining in commons, or being present at least *four* days in every term; that is to say, *two* days *in each of *two* separate full weeks in each term: And, unless [*42] a certificate be produced, of his being a member of the college of advocates in *Scotland*, or member of one of the said universities of *Oxford*, *Cambridge*, or *Dublin*, he must make a deposit of £100, previously to his entering into commons, which is allowed him on being called to the bar: And, after being called, he must, within *six* calendar months, take the oaths of allegiance and supremacy, and subscribe the declaration against popery; or, if a roman *catholic*, the declaration and oath prescribed by the statute 31 Geo. III. c. 32, in one of the courts at *Westminster*, or at the general or quarter sessions of the place where he shall reside; which oaths may be taken, and the declarations subscribed, in the King's Bench, before a single judge, in the bail court.(a)

Serjeants at law are appointed, or called, at the pleasure of the king, by writ issuing out of chancery; And, by a late act of parliament(b) his majesty may, in *vacation*, cause a writ to be issued, directed to any barrister, calling him to the degree of a sejeant at law; and such persons as his majesty may be pleased to call, are authorized to take upon themselves that office, in vacation. From both the above degrees, some are usually selected, to be his majesty's counsel learned in the law; the two principal of whom are called his attorney, and solicitor general. And a custom has of late years prevailed, of granting letters patent of precedence, to such barristers as the crown thinks proper to honour with that mark of distinction; whereby they are intitled to such rank and pre-audience, as are assigned in their respective patents; sometimes next after the king's attorney-general, but usually next after his majesty's counsel then being. These (as well as the

(a) Stat. 1 Geo. IV., c. 55, § 4.

(b) 6 Geo. IV., c. 95.

queen's attorney and solicitor-general,)(c) rank promiscuously with the king's counsel, and together with them sit within the bar of the respective courts. The king's counsel have a standing salary, and cannot be employed in any cause against the crown, without special license; but those who have merely patents of precedence receive no salaries, and are not sworn; and therefore are at liberty to be retained in causes against the crown.(d)

By a mandate of his late majesty,(e) the king's attorney and solicitor-general are now to have place and audience, before the king's *premier serjeant*; and the following may be considered as the order of precedence, or pre-audience, which obtains among practisers: 1. The king's attorney-general: 2. The king's solicitor-general: 3. The king's *premier serjeant*, (so constituted by special patent:) 4. The king's ancient serjeant, or the eldest among the king's serjeants: 5. The king's advocate-general: 6. The king's serjeants: 7. The king's counsel, or those who have patents of precedence, with the queen's attorney and solicitor-general: 8. Serjeant's at law: 9. The recorder of *London*: 10. Advocates of the civil law; and lastly, Barristers. In the court of Exchequer; two of the most [*43] experienced *barristers, called the *postman*, and the *tubman*, (from the place in which they sit,) have also precedence in motions.(aa)

The officers of the court of King's Bench, on the *crown* side, are the *clerk of the crown*,(bb) or king's *coroner* and attorney, usually called the *master* of the crown office, who holds his place for life, by letters patent under the great seal, and has the appointment of the secondary, clerk of the rules, examiner, calendar, keeper, clerk of the grand juries, and clerks in court; and, on the *plea* side, the *prothonotary*, or *chief clerk* for enrolling pleas, in *civil* causes depending between party and party, and particularly by *bill*;(c) the *secondary*, or deputy to the chief clerk, usually called the *master* of the King's Bench office, and his *assistant*; the clerk of the *treasury*;(d) the keeper of the *writs* and *records* of the court, commonly called the *custos breviarum*,(e) who has annexed to his office, the making up of records of *nisi prius*, except in *Middlesex*; the *filacer*,(f) *exigenter*, and clerk of the *outlawries*,(g) for proceedings by *original writ*; the signer of writs, and signer of bills of *Middlesex*; the clerk of the *rules*; the clerk of the *papers*;(h) the clerk of the *declarations*; the clerk of the *common bails*, *postcas*, and *estreats*; the clerk of the *dockets*, *commitments*, and *satisfactions*; the clerks of the *inner* and *upper* treasury; the clerk of the *outer* treasury; the clerk of *nisi prius* in *London*, and other cities, and on the several circuits; the clerk of *nisi prius* for *Middlesex*; the clerk of the *errors*; and *bag* bearer, on the *plea* side of the court.

Before the making of the statute 6 Geo. IV. c. 82, the several offices of *chief clerk*, clerk of the *treasury*, and *custos breviarum*, and *filacer*, *exigenter*, and clerk of the *outlawries*, of the court of King's Bench, were in

(c) Seld. tit. *hon.* 1, 6, 7.

(e) 14 Dec. 1811.

(bb) Show. P. C. 111, and see Cas. temp. Talb. 97.

(c) 1 Ch. Cas. 20. Show. P. C. 111. Skin. 354.

(d) This officer is required to appoint a person to attend in the treasury, that the clerks may have access to the rolls. R. T. 1656, reg. 2, K. B. (e) 1 Lev. 1. 1 Sid. 74.

(f) This officer is appointed to sign *original* writs, and all writs and process issuing thereon, before the appearance of the defendant. R. H. 30 Car. II., R. H. 31 Car. II., and R. E. 31 Car. II. K. B. See also R. M. 15 Car. I. K. B., and Trye's *jus fil. per tot.*

(g) Trye, in *pref.*

(h) 1 Vent. 296. 2 Mod. 95, S. C.

(d) 3 Blac. Com. 27, 8.

(aa) 3 Blac. Com. 28.

the gift of the Lord Chief Justice of the same court, and deemed to be saleable by him, as and when the same from time to time became vacant; and the several offices of clerk of the *rules* on the plea side, clerk of the *papers* on the plea side, clerk of the *declarations*, clerk of the *common bails*, *estreats*, and *posteas*, and clerk of the dockets of the same court, were in the gift of the said chief clerk, and deemed to be saleable by him; and the several offices of clerks of the *inner* and *outer* treasury, clerks of *nisi prius* in *London*, and other cities, and on the several circuits, and bag bearer, on the plea side of the same court, were in the gift of the said *custos brevium*, and deemed to be saleable by him; and the said several offices were held for the respective lives of the persons then holding the same, (or for the life of the survivor of two persons, where the office was then vested in two persons,) and the emoluments thereof were derived entirely from the fees payable by the suitors of the same court; and some thereof were, and for *many years had been, executed [* 44] by *deputy*: (a) But now, by the above statute, (b) it is enacted, that "the said offices of *chief clerk*, clerk of the *treasury*, and *custos brevium*, and *filacer*, *exigenter*, and clerk of the *outlawries*, shall from and after the passing of that act, and the said several offices thereinbefore mentioned to be in the gift of the said chief clerk, shall from and after the time when the said office of chief clerk shall become vacant, and the said several offices thereinbefore mentioned to be in the gift of the said *custos brevium*, shall from and after the time when the said office of *custos brevium* shall become vacant, be disposed of, and all appointments to the said respective offices, as they may respectively become vacant, shall be made, according to the directions of that act, and not otherwise: And all and every the persons to be so appointed to the said several offices, shall continually execute the same in *person*, and not by *deputy*, unless for some reasonable cause to be allowed as thereafter mentioned; and every such officer and his deputy, to be appointed according to the directions of that act, shall be deemed and taken to be a public accountable officer, to all intents and purposes, and shall severally account for the fees and emoluments of his office, according to the directions of that act. And that all appointments to the said several offices, to be made by virtue of that act, shall be made by the Lord Chief Justice of the said court for the time being, by warrant under his hand and seal, without any fee, gratuity, or reward, to be directly or indirectly paid or received for the same; and every such appointment shall be made, and shall be in such warrant expressed to be made, during the good behaviour of the person appointed, and for so long time only as the person appointed shall execute the same in *person*: Provided always, that no such office shall be vacated, by reason of the officers not executing the office in *person*, if he shall execute the same by some deputy to be appointed by virtue of that act; nor in cases of occasional illness, or other like necessary cause of absence, not continuing more than two months at any one time." And, by the same statute, (c) "the several offices of clerk of the *papers*, and clerk of the *declarations*, shall, so soon as an appointment thereto may be made by authority of that act, be consolidated into one office, and be executed by one and the same person."

The *master* and his *assistant*, and signer of the *writs*, are appointed by,

(a) Stat. 6 Geo. IV. c. 82, § 1.

(b) § 1, 2.

(c) § 8.

and hold their situations, during the pleasure of the chief clerk. The chief justice has also the appointment of the clerk of the *errors*, and clerk of *nisi prius* for *Middlesex*, whose business it is to transcribe from the plea rolls, the records of *nisi prius* in that county, and to examine and seal the same, and to receive and file the warrants of attorney on the plea side of the court. The three other judges have the appointment of *signer* of bills of *Middlesex*; and each of the judges appoints his own clerk.

The officers of the court of Common Pleas are the three *prothonotaries*; the three *secondaries*; the *filacers*; the clerk of the *exigents*; [*45] the clerk of *the supersedeases*; the clerk of the *outlawries*; the clerk of the *reversal* of outlawries; the clerk of the king's silver; the clerk of the *jurata*; the clerk of the *juries*; the clerk of the *warrants*, *enrolments*, and *estreats*; the clerk of the *essoins*; the clerk of the *dockets*; the clerk of the *judgments*; the clerk of the *treasury*; and the clerk of the *errors*.

Before the making of the statute 6 Geo. IV. c. 83, the several offices of *chief* and *third* prothonotaries, clerk of the *king's silver*, clerk of the *jurata*, clerk of the *essoins*, clerk of the *warrants*, *enrolments*, and *estreats*, *exigenter*, clerk of the *supersedeas*, *filacers* for all the counties in *England*, and clerk of the *errors* in the Exchequer Chamber, were appointed by the Lord Chief Justice of the Common Pleas, and were saleable by him, as and when the same from time to time became vacant: And the offices of *second* prothonotary, and clerk of the *juries*, were appointed by the said Lord Chief Justice, on the nomination of the *custus brevium*; for which last mentioned appointment the said Lord Chief Justice had been deemed entitled to, and had always received, whenever such appointments had been made, certain fees; and each of the three prothonotaries of the said court had the appointment of one secondary: and the said several offices were held for the respective lives of the persons then holding the same, and the emoluments thereof were derived entirely from the fees payable by the suitors of the same court; and some of such offices were, and for many years past had been, executed by deputy. But now, by the above statute, (a) it is enacted, that "the said offices of *chief* and *third* prothonotaries, clerk of the *king's silver*, clerk of the *jurata*, clerk of the *essoins*, clerk of the *warrants*, *enrolments*, and *estreats*, *exigenter*, clerk of the *supersedeas*, *filacers* for all the counties in *England*, and clerk of the *errors* in the Exchequer Chamber, shall be disposed of, and all appointments to the said respective offices, as they may respectively become vacant, shall be made, according to the directions of that act, and not otherwise: And all and every the persons to be so appointed to the said several offices, shall continually execute the same in *person*, and not by *deputy*, unless for some reasonable cause to be allowed as thereafter mentioned: And every such officer and his deputy, to be appointed according to the directions of that act, shall be deemed and taken to be a public accountable officer, to all intents and purposes, and shall severally account for the fees and emoluments of his office, according to the directions of that act. And that all appointments to the several offices, to be made by virtue of that act, shall be made by the Lord Chief Justice of the said court for the time being, by warrant under his hand and seal, without any fee, gratuity, or reward, to be directly or indirectly paid to, or received for the same, by the Lord

(a) § 1.

Chief Justice, or any judge of the said court; and every such appointment, except the appointment of the *filacers*, shall be made, and shall be in such warrant expressed to be made, during the good behaviour of the person appointed, and for so long a time only as the person appointed shall execute the same in person: Provided always, that no *such office shall be vacated, by reason of the officer's not exe- [*46] cuting his office in person, if he shall execute the same by some deputy, to be appointed by virtue of that act; nor in cases of occasional illness, or other like necessary cause of absence, not continuing more than two months at any one time."(*aa*)

"And if any person to be appointed by virtue of that act, or of the statute 6 Geo. IV., c. 82, § 1, 2, shall demean himself in any manner contrary to the true intent and meaning thereof, or otherwise misbehave himself, it shall be lawful for the court, of which he is an officer, to hear and decide upon such misbehaviour, and also to hear and determine all complaints that may be made against such person, in a summary way; and, by rule of the same court, to order compensation to be made to any person injured by such misbehaviour; or to fine such offender, or make void his appointment, or punish the offender by all or any of the ways aforesaid, as to such court in its discretion shall seem fit."(*b*)

"Provided always, that in case any officer to be appointed by virtue of either of the above acts, shall, by ill health or other infirmity, become incapable of discharging the duties of his said office, or shall for any other reasonable cause to be allowed by the Lord Chief Justice of the court of which he is an officer, be desirous of being relieved from the discharge of the duties thereof, either permanently or for a certain time only, it shall and may be lawful for the said Lord Chief Justice to appoint some fit and proper person to act as a deputy of such officer: the cause of such appointment being always distinctly mentioned and specified in the warrant of such appointment."(*c*)

For the purpose of uniting the two offices of *chief* and *third* prothonotary in the same officer, it is enacted by the statute 6 Geo. IV., c. 83, § 12, that "whoever shall be appointed to the first of those offices that shall become vacant after the passing of that act, shall, on the other of the said offices becoming vacant, take upon himself and perform the duties of the other of the said offices, and shall receive the fees accruing in respect of the said last mentioned office; and shall retain out of the fees of the office last becoming vacant, so much as the Lord Chief Justice of the said court of Common Pleas, and the lord high treasurer, or any three or more of the commissioners of the treasury for the time being, shall think a reasonable compensation for his additional trouble, and shall account for and pay the residue of such fees into his majesty's Exchequer, on the first day of every term: And the said offices of *chief* and *third* prothonotary shall, after such union as aforesaid, be always executed by one officer, who shall be called the *chief* prothonotary of the court of Common Pleas, and who shall receive the fees payable in respect of the offices of *chief* and *third* prothonotary, and account for the same, in such manner as may be directed by the lord high treasurer or commissioners of the treasury for the time being."(*d*)

(*aa*) § 2.

(*b*) Stat. 6 Geo. IV., c. 82, § 3, § 3.

(*c*) *Id.* § 4.

(*d*) Stat. 6 Geo. IV., c. 83, § 12.

The duties of the *prothonotaries* are, to attend the sitting *of
 [*47] the court at *Westminster* hall, for the despatch of such matters
 as arise from causes entered in their office ;(a) to inform the court
 of the state of such causes ; to draw up general rules, for regulating and
 settling the practice of the court, and the proceedings therein ; and to
 certify to the court in matters of practice, when required. A great variety
 of matters arising out of causes are referred to the *prothonotaries* ; who
 make reports thereon to the court, and also on the examination of persons
 in contempt upon interrogatories. They enter, in books kept in their office,
 the declarations filed and delivered out in all the several causes passing
 through their office, and also the pleas and subsequent pleadings between
 the parties, the money paid into and out of court, the records passed for
 trial, the entries of issues joined between the parties, the interlocutory
 and final judgments thereon, writs of inquiry and executions, the bills
 filed against privileged persons, and the appearances to such process as
 issues out of their office. They inquire into and state the debt and costs
 on bills, bonds, mortgages and other securities : name and strike special
 juries, sign records of *nisi prius*, see that all common recoveries are
 carefully engrossed on rolls of the court, examined, docketed, and placed
 in their proper offices, and that the writs belonging to the same are
 filed with the proper officer, and examine all exemplifications of such
 recoveries.(b) They have the custody of all common and plea rolls,(c)
 deliver the same out,(d) and keep an account of the names of the
 persons to whom the rolls are delivered,(e) that they may be enabled
 to call for their return, and make *caret* papers of the defaulters,(f)
 in order to enforce their being brought in, pursuant to various rules
 of the court.(g) They keep an account of all rolls received into their
 office, after the proper entries are made thereon ; keep dockets of all
 judgments, entries, of writs, and other entries, which they carefully ex-
 amine with the rolls, before they are delivered to the proper officers, keep
 remembrance rolls, in which all rules made in court, appearances, and recog-
 nizances of bail on attachments of privilege, and *præcipes* taken at bar on
 common recoveries, are entered. They enter on a remembrance roll, the
 names of all attorneys sworn in court, and make certificates thereof to the
 clerk of the warrants ; and have the custody of the court-books, in which
 are entered the names of all causes on demurrers, special verdicts, and other
 matters which are to be argued in court, and of causes which are to be tried
 at bar, with the respective terms and number-rolls ; and take minutes of the
 judgment of the court, in all cases argued therein. And they regulate and
 allow costs, on all judgments, rules, and judicial orders ; and tax bills of costs
 between attorneys and their clients, and settle and adjust accounts
 [*48] implicated therein. *For these purposes, one of the *prothono-*
taries alternately attends at the office in term-time, from *eleven* to
two (except the first and last days of term, when all attend the court ;) the

(a) R. T. 35 Hen. IV., § 1, C. P. And for the ancient fees payable to the *prothonotaries*, see the same rule, § 5.

(b) R. M. 1654, § 6, C. P.

(c) R. H. 8 Car. 1, § 8, R. M. 1654, § 7, R. E. 34 Car. II., reg. 3, R. E. 5 W. & M., reg. 2, R. M. 2 Geo. I., C. P. The plea rolls are in *real*, and the common ones in *personal* actions.

(d) R. E. 12 Jac. I., § 2, R. M. 1649, R. M. 1654, § 5, R. T. 21 Car. II., C. P.

(e) R. E. 34 Car. II. reg. 3 C. P.

(f) Same rule, R. M. 2 Geo. 1, C. P.

(g) R. E. 12 Jac. I., R. M. 1649, reg. 1, § 3, R. M. 1654, § 7, R. T. 29 Car. II., reg. 5, R. E. 34 Car. II., reg. 3, C. P.

others attending the court during the sitting. In the evening, all the prothonotaries attend at the office from *six* to *eight*, and sometimes later: Out of term, they all attend every day, from *eleven* to *two* o'clock.

The *secondaries* were formerly appointed for life, by the prothonotaries, each of whom appointed one. But, by the statute 6 Geo. IV. c. 83, § 13, "no person who shall hereafter be appointed to the office of chief or third prothonotary, or shall hold the said two offices when united, shall appoint a secondary; but the secondary of such prothonotary shall be appointed by the lord chief justice of the said court of Common Pleas: and all secondaries so appointed, shall hold their offices during their good behaviour, and shall receive such a proportion of the accustomed fees of the said office, as the lord chief justice of the said court, and the lord high treasurer, or any three or more of the commissioners of the treasury for the time being, shall think reasonable; and shall account for and pay the residue into his majesty's Exchequer, on the first day of every term." And, by § 14, "the person who shall first be appointed secondary, under the provisions of that act, shall, when the office of secondary to the other prothonotary appointed by virtue of that act shall become vacant, take upon himself and perform the duties of both of the said secondaries, and receive the fees, and retain out of the same so much as the said lord chief justice of the said court, and the lord high treasurer, or any three or more of the commissioners of the treasury for the time being, shall think a reasonable compensation for his additional trouble; and shall account for and pay the residue of such fees into his majesty's Exchequer, on the first day of every term."

The duties of the *secondaries* are, constantly to attend the court and judges in the treasury, in term time; to read all records, writings, affidavits, petitions, papers and exhibits, produced upon motions, complaints, or other applications, and to take minutes of all rules and orders pronounced thereon; to take all recognizances in court; to enter discontinuances, commitments of prisoners, and satisfactions acknowledged upon record; to amend records, by order of the court; to administer the oaths appointed to be taken by prisoners, by the acts of parliament for the relief of debtors with respect to the imprisonment of their persons, and to prepare assignments of such prisoners' goods and effects, to be signed by them, as directed by the said acts, and to draw up rules for their discharge. Upon trials at bar, it is their duty to copy the issues for the judges, and to deliver four copies thereof, to call the jury out of and in court, to read the record, to call the defendant, to read all written evidence, to call the jury before a verdict is given, and to record the verdict; to take minutes of special verdicts, and to draw up the same; to make two copies for the plaintiff and defendant, and four copies for the judges; to take an account of all fines and recoveries, passed and suffered at bar; and in *term* time, after the rising of the court, to attend at their respective offices, there to draw up such rules and *orders as have been pronounced [*49] in court, or in the treasury, and enter the same in books kept for that purpose,^(a) and make copies of such rules or orders, if applied for; as also to enter all rules to declare, plead, reply, rejoin, surrejoin, rebut, surrebut, and join in demurrer, in paper, and afterwards to enter the same in books; to give rules for attorneys, and other officers of the court, to appear to bills filed against them; to file and copy all affidavits, papers

(a) Formerly, it appears, they were entered upon remembrance rolls. R. M. 1654, § 15, C. P.

and exhibits, produced on motions, taxation of costs, or otherwise, and all suggestions and proceedings in spiritual courts, in causes where *prohibitions* are applied for; to examine persons in contempt upon interrogatories, and to file and copy such interrogatories, and the depositions taken thereon. Their attendance is also necessary in *vacation* time, by themselves, clerks or assistants. Upon all complaints made by prisoners in the *Fleet* against the warden, it is the duty of the secondaries to attend the judges, at such times and places as they may appoint to hear and determine the said complaints, and to file and read all affidavits and exhibits produced on such attendance, and to draw up all orders made thereupon, as well as all orders made by the court, for the regulation of the *Fleet* prison. The secondary to the *chief* prothonotary administers in court the oaths of allegiance, supremacy, and abjuration; and, if required, makes out and signs certificates of persons having taken the same: he also administers the oath in court, to every person who is admitted an attorney. The secondary to the *second* prothonotary enters in a book kept for that purpose, the particulars of all fines acknowledged at the bar of the court.

The *filacers* were formerly appointed, for the different counties, by the chief justice, for their lives; and their several offices were required to be executed in one certain place.^(b) But now, by the statute 6 Geo. IV. c. 83, § 15, reciting that the offices of filacers of all the counties in *England* would be executed better, and at less expense, by one person: and as such offices were then holden by many different persons, and the whole of such offices were not likely soon to become vacant, that they might, when the then present interests in them should expire, be all given to some one fit and proper person; it was enacted "that when the office of filacer of any county or counties shall become vacant, the person to be appointed to discharge the duties of such office, shall only receive an appointment during the pleasure of the lord chief justice; and when all the present interests shall have vacated those offices by death or otherwise, the lord chief justice of the court of Common Pleas shall revoke the appointments made during pleasure, and appoint some one fit and proper person to hold the united office of filacer of all the counties of *England*, during his good behaviour in the said office."

The duties of the *filacers* are; to procure original writs to be duly sued forth and filed;^(c) to take affidavits of debt, in order to hold to bail [*50] and to *file such affidavits when the process is issued, and to make office copies of them, when required; to make out writs of *capias*, *alias* and *pluries*, and all other incident process, before appearance of the defendant, in all actions wherein process of outlawry lies, until the *exigent* is awarded; (a) and all writs of *supersedeas*, upon any writs of *capias* awarded out of their own offices and writs of *rescous* upon the sheriff's return;^(b) to take and file affidavits of service of common process; and file bills against persons entitled to privilege of parliament, and make out the subsequent process thereon, before appearance, to enter appearances upon all writs issuing out of their own offices,^(c) and give rules for the sheriff to bring in the body;^(d) to attend the court, or a judge, on taking

(b) R. H. 23 Geo. III. C. P.

(c) R. T. 1649, C. P.

(a) R. M. 15 & 16 Eliz. R. M. 14 Jac. I. reg. 1, C. P. And for the fees anciently payable to the *filacers*, for common process, see R. T. 35 Hen. VI. § 8, C. P.

(b) Same rules.

(c) R. M. 14 Jac. I. reg. 1, 2. R. E. 24, Car. II. reg. 2, C. P.

(d) *Id.* R. T. 2 W. & M. reg. 1, C. P.

special bail by *original*; (e) to enter recognizances of bail, and make out the first writ of *scire facias* thereon; (f) to enter and file writs of *re. fa. lo.* &c. issuing out of the court of Chancery, and returnable in the court of Common Pleas, for the removal of complaints from inferior courts, and to issue writs of *pone* and *distringas*, to compel appearances in such proceedings; and to make out all writs of *retorno habendo* upon nonsuit, writs of *second deliverance*, and writs of *capias in withernam, alias*, and *pluries*, before appearance, (g) &c.

The duty of the clerk of the *exigent* is to make out writs of *exigent* and proclamations, in order to proceed to outlawry; and of the clerk of the *supersedeas*, to make out writs of *supersedeas* to *exigents quia improvidè*, &c., (h) in order to prevent persons from being outlawed or waived, against whom *exigents* have issued. The office of clerk of the *outlawries* is incident to the office of his majesty's attorney-general; and usually executed by his clerk. His duty is to make out all writs of *capias utlagatum*, and sequestrations of ecclesiastical benefices, in personal actions, after the return of the *exigent*. Inquisitions taken on special writs of *capias utlagatum*, are transmitted into this office; and are here exemplified, upon rolls signed by the clerk of the *outlawries*, and then carried into the office of the king's remembrancer of the court of Exchequer, and there filed of record; and the inquisitions themselves, and writs of *exigent*, are filed with the *custos brevium*. The clerk of the *reversal* of *outlawries* is appointed by the prothonotaries, during pleasure: His duty is to draw up and enter the reversals of *outlawries* on remembrances, and deliver certificates thereof to the clerk of the *outlawries*; to make out bail-pieces on such reversals, and writs of *supersedeas* when necessary. The clerk of the *juries* is appointed by the *custos brevium*, for life: His duty is to make out writs of *habeas corpora juratorum*, for the trials of issues in *London* and *Middlesex*, and for the assizes in the country.

*The duties of the clerk of the *warrants, involments, and estreats*, are, to file warrants of attorney upon judgments, issues, [*51] *outlawries*, and writs of *covenant* for levying fines; and also the warrants of attorney of sheriff's for the different counties in *England*; to stamp all judgment-papers, (aa) records of *nisi prius*, (bb) writs of *pluries capias* on *outlawries*, (b) and writs of *covenant*; to enroll deeds, recoveries, and foreign estreats; and to file affidavits of the execution of articles of clerkship, and enter attorneys' certificates, &c. This officer may refuse to file a warrant of attorney, or pass a fine, till the attorney employed by the parties, has paid his termage fees. (c)

The clerk of the *essoins* is appointed by the chief justice, for life: his duty is to enter *essoins* for the tenants in *real* actions, (for it is now determined, that no *ession* lies in *personal* actions;) and in case the tenant be not *essioned*, by the time limited by the rules of the court in *real* actions, the demandant may enter a *ne recipiatur*. This officer is required, by the statute 4 & 5 W. & M. c. 20. § 2. to make an alphabetical doget, by the defendants' names, of all judgments for debt by confession, &c., in the court of Common Pleas; (d) and rolls belonging to the several offices of the said

(e) R. T. 1 W. & M. reg. 2, C. P.

(f) R. M. 14 Jac. I. reg. 1 C. P. Barnes, 97.

(g) R. M. 15 & 16 Eliz. R. M. 14 Jac. I. reg. 1, C. P.

(h) R. E. 24 Car. II. reg. 1, C. P.

(aa) R. M. 5 Geo. II. C. P.

(bb) R. H. 2 & 3 Jac. II. C. P.

(b) R. H. 2 & 3 Jac. II. C. P.

(c) 1 Bing. 277. 8 Moore, 229, S. C.

(d) R. E. 5 W. & M. reg. 2, R. M. 2 Geo. I. C. P.

court are marked, numbered and delivered out by the clerk of the essions to the prothonotaries: and when the proper entries are made thereon, they are returned into his office, whence they are carried, by the clerk of the judgments, to the treasury at *Westminster*.

The clerk of the *dockets* is appointed by the prothonotaries, during pleasure. The duty of this officer is to draw up, exemplify, and enter on the roll, the admission of the several officers of the court; to prepare bail-pieces, entered into any attachment of privilege, or other bailable process, issuing out of the prothonotaries' office, and attend the court or a judge therewith, when entered into, and when the bail are justified, or fresh bail added, or the defendant surrendered; to make copies of all special juries, named by the prothonotaries, for the plaintiff and defendant; to make copies of reports in court by the prothonotaries, if desired, and of all special verdicts, for the judges and attorneys; to make copies of all rules of court, from the remembrances of terms past; to make certificates of declarations not being filed against prisoners, according to the rules of the court, in order to their being discharged; to make out certificates of writs of *recordari* and false judgment not being filed according to the course of court, to enable the parties, to proceed in inferior courts; to copy, if desired by the parties, all bills of cost, and other papers produced before the prothonotaries relating to such bills, when taxed; to attend the office of the prothonotaries daily during office hours, and to do the common business belonging to the office.

The clerk of the *judgments* is also appointed by the prothonotaries, during pleasure. His duty is to draw up every final judgment, after inquisition taken, verdict obtained, or nonsuit had at *nisi prius*, [*52] and upon every *demurrer, issue of *nul tiel record*, and rule of court; (a) and to draw up and enter all the continuances necessary to the said judgments: and he is directed, by the statute 4 & 5 W. & M. c. 20, § 2, to bring in all the above-mentioned judgments, to be docketed; after which he carries them to the treasury at *Westminster*. He draws up the award of writs of *elegit* and *partition*, and enters the same, with the returns thereof, upon the roll; enters satisfaction on all judgments, when the same is done by a judge's order, and not in open court; and makes out exemplifications of any of the above-mentioned judgments, if applied for within a year after the signing thereof.

The chief justice for the time being, is keeper and clerk of the *treasury*, and also clerk of the *errors*, of the court of Common Pleas; and executes these offices by his clerks, who are appointed by him during pleasure. The clerk of the *treasury* has the custody of the records of the court; the signing and sealing of records of *nisi prius*; (b) and the signing of exemplifications, except of fines and recoveries, within two terms. (c) The clerk of the *errors* has the allowance and receipt of all writs of error, upon judgments in this court; gives certificates thereof; makes out writs of *supersedeas*; enters bail taken thereon; makes out writs of *scire facias* against the bail; gives rules for bail, and for the plaintiff in causes to certify the record; makes transcripts of the records and judgments, and transmits the same into the court of King's Bench, &c.; signs *nonprosses* for not certifying the record; and allows and returns all writs of *certiorari*

(a) R. T. 29, *Car. II. reg. 5*, R. T. 13 *Geo. II. reg. 2* C. P.

(b) R. T. 29 *Car. II., reg. 4.* R. H. 2 & 3 *Jac. II., C. P.* And for the fees anciently due to the clerk of the treasury, see R. T. 35 *Hen. VI., § 7*, C. P.

(c) R. M. 1654, § 6, C. P.

directed to the lord chief justice, for certifying records from this court into any other.

Besides the officers that have been mentioned, there are others who derive their authority more immediately from the crown, namely, the *marshal* of the King's Bench prison, *(d)* and chief *usher* and *crier* of the court, in the King's Bench: and the *custos breviarum*, warden of the *Fleet* prison, and chief *proclamator* to the court, in the Common Pleas; and the *sealer* of writs, for both courts. The office of *marshal* of the King's Bench prison was granted by king *James* the First, in the 14th year of his reign, to Sir *William Smith*, knight, in fee; and the appointment to that office, as well as of the inferior officers, continued in the proprietors of the *inheritance of the prison, till the statute 27 Geo. II. c. 17, by [*53] which the office was revested in the crown; and by that statute, the marshal has the appointment of all inferior officers belonging to his office, such as the *deputy* marshal, *chaplain*, clerk of the *papers* of the King's Bench prison, and clerk of the *day rules*: (which latter officers must be resident within the prison, or its rules,) *(a)* three *turnkeys* and four *tipstiffs*, (one for each of the judges,) &c. And, by a late rule, *(bb)* the marshal must also reside within the King's Bench prison, or the rules thereof, according to the terms of the above statute, § 5, and of his patent. The chief *usher* and *crier* of the court of King's Bench holds his place for two lives, by letters patent under the great seal; and executes the same by two deputy ushers, and two deputy criers, who, according to a modern determination, *(cc)* are considered as distinct and independent officers.

The office of *custos breviarum* of the court of Common Pleas was granted by king *Charles* the Second, by letters patent dated the 14th of *December*, in the 29th year of his reign, with all profits, rights and privileges thereunto belonging, (after the determination of grants for lives, then subsisting,) to certain persons therein named, and their heirs and assigns, in trust for the then earl and countess of *Litchfield*, and for the issue of the countess in tail. *(d)* The persons at present entitled to the office, acquired it by inheritance: and the general business of the office is to record and file all original and judicial writs, and inquisitions taken by virtue of any such writs; all *postea*s after verdicts, and fines, with the concords signed by the parties acknowledging the same, and the writs of *dedimus potestatum* issued for taking the acknowledgment of such fines, with the transcripts thereof; which fines are entered in a book of the same term the respective writs of covenant are returnable, and the proclamation of such fines are indorsed upon the captions, according to the statute; to record and file all writs of entry and summons, writs of *dedimus potestatum* for taking warrants of attorney thereupon, and writs of *seisin* to support recoveries suffered in the said

(d) 2 Salk. 439. 3 Salk. 320, S. C. And for the rules and orders made for the better government of the King's Bench prison, see R. M. 3 Geo. II. R. T. 19 Geo. III. R. T. 21 Geo. III. R. H. 57 Geo. III. R. M. 58 Geo. III. R. T. 58 Geo. III. 1 Barn. & Ald. 728. 2 Chit. Rep. 373. R. H. 59 Geo. III. 2 Barn. & Ald. 403. 2 Chit. Rep. 374. 2 Barn. & Cres. 344. 3 Dowl. & Ryl. 599, S. C. R. M. 7 Geo. IV. 6 Barn. & Cres. 123. 9 Dowl. & Ryl. 189. R. H. 7 & 8 Geo. IV. 6 Barn. & Cres. 267, K. B. And, for the fees payable by the prisoners therein see R. Dec. 17, 1730. 4 Geo. II. R. M. 57 Geo. III. R. H. 2 & 3 Geo. IV. K. B. The above rules, subsequent to those of 3 & 4 Geo. II. are to be found in the collection of rules and orders, on the *plea* side of the Court of King's Bench, with which Mr. *Short*, the clerk of the rules, has obliged the profession.

(a) 4 Durnf. & East, 716. 5 Durnf. & East, 511.

(bb) R. M. 2 Geo. IV. K. B.

(cc) Peake's Cas. Ni. Pri. 3 Ed. 243.

(d) Stat. 6 Geo. IV. c. 89.

court; to make copies and exemplifications of the said writs and records, when required; and to return writs of *certiorari*, directed to the *custos brevium*, for removing any writs or other records into the court of King's Bench.(e)

The *warden* of the *Fleet* prison,(f) holds his office, by letters patent from the crown, during pleasure; and has the appointment of the clerk of the *papers* and *rules* of the *Fleet* prison, and keeper of *Westminster* hall; and also of four *tipstiffs*, two for the Common Pleas, one for the court of *Exchequer* and *Rolls*, and another for the court of *Chancery*; the [*54] *Fleet* being *the prison for all these courts. The two *tipstiffs* for the Common Pleas attend the judges while sitting in court, and in the afternoon at their chambers; and out of term, they attend there morning and afternoon: One of them also attends the lord chief justice, at the sittings of *nisi prius* for *London* and *Middlesex*. The office of *chief proclamator*, in the court of Common Pleas, is an hereditary office, claimed by descent in *fec*. This officer has no personal duty attached to his office; but he appoints four *criers*, one of whom is also *court-keeper*, and another *porter* of the court: They hold their places for life; and their duty is to attend the court, and make proclamations, &c.

The office of receiver general and comptroller of the seal of the courts of King's Bench and Common Pleas, (commonly called the *seal* office,) was granted by King *Charles* the second, by letters patent dated the 30th of *April*, in the 25th year of his reign, (after certain estates tail, since determined,) to *Henry* earl of *Euston*, afterwards duke of *Grafton*, in tail male.(a) This office is now vested in the duke of *Grafton*, who exercises the same by deputy; and has the sealing of all process, except bills of *Middlesex*, issuing out of the King's Bench and Common Pleas, and the exemplification of recoveries and judgments. But, by a late act of parliament,(b) the commissioners of his majesty's treasury are authorized "to treat, contract, and agree with the several persons beneficially entitled to the fees, receipts, and profits of the said office, and also of the office of *custos brevium* of the court of Common Pleas, for the purchase of all the rights, profits, privileges and advantages whatever belonging thereto, for such annuity or annuities, to be charged upon the consolidated fund of the united kingdom, as the said commissioners, or any three or more of them, shall think fit; and from and after the confirmation of the said agreement by parliament, the rights and interests of all persons whatsoever, claiming or entitled to claim under the said letters patent, shall cease and determine: And the said annuity or annuities so to be granted, shall go and be paid from time to time to such person or persons, as would have been entitled to the fees, profits, and advantages of the said offices respectively, under the said letters patent, in case that act had not been passed."

The seal office is required to be open from *eleven* in the morning till *two* in the afternoon, and from *five* to *seven* in the evening, during term, and for *ten* days after every *issuable* term, and *one* week after every other term; and from *eleven* in the morning till *three* in the afternoon, at all other

(e) For the fees anciently payable to the *custos brevium*, see R. T. 35 Hen. VI. § 6.

(f) For the rules and orders made for the better government of the *Fleet* prison, and the fees payable by the prisoners, see R. E. and T. 13 Geo. I. Jan. 19. 3 Geo. II. H. 3 Geo. II. E. 8. Geo. IV. 4 Bing. 247, C. P. and see 1 H. Blac. 105. 8 Moore, 157. 1 Bing. 255, S. C.

(a) Stat. 6 Geo. IV. c. 89.

(b) *Id.*

times.(e) It was formerly usual to seal *blank* writs; but an inconvenience having attended this practice, it was ordered that for the future, no printed blanks or other writs should be sealed, before the same were regularly made out and filled up:(d) And by several old rules of court,(e) no *signable writs are to sealed, till they have been duly signed by [*55] the proper officer.

The sealer of writs however, and other law officers, are not bound to attend, or keep open their offices, on licensed *holydays*. It will therefore be proper to consider what these *holydays* are, and when they are commanded or allowed to be kept, in term time or vacation, with the remedies for not opening the offices on other days, or refusing to do business in office hours, without the payment of *extra* fees. *Holydays*, it appears, are of two kinds; first, such as were originally derived from the *church*; and secondly, *state* *holydays*; the former are of ecclesiastical institution; but when, upon the reformation, the liturgy was settled and established, such days were enjoined to be observed; as plainly appears by the statutes 2 & 3 Edw. VI. c. 1 & 19, and 5 & 6 Edw. VI. c. 3: And though these acts were abrogated by Queen *Mary*, yet they were revived and continued in the first years of Queen *Elizabeth* and King *James*.(a)

The reasons for these *holydays*, being of a religious nature, are fully stated in the preamble to the statute 5 & 6 Edw. VI. c. 3, by which it is enacted that "all the days hereafter mentioned shall be kept and commanded to be kept *holydays*, and none other, that is to say, all *Sundays* in the year; the days of the feast of the *Circumcision* of our Lord, (being the 1st of *January*); of the *Epiphany*, (6th of *January*); of the *Purification* of the blessed virgin *Mary*, (2d of *February*); of *St. Matthias* the apostle, (24th of *February*); of the *Annunciation* of the blessed virgin, (25th of *March*); of *St. Mark* the evangelist, (25th of *April*); of *St. Philip* and *Jacob* the apostles, (1st of *May*); of the *Ascension* of our Lord, (which is a movable feast, happening 40 days after *Easter*, and ten days before *Whitsuntide*); of the *Nativity* of *St. John* the baptist, (24th of *June*); of *St. Peter* the Apostle, (29th of *June*); of *St. James* the Apostle, (25th of *July*); of *St. Bartholomew* the apostle, (24th of *August*); of *St. Matthew* the apostle, (21st of *September*); of *St. Michael* the archangel, (29th of *September*); of *St. Luke* the evangelist, (18th of *October*); of *St. Simon* and *Jude* the apostles, (28th of *October*); of *All Saints*, (1st of *November*); of *St. Andrew* the apostle, (30th of *November*); of *St. Thomas* the apostle, (21st of *December*); of the *Nativity* of our Lord, (25th of *December*); and the three following days, (being the feast days of *St. Stephen* the martyr, *St. John* the evangelist, and the *Holy Innocents*): and *Monday* and *Tuesday* in *Easter* and *Whitsun* weeks:" to which may be added *Good Friday*, though it is not mentioned in the statute. Hence it appears, there are *twenty four* licensed *holydays* in a year, besides those in *Easter* and *Whitsun* weeks; of which, it will be seen, there are five in the month of *December*, and in every other month *two*, except in *March*, *April*, *July* and *August*, in each

(c) R. T. 54 Geo. III. K. B. 3 Maule & Sel. 163. 2 Chit. Rep. 379. 5 Taunt. 702. 1 Marsh. 245, C. P. and see a former rule of M. 34 Geo. III. K. B.

(d) N. 3 Apr. 1747, K. B. and see the statute 6 Geo. I. c. 21, § 53. 2 Wils. 47. 1 Chit. Rep. 320.(a)

(e) R. T. 1656, reg. 1, R. E. 1659, R. E. 15 Car. II. reg. 1, K. B. and see R. M. 13 Car. II. R. H. 24 & 25 Car. II. R. E. 32 Car. II. R. T. 4 W. & M. reg. 3, K. B. R. T. 1649, R. M. 1654, § 6, R. T. 9 W. III. C. P.

(a) Nelson's Festivals, 1, 2.

of which there is only *one*; which was probably on account of these being the months of seed time and harvest.

[*56] *The statute being express, that “none other days shall be kept or commanded to be kept holyday, or to abstain from lawful bodily labour,” it has been determined, that the feast day of *St. Barnabas*, (11th of *June*,) not being mentioned in the statute, is not a legal holyday at the seal office; (a) and though it appeared by affidavit, in the case of *Fig-gins v. Willie*, (b) that this feast was kept at the excise, customs, &c. and that for 35 years together, and before the then officers came into the office, it had been kept at the seal office in this manner, that is, the outer door had been kept shut the whole day, if *St. Barnabas* fell on a *Monday*, *Wednesday* or *Friday*, but on *Tuesdays*, *Thursdays*, and *Saturdays*, it was shut in the mornings only; those being post nights, yet from the opinion of Mr. Justice *Blackstone* in that case, (c) it seems that this practice crept in when *St. Barnabas* became a state holyday, by coinciding with the king’s inauguration or accession, which it did for the first 25 years of the reign of *George the Second*, till they were separated by the new style act, in 1752. It is also observable, that there is another feast day observed by the church, which is not mentioned in the statute 5 & 6 Edw. VI. namely, the conversion of *St. Paul*, which happens on the 25th of *January*: and the reason why this feast day, as well as that of *St. Barnabas*, are not mentioned in the statute, probably was, that one of these feasts always happens in *Hilary* term, and the other frequently in *Trinity* term; and as there was already one holyday at least in each of these terms, it might have been thought that the business of the court would have been interrupted, if more had been allowed, and directed to be kept.

State holydays are either appointed by act of parliament, or founded on ancient usage. The former are the anniversary of the *Gunpowder Treason*, (*November 5*,) the martyrdom of *Charles the First*, (*January 30*,) and the restoration of *Charles the Second*, (*May 29*,) which are made state holydays by the statutes 3 *Jac. I. c. 1*, 12 *Car. II. c. 14*, (confirmed by 13 *Car. II. stat. 1, c. 11*,) and 12 *Car. II. c. 30*. The latter are the *birth* day, *accession*, *proclamation*, and *coronation* of the reigning monarch; and the *birth* days of his consort, and the prince of *Wales*. And it has been usual to keep *half* holidays on some other days; as on *Shrove Tuesday*, *Ash Wednesday*, the feast of *All Souls*, (*November 2*,) and the *birth* day and landing of *William the Third*, (*November 4*); the offices being open only half the usual hours of attendance on those days. The 5th of *November* is a holyday at the office of signer of writs, in the King’s Bench, during the time of morning service. (d) But it has been determined, by the court of Common Pleas, that *Lord Mayor’s* day is not such an holyday, as entitles the sealer of writs to an extraordinary fee for sealing a writ on that day. (e) In the Exchequer, the anniversary of the king’s *accession* has been holden not to be an holyday: (f) And, on the anniversary of the martyrdom of

[*57] *Charles the First*, the junior baron of the court sits in the morning, to take motions *of course. (a) In that court also, the service of a rule to bring in the body, on the day of the *purification*, is deemed good service. (b)

The only licensed holidays in *term* time, are said to be the *Purification*

(a) 2 Blac. Rep. 1186, 1314.

(d) 6 Maule & Sel. 336.

(a) 9 Price, 15.

(b) *Id.* 1186.

(c) 5 Taunt. 180.

(b) 13 Price, 208. McClel. 66, 7, S. C.

(c) *Id.* 1188.

(f) 9 Price, 13.

in *Hilary* term, *Ascension* day in *Easter* term, and *St. John* the baptist(e), (being *Midsummer* day,) if it happen in *Trinity* term, unless it be on *Friday* next after *Trinity Sunday*, in which case it is *dies juridicus*, by the statute 32 *Hen. VIII. c. 21. (dl)* These are considered as *dies non juridici*; but on all other days, the courts regularly sit for the dispatch of business in term time, though it has been usual on the 30th of *January*, (being the anniversary of the martyrdom of *Charles the First*,) for the courts to rise early, or as soon as the common business is over. And, as the courts sit themselves, they expect that the offices should be open on all other days in term time: For, as was observed by Mr. Justice *Blackstone*, in the case of *Sparrow v. Cooper (ce)*, the officers are supposed to be every day in court, sitting at the feet of the chief justice, and (in the case of the sealer of writs,) affixing the seal of the court to all judicial writs, which are witnessed at *Westminster*, in the name of the lord chief justice: The suffering him to do this in a private chamber is a mere indulgence, convenient to the court, the suitor, and the officer, and therefore connived at; but the supposition of law is otherwise. Of course, upon all days when the courts sit at *Westminster*, he ought to be ready to execute his duty at all convenient hours. On these or similar grounds it has been determined, that the feast of *St. Philip* and *Jacob*, which happens on the 1st of *May*, is not a holyday,(ff) nor the 29th of *May*, being the restoration of *Charles the second*,(g) when these days fall in *Easter* term; nor the feast of *St. Peter*, being the 29th of *June*, when it falls in *Trinity* term;(h) and consequently, no officer can take an extraordinary fee for business done on these days.

It has been made a question, whether the officers are entitled to take *extra* fees, for business done on legal holydays in *vacation*: and upon this subject, Lord *Ellenborough* is reported to have said, in the case of *Tweddle v. Fennell*,(i) that the officers, though they may keep legal holydays, must not be allowed to *sell* or make a traffic of them. But it should be observed, that in this case an *extra* fee had been taken by the clerk of the declarations, on the feast of *St. Peter*, which, though mentioned in the statute 5 & 6 *Edw. VI.* is not considered as a legal holyday in *term* time. This question however, came directly before the court of Common Pleas, in the case of *Martin v. Bold*,(k) but was not decided. In that case, the deputy sealer of writs, being at his office on a legal holyday, (that of *St. Luke*, which falls on the 18th of *October*,) a writ was offered him to seal, *which he refused to do without an *extra* fee; and the court with- [*58] out deciding on his right to make such a demand, held that at all events, his refusal to seal the writ was not an offence, for which they would grant an attachment: so that the question may be considered as still unsettled.

The remedies against officers, for not opening their offices, on days which are not licensed holydays, is by special action on the *case* for consequential damages,(a) or by summary application to the court for an attachment:(b) or, if they have taken improper fees, an action of *assumpsit* may be maintained for money had and received; or the court will order them to be re-

(c) 2 Blac. Rep. 1316. 7 Durnf. & East, 336.

(dl) 1 Chit. Rep. 400.(a)

(ce) 2 Blac. Rep. 1316. (ff) 2 Smith R. 403.

(g) 7 Durnf. & East, 336.

(h) *Tweddle v. Fennell*, T. 56 Geo. III. K. B.

(i) T. 56 Geo. III. K. B. This case is not reported; but is referred to in the case of *Martin v. Bold*, 7 Taunt. 182. 2 Marsh. 487, S. C.

(k) 7 Taunt. 182. 2 Marsh. 487, S. C.

(a) 2 Blac. Rep. 1187.

(b) 7 Taunt. 182. 2 Marsh. 487, S. C.

funded.(c) And, in the Common Pleas, when a complaint is made against an officer of the court, the judges will not refer it to the prothonotaries for examination, but will examine it themselves.(d)

The officers of the court of Exchequer of Pleas, are the clerk of the pleas, and his deputy, who is called the *master*. The clerk of the pleas is appointed by the chancellor of the Exchequer for life, or *quamdiu se bene gesserit*, and the deputy or master, by the clerk of the pleas; and the business of the master is to take minutes of what is done in court, draw up rules, make reports on matters referred to him, tax bills of costs, allow bails, and sign process, and judgments. The clerk of the pleas is also clerk of the errors in the Exchequer Chamber: and his duty in that character is to allow writs of error, certify transcripts, and attend the court of Exchequer Chamber, and draw up rules thereon. The general business of the office is the prosecution and defence of actions at common law, and the enrolment of deeds; which business is transacted by *four* sworn clerks or attorneys, appointed by the clerk of the pleas for life, and *sixteen* side clerks, or clerks in court, *four* of whom are appointed by each of the attorneys.(e) In this court, the office of sealer of writs, &c., is executed by the under-secretary of the chancellor of the Exchequer.(f)

Sheriffs may also, to some purposes, be considered as officers of the courts; and it is their duty to have deputies therein, to receive and return writs and process:(g) which deputies are required to give their personal attendance in *Westminster* hall, daily in term time.(h) And, for the prevention and remedy of delays and abuses in sheriffs, under-sheriffs, bailiffs of liberties, and their deputies, and other bailiffs of sheriffs, &c. in the execution of process and writs, it is a rule,(i) that “if any such officer shall wilfully delay the execution or return of any process or execution, or shall take or require any undue fees for the same, or shall give notice to the defendant,

thereby to frustrate the execution of any process or writ, or, having [*59] levied money, shall detain it in his hands, after the return of *the writ besides the ordinary course of amerciaments, the contempt or misdemeanor appearing, an attachment, information, commitment or fine shall be, as the case requireth; and this as well in case of a late, as the present sheriff, &c.”

There are other officers, who may here be noticed, though they are not properly officers of the court. These are the officers who attend on the trial of causes at *nisi prius* in *London* and *Middlesex*, consisting of the clerk of *nisi prius*, associate and marshal, crier and train-bearer, who are appointed by the chief justice; and the officers belonging to the different *circuits*, namely, the clerk of assize, associate, clerk of arraigns, clerk of indictments, judge's marshal, crier, clerk, steward, and tipstaff.(a)

(c) 2 Blac. Rep. 1314. 7 Durnf. & East, 336. 5 Taunt. 180.

(d) 1 H. Blac. 105.

(e) See 5 Price, 559, n.

(f) Man. Ex. Append. 270.

(g) Stat. 23 Hen. VI. c. 9, R. M. 1654, § 1, R. E. 15 Car. II. reg. 4 K. B. R. M. 1654, § 1, R. H. 14 & 15 Car. II. reg. 1, R. H. 15 & 16 Car. II. C. P.

(h) R. H. 21 Car. I. R. E. 15 Car. II. reg. 4 K. B. and see R. E. 23 Car. I. R. M. 1654, § 1, K. B. R. M. 15 Eliz. § 4, R. M. 1654, § 1, R. H. 14 & 15 Car. II. reg. 1, R. H. 15 & 16 Car. II. C. P.

(i) R. M. 1654, § 2 K. B. & C. P.

(a) For a more particular account of the *Officers* of the Courts, their appointment, duties, and fees, &c. see the Report of the Select Committee of the House of Commons, respecting Courts of Justice, 26 June, 1798.

*CHAPTER III.

Of the ADMISSION, ENROLMENT, CERTIFICATES, and READMISSION of ATTORNEYS; their PRIVILEGES, DISABILITIES, and DUTIES, with the CONSEQUENCES of their MISBEHAVIOUR.

AN *Attorney* is a person put in the place, stead, or *turn* of another, to manage his concerns; and may be either appointed to *prosecute*, or *defend* an action, (aa) or other purposes. (b) Before the statute Westm. 11. (13 Edw. I.) c. 10, the parties to a suit could not have appeared by attorney, without the king's special warrant, by writ or letters patent; but must have attended the court in person. (c) By the above and other ancient statutes, a general liberty was given to the parties, of appearing and prosecuting or defending their suits by attorney; (d) in consequence whereof the increase of attorneys was so great, that several acts of parliament were made to regulate them, and limit their number. (e) And by the statute 3 Jac. 1 c. 7, § 2, it was enacted that "none should from thenceforth be admitted attorneys, in any of the king's courts of record at *Westminster*, but such as had been *brought up* in the same courts, or otherwise well practiced in soliciting causes; and had been found by their dealings to be skilful, and of honest dispositions." In confirmation of this statute, a rule was made in both courts, that none should be admitted an attorney therein, unless he should have served, by the space of *five* years, as a clerk to some judge, serjeant at law, practising counsel, attorney, clerk or officer of one of the courts at *Westminster*; and were also, on *examination*, found of good ability and honesty for such employments. (f) And it was then usual to nominate twelve or more able practisers of the courts yearly, whose business it was to examine such persons as should desire to be admitted attorneys: which persons were first to attend the prothonotary, with their proof of service, and then to repair to the persons appointed to examine them, and on being approved, were to be presented to the court and sworn in unless some just exception were made against them. (g) it was also necessary that attorneys should be admitted, and reside in [*61] or near some inn of chancery, and keep commons there. (a)

At length, by the statute 2 Geo. II. c. 23, § 5, (*continued* by 12 Geo. II. c. 13, § 3, and 22 Geo. II. c. 46, § 2, and made *perpetual* by 30 Geo. II. c. 19, § 75,) it was enacted, that "no person shall be permitted to act as an attorney, or to sue out any writ or process, or to commence, carry on, or defend any action or actions, or any proceedings, either before or after judgment obtained, in the name or names of any other person or persons, in his majesty's court of King's Bench, Common Pleas, or Exchequer, or duchy of *Lancaster*, or any of his majesty's courts of Great Sessions in

(aa) Com. Dig. tit. *Attorney*, A. B.

(b) *Id.* C. and see 3 Black Com. 25.

(c) Co. Lit. 128, a, 2 Inst. 249, 378, F. N. B. 25. C. Gilb. C. P. 32.

(d) Com. Dig. tit. *Attorney*, B. 5.

(e) 4 Hen. IV. c. 18. 33 Hen. VI. C. 7. See also the rules of M. 15 Eliz. § 10, T. 24 Eliz. § 9, & H. 14 Jac. I. reg. 2, § 2, C. P.

(f) R. M. 1654, § 1, K. B. & C. P. and see R. H. 8 Car. I. § 3, C. P.

(g) R. M. 1654, § 4, K. B. & C. P.

(a) R. M. 1654, § 1, R. M. 3 Ann. K. B. R. M. 1654. § 1. R. T. 29 Car. II. reg. 1. R. M. 36 Car. II. R. M. 4 Ann. C. P.

Wales, or in any of the courts of the counties palatine of *Chester*, *Lancaster*, and *Durham*, or in any other court of record in that part of *Great Britain* called *England*, wherein attorneys have been accustomedly admitted and sworn, unless such person shall have been bound, by *contract in writing*,^(b) to serve as a clerk, for and during the space of *five years* to an attorney duly and legally sworn and admitted according to that act; and that such person, for and during the said term of five years, shall have *continued* in such service;^(c) and also unless such person, after the expiration, of the said term of five years, shall be *examined, sworn, admitted, and enrolled*, in manner therien mentioned; And in case any person shall in his own name, or in the name of any other person, sue out any writ or process, or commence, prosecute, or defend any action or suit, or any proceeding, in any of the courts of law aforesaid, or courts of Equity therein mentioned, as an attorney or solicitor, for or in expectation of any gain, fee, or reward, without being admitted and enrolled as aforesaid, every such person, for every such offence, shall forfeit and pay 50*l.* to the use of the person who shall prosecute him for the said offence; and it is thereby made incapable to maintain or prosecute any action or suit, in any court of law or equity, for any fee, reward or disbursements, on account of prosecuting, carrying on, or defending any such action, suit, or proceeding.”^(d) The court of Common Pleas, however would not grant an *attachment* against a person who had acted as an attorney of that court, without having been admitted; but left the party to sue for the *penalty* given him by the statute 2 Geo. II. c 23, § 24.^(e)

By subsequent statutes, it is made penal for any person to act as an attorney in the *county court*,^(f) or at any general or quarter *sessions* of the peace,^(gg) unless such person shall have been duly admitted an attorney, and enrolled as aforesaid. And by the statute 34 Geo. III. c. 14, § 4 [*62] “in case *any person, other than such who shall have been admitted an attorney, in one of the courts of Great Sessions in *Wales*, or of the counties palatine of *Chester*, *Lancaster*, or *Durham*, or in some other court of Record in *England* where attorneys have been accustomedly admitted and sworn, by virtue of a contract made before the 5th and 10th days of *February*, 1794, respectively, and a service in pursuance thereof, or who shall have been admitted a solicitor in one of the said courts of Great Sessions, or of the said counties palatine, or some other inferior court of equity in *England*, by virtue of a like contract and service, and according to the directions of the several acts then in force for the regulation of attorneys and solicitors respectively, shall in his own name, or in the name of any other person, sue out any writ or process, or commence, prosecute or defend any action or suit or any proceeding, in any of the said courts at *Westminster*, as an attorney or solicitor, for or in expectation of any gain, fee or reward, without being admitted and enrolled an attorney or solicitor in one of the said courts at *Westminster*, according to the directions of the several acts in force for the regulation of attorneys and solicitors, every such person shall, for every such offence, forfeit the sum of *one hundred pounds*;

(b) Append. Chap. III. § 1.

(c) But see 2 Blac. Rep. 734, 957, where attorneys were admitted by the court of Common Pleas, under special circumstances, though they had not regularly served the whole term of *five years* under the original articles: and see 1 Chit. Rep. 14. 1 Dowl. & Ry. 14.

(d) 2 Geo. II. c. 23, § 24, and see 7 Moore, 54, 3 Brod. & Bing. 241, S. C.

(e) 6 Moore, 70.

(f) 12 Geo. II. c. 13, § 7.

(gg) 22 Geo. II. c. 46, § 12.

one moiety thereof to the use of his majesty, and the other moiety, with full costs of suit, to the use of such person who shall prosecute for the said offence, by action of *debt*, &c. in any of his majesty's courts of record at *Westminster*: And such person is thereby also made incapable to maintain or prosecute any action or suit, in any court of law or equity, for any fee, reward or disbursements, on account of prosecuting, carrying on or defending any such action, suit or proceeding." An attorney therefore, who has been admitted in one of the courts of Great Sessions in *Wales*, or of the counties palatine of *Chester*, *Lancaster*, or *Durham*, &c. since the 10th day of *February* 1794, is not entitled to practise in the courts at *Westminster*, without being also admitted an attorney therein; and he cannot be so admitted, unless the higher duty was paid on his articles of clerkship.

There is a *proviso*, however, in the statute 2 Geo. II. c. 23, § 26, that "nothing therein contained shall extend, or be construed to extend, to the examination, swearing, admission, or enrolment of the six clerks of the court of Chancery, or the sworn clerks in their office or the waiting clerks belonging to the said six clerks, or the cursitors of the said court, or of the clerks of the petty bag office, or of the clerks of the king's coroner and attorney in the court of King's Bench, or of the filacers of the same court, or of the filacers of the court of Common Pleas at *Westminster*, or of the attorneys of the court of the duchy chamber of *Lancaster*, or of the attorneys of the court of Exchequer at *Chester*, or of the attorneys of the courts of the lord mayor and sheriffs of *London* respectively, for the time being; but that the said clerks, filacers, and attorneys respectively, shall and may be examined, sworn, admitted, enrolled, and practise, in their respective courts and offices aforesaid, in like manner as they might have been or done before the making of that act." And, by the statute 49 Geo. III. c. 28, § 1, "persons having *served a clerkship of *five* years, to some of [*63] the clerks of the king's coroner and attorney in the court of King's Bench, who have been regularly admitted as such clerks, shall and may be approved, sworn and admitted to practise, and may practise as attorneys in the said court of King's Bench, and may also practise in any other of the courts of record in the said recited act mentioned, in the name, and with the consent of some sworn attorney of such court, such consent to be in writing, and signed by such attorney as aforesaid, in like manner as the attorneys of such court, or the attorneys or clerks of the offices of the king's remembrancer, treasurer's remembrancer, pipe, or office of pleas in the court of Exchequer at *Westminster*, are in and by the said act empowered to do."(a)

Also, by the statute 1 & 2 Geo. IV. c. 48, § 1, (as amended by the statute 3 Geo. IV. c. 16, "in case any person, who shall have taken the degree of bachelor of arts, or bachelor of law, either in the university of *Oxford* or *Cambridge*, or in the university of *Dublin*, shall, at any time after he shall have taken such degree, be bound by contract in writing to serve as a clerk, for and during the space of *three* years, to an attorney or solicitor, &c. in some or one of the courts of law or equity in the therein recited acts of the second, seventh, and twenty-second years of the reign of king *George* the second mentioned, and during the said term of three years shall continue in such service, and during the whole term of such three years' service, shall continue and be actually employed by such attorney or solicitor, or his

(a) 2 Geo. II. c. 23, § 27.

agent or agents, in the proper business, practice or employment of an attorney or solicitor, and shall also cause an affidavit, or being one of the people called *Quakers*, a solemn affirmation, of himself, or of such attorney or solicitor to whom he was bound as aforesaid, to be duly made and filed, that he hath actually and really so served and been employed, during the said whole term of *three* years, in like manner as is required by the said recited acts with respect to persons thereby required to serve for the term of *five* years, shall and may be qualified to be sworn, or take his solemn affirmation, and to be admitted and enrolled as an attorney or solicitor respectively, according to the nature of his service, in the several and respective courts of law or equity, as fully and effectually to all intents and purposes, as any person, have been bound, and having served *five* years, is qualified to be sworn or take his solemn affirmation, and to be admitted or enrolled, under or by virtue of the said recited acts, or any other act or acts for the regulation of attorneys or solicitors in *England*. Provided always, that nothing in this act contained shall extend to any person who shall have taken such degree of bachelor of arts, unless such person shall have taken such degree within *six* years next after the day when he shall have been first matriculated in the said universities respectively; nor to any person who shall have taken such degree of bachelor of law, unless he shall have taken the same within *eight* years after such matriculation; nor to any

[*64] person, who shall be bound *by contract in writing to serve as clerk to an attorney or solicitor, under the provisions of this act, unless such person shall be so bound within *four* years next after the day when he shall have taken such degree.”(a) This *proviso* however, by a subsequent statute,(b) does not apply to persons who had taken such degrees, previous to the passing of the former act.

And, for the better preventing unqualified persons from being admitted attorneys and solicitors, and for rendering the said act of 2 Geo. II. more effectual, “every person who shall be bound, by contract in writing, to serve as a clerk to any attorney or solicitor, as by the said act is directed, shall within *three* months next after the date of every such contract, cause an *affidavit* to be made and duly sworn, of the actual execution of every such contract, by every such attorney or solicitor, and the person so to be bound to serve as a clerk as aforesaid: and in every such *affidavit* shall be specified the names of every such attorney or solicitor, and of every such person so bound, and their places of abode respectively, together with the day of the date of such contract;(c) and every such affidavit shall be *filed*, within the time aforesaid, in the court where the attorney or solicitor to whom every such person respectively shall be bound, hath been enrolled as an attorney or solicitor, with the respective officers, or their deputies, therein mentioned, who shall make and sign a *memorandum*, or mark the day of filing every such affidavit, at the back or bottom thereof;(d) and no person who shall become bound as aforesaid, shall be admitted or enrolled an attorney or solicitor, in any court in the said act mentioned, before such affidavit, so marked by the proper officer, shall be produced, and openly read in the court where such person shall be admitted and enrolled an attorney or solicitor.”(e) The officers appointed for this purpose, are the chief clerk, or his

(a) § 4. And, for the form of an affidavit of execution of articles, &c. on this statute, see Append. Chap. III. § 3.

(b) 7 Geo. IV. c. 44, § 5.

(d) 22 Geo. II. c. 46, § 3.

(c) Append. Chap. III. § 2.

(e) *d.* § 4.

deputy, in the King's Bench, (f) and the clerk of the warrants in the Common Pleas; (f) who are directed to keep a book, wherein shall be entered the substance of such affidavit, specifying the names and places of abode of every such attorney or solicitor, and clerk or person bound as aforesaid, and of the person making such affidavit, with the date of the articles or contract, and the days of swearing and filing every such affidavit respectively; for which a fee of two shillings and sixpence is allowed to be taken, and no more. (g) *Indemnity* acts, however, are occasionally passed, relieving persons who have neglected to file their affidavits within the limited time: (h) And *in some of these acts, (a) there is a clause allowing [*65] persons to make and file affidavits of the execution of articles of clerkship, within a limited time, although the persons whom they served, have neglected to take out their annual certificates. This clause, in the indemnity act of 4 Geo. IV. c. 1, was holden to be *prospective*, as well as *retrospective*; extending to those persons who might be in default during the time for which it was made, and not being limited to those who had incurred penalties or disabilities, before it passed. (b)

By the last general stamp act, (c) a duty of *one hundred and twenty* pounds is imposed upon the articles or contract, whereby any person shall first become bound to serve as a clerk, in order to his admission as an attorney or solicitor, in any of his majesty's courts at *Westminster*; and a duty of *sixty* pounds, in any of the courts of Great Sessions in *Wales*, or counties palatine of *Chester*, *Lancaster*, and *Durham*, or in any other court of record in *England*, holding pleas where the debt or damage amounts to forty shillings; and a duty of *one pound fifteen* shillings, for any counterpart or duplicate of any such articles of contract of clerkship: which are in lieu of all former duties previously imposed, as well on the articles or contract, as on the amount of the premium paid with the clerk. This regulation, being calculated to prevent improper persons from being admitted into the profession, has been productive of the most beneficial consequences. And by the statute 34 Geo. III. c. 14, § 2, "no person, who by any such contract shall be bound to serve as a clerk as aforesaid, shall be admitted to be a solicitor or attorney in any of the said courts, unless the indenture or other writing containing such contract, duly stamped according to the directions of the said act, shall be enrolled or registered, with the proper officer to be appointed for that purpose, in the court wherein such person shall propose to be afterwards admitted a solicitor or attorney, by virtue of his service under such contract; together with an *affidavit* of the time of the execution of the contract by such clerk: And in case such indenture or other writing shall not be enrolled or registered in such court, within *six* months

(f) *Id.* § 5. This section also appoints the proper officers for filing such affidavits, in the courts of *Chancery* and *Exchequer*, Duchy Chamber of *Lancaster County Palatine* courts, and courts of Great Sessions in *Wales*.

(g) *Id.* § 6.

(h) See the statutes 37 Geo. III. c. 60, § 3*, c. 93*. 39 & 40 Geo. III. c. 72. 44 Geo. III. c. 59*. 50 Geo. III. c. 4. 52 Geo. III. c. 26. 54 Geo. III. c. 5*. 55 Geo. III. c. 17. 56 Geo. III. c. 33. 57 Geo. III. c. 14. 58 Geo. III. c. 5*. 59 Geo. III. c. 11. 60 Geo. III. & 1 Geo. IV. c. 10. 1 & 2 Geo. IV. c. 5. 3 Geo. IV. c. 12*. 4 Geo. IV. c. 1*. 5 Geo. IV. c. 6*. 6 Geo. IV. c. 45*. 7 Geo. IV. c. 44, § 1, 2*, and 7 & 8 Geo. IV. c. 45. *N. B.* Such of these statutes as are marked with an *asterisk*, are to be found in the statutes at large.

(a) 58 Geo. III. c. 5, § 7. 3 Geo. IV. c. 12, § 8. 4 Geo. IV. c. 1, § 8. 6 Geo. IV. c. 46.

(b) 2 Barn. & Cres. 34.

(c) 55 Geo. III. c. 184, *Sched.* Part. I. And, for the former duties, see the statutes 8 Ann. c. 9, § 32, 37. 34 Geo. III. c. 14, § 1. 44 Geo. III. c. 98, *Sched.* A, and 48 Geo. III. c. 149, *Sched.* Part. I.

next after the execution thereof, together with such affidavit of the time of the execution of the contract, then the service of such clerk, under such indenture or writing, shall be deemed to commence from the time of such enrolment or registry only, and not from the execution of such indenture or writing." By a subsequent statute,^(d) however, persons who shall have paid the duties, within *six* months after execution of the articles [*66] of clerkship, but shall have neglected to cause the necessary affidavits to be filed within the time required, were indemnified, on filing them on or before the 10th *October*, 1826: but the commissioners of stamps are prohibited by that statute, from stamping any articles of clerkship, &c., after *six* months from the date thereof.^(a) Where the original articles of clerkship had been lost, the court of King's Bench, on motion, ordered that the master should be at liberty to enrol a copy of them.^(b) But where a clerk had been articled to an attorney in the country, and the indentures had been sent up to *London*, to be enrolled in the master's office, pursuant to the statute, and after the clerkship had been served, no trace of the indentures could be discovered in the master's office, the court refused to admit him; although it appeared from the books of the town agent, that a clerk of the latter had paid the fees payable in the master's office upon the enrolment, at the time when it was supposed to have taken place.^(c)

No attorney or solicitor is allowed to have more than *two* articulated clerks, at the same time;^(dd) nor can take, have, or retain any clerk, who shall become bound by contract in writing as aforesaid, after such attorney or solicitor shall have discontinued or left off, or during such time as he shall not actually practise as, or carry on the business of an attorney or solicitor.^(e) And, by a rule of court of the King's Bench and Common Pleas,^(f) "no attorney who shall be retained or employed as a writer or clerk, by any other attorney, shall, during the time of such employ, take or have any clerk under articles; and no service to any such attorney under articles, during the time that such attorney shall be so employed by any other attorney, shall be deemed good service:" which rule was determined by the court of King's Bench, to have a retrospective operation; it not being introductive of any new regulation, but confirmatory of an old one.^(g) And where articles of clerkship appeared to have been entered into collusively, between an attorney and a person who was and continued to act as a turnkey of the King's Bench prison, for the purpose of securing the business of the prisoners to the attorney, the court ordered them to be cancelled.^(h)

With respect to the *service* in general, under articles of clerkship, it is enacted, by the statute 22 Geo. , II. c. 46, § 8, that "every person who shall become bound by contract in writing to serve any attorney or solicitor, shall, during the whole time and term of service to be specified in such contract, continue and be actually employed by such attorney or solicitor, or his or their agent or agents, in the proper business, practice, or employment of an attorney or solicitor." By the above statute, it is necessary that a clerk, in order to be admitted an attorney, should actually serve *five* years under articles: Therefore, where a clerk had served part of his time

(d) 7 Geo. IV. c. 44, § 1.

(a) § 4.

(b) 3 Barn. & Ald. 610.

(c) Dowl. & RyL. 429. 1 Barn & Cres. 264, S. C.

(dd) 2 Geo. II. c. 23, § 15.

(e) 22 Geo. II. c. 46, § 7.

(f) R. T. 31 Geo. III. K. B. & C. P. 4 Durnf. & East, 379.

(g) 4 Durnf. & East, 492.

(h) 1 Bur. 291.

with a master who had left the country, and, before his articles *were assigned to another master, an interval of *ten* months had [*67] elapsed during which he was not serving under any articles, but under the assignment, he served the remainder of the time specified, the court would not allow him to be admitted, until he had served out the *ten* months, under new articles.(a) And it has been holden, that the requisite of the statute is not complied with, by the clerk's serving part of the time with another attorney, though with his master's consent, and the rest of the time with his master.(b) So, where a clerk to an attorney held, during the term for which he was bound, the office of surveyor of taxes under the crown, the court of King's Bench determined, that he could not be considered as having served his whole time and term in the proper business of an attorney; and upon that ground, ordered him, after he had been admitted to be struck off the roll.(c) In this case the clerk afterwards bound himself to another attorney, and served him for *two* years; at the expiration of which time he was again admitted an attorney, upon an affidavit stating that for more than *three* of the *five* years for which he was originally bound, his service had been given to the attorney to whom he was articulated; and on moving to strike him off the roll, it was held, that his service under the first articles, could not be coupled with his service under the second, so as to entitle him to be admitted.(d) But the court of Common Pleas refused to strike an attorney off the roll, on an affidavit which stated that he had not served a regular clerkship: as he had been opposed by counsel before a judge, on the same ground, at the time he was admitted, and no misconduct or malpractice had been imputed to him, subsequently to such admission.(e)

There is a *proviso*, however, in the statute 22 Geo. II. c. 46. (f) that "if any attorney or solicitor, to or with whom any such person shall be so bound, shall happen to *die*, before the expiration of such term, or shall *discontinue* or leave off such his practice as aforesaid, or if such contract shall by mutual consent of the parties be *cancelled*, or in case such clerk shall be legally *discharged*, by any rule or order of the court wherein such attorney or solicitor shall practice, before the expiration of such term, and such clerk shall in any of the said cases, be bound by another contract or other contracts in writing to serve, and shall accordingly serve, in manner before mentioned, as clerk to any other practising attorney or attorneys, solicitor or solicitors respectively, during the residue of the said term of five years, then such service shall be deemed and taken to be as good, effectual, and available, as if such clerk had continued to serve as a clerk for the said term, to the same person to whom he was originally bound; so as an affidavit be duly made and filed, of the execution of such second or other contract or contracts, within the time, *and in like manner as is be- [*68] fore directed, concerning such original contract." And, by the statute 34 Geo. III. c. 14, § 5, "if any person, having been articulated to any attorney or solicitor for the term of five years, and having duly paid the duty by that act imposed, shall, on the event of such attorney or solicitor dying, or leaving off his practice, or of such articles being cancelled or discharged, or on any other event, before the expiration of such term of five

(a) 2 Chit. Rep. 61.

(b) 7 Durnf. & East, 456, but see the case *ex parte Blunt*, 2 Blac. Rep. 764. *Ante*, 61, (c).

(c) 5 Barn. & Ald. 538.

(d) 4 Barn. & Cres. 341. 6 Dowl. & Ry. 428, S. C.

(e) 7 Moore, 572. 1 Bing. 160, S. C.

(f) § 9, and see stat. 2 Geo. II. c. 23, § 12.

years, enter into any subsequent contract, with any other attorney or solicitor, to serve him as his clerk, for the residue of the said term of five years, such last-mentioned contract shall not be subject to or chargeable with any of the duties by that act imposed.”(a) The duty of *one pound fifteen shillings*, however, is payable, by the last general stamp act,(b) for any articles of clerkship or contract, whereby any person shall become bound to serve as a clerk, in order to his admission as an attorney or solicitor, for the residue of the term for which he was originally bound, in consequence of the death of his former master, or of the contract between them being vacated by consent, or by rule of court, or in any other event; and for any counterpart or duplicate thereof.

An articulated clerk, having served part of his clerkship with an attorney who *died* before the expiration of his term, is, it seems, at liberty, even after an interval of *six* years, to serve the remainder of his clerkship with another attorney, with a view to his admittance:(c) And the court of King’s Bench granted a rule to discharge an articulated clerk, where the attorney to whom he was bound had become *bankrupt*, and absconded; and directed the rule to be served at the last place of abode of the attorney, and on the clerk to the commission of bankruptcy, and also to be stuck up in the King’s Bench office.(d) This court has also a summary jurisdiction over matters in difference between attorneys and their clerks: and, therefore, where a clerk had misconducted himself, and left the service of the attorney to whom he was articulated, at the end of a year and a half, and the latter refused to take him back in consequence of his previous misconduct, the court referred it to the master, who decided that a portion of the premium should be returned; and this decision was confirmed by the court, though the point in question had been decided otherwise in a suit in the Exchequer.(e) But the court refused to compel an attorney to execute an assignment of articles of clerkship, where the clerk had been guilty of criminal conversation with an attorney’s wife, even though the attorney had promised to assign him over.(f)

It is a rule, that “no person who shall enter into articles with an attorney or attorneys, shall be at liberty to serve the *agent* or agents of such [*69] attorney or attorneys, under such articles, for a longer time than *one* year of his clerkship: and any such service to an agent or agents, beyond that time, shall not be deemed good service.”(aa) But, by the statute 1 & 2 Geo. IV. c. 48, § 2, “if any person, bound by contract in writing, to serve as a clerk for the space of *five* years, in manner mentioned in the therein recited acts, shall actually and *bona fide* be and continue as pupil to any practising barrister, or to any person *bona fide* practising as a certificated special pleader, in *England* or *Ireland*, for any part or parts of the said term of five years, not exceeding *one* year, it shall be lawful for the judge, or other sufficient authority, to whom such persons shall apply to be admitted as attorney or solicitor, or upon affidavit or affirmation of such clerk, and of such barrister or special pleader, to be duly made and

(a) And see the statutes 48 Geo. III. c. 149, § 10, & 55 Geo. III. c. 184, *Sched.* Part I. tit. *Articles of Clerkship*.

(b) 55 Geo. III. c. 184, *Sched.* Part I. And, for the former duty, see the statutes 44 Geo. III. c. 98, *Sched.* A. 48 Geo. III. c. 149, *Sched.* Part I.

(c) 1 Dowl. & Ryl. 14.

(d) 1 Chit. Rep. 558, *in notis.* 2 Chit. Rep. 62, S. C.

(e) 3 Barn. & Ald. 257. 1 Chit. Rep. 694, S. C.

(f) *Ex parte Briggs*, M. 22 Geo. III. K. B.

(aa) R. T. 31 Geo. III. K. B. 4 Durnf. & East, 379.

filed, and upon being satisfied that such person, so applying for admission, had actually and really been and continued with, and had been employed as pupil by such practising barrister or special pleader as aforesaid, (but not otherwise,) to admit such person as attorney or solicitor, in like manner as is now done in cases where the clerk has served part of the term of his clerkship, with the agent of the person to whom he has been bound."

And, to the intent that better information may be obtained, touching the fitness and qualifications of persons applying to be admitted attorneys, there are rules in the king's Bench,^(b) that "every person who shall intend to apply for admission as an attorney in that court, and who shall not have been admitted an attorney or solicitor of any other court, shall, for the space of one full term previous to the term in which he shall apply to be admitted, cause his name and place of abode, and also the name or names, and place or places of abode of the attorney or attorneys to whom he shall have been articulated, written in legible characters, to be affixed on the outside of the court of King's Bench, in such places as public notices are usually affixed on, and in the King's Bench office; and also enter or cause to be entered, in a book to be kept for that purpose, at each of the judges chambers of this court, his name and place of abode, and also the name and place of abode of the attorney or attorneys to whom he shall have been articulated." And there is a similar rule in the Common Pleas,^(c) directing the notice to be affixed on the outside of the court, in such places as public notices are usually affixed on, and to be left at each of the judges chambers of that court, and there fixed up in some conspicuous place, and that such notice shall likewise be fixed up, for the like time, in the Common Pleas office. This notice must be put up for the term *immediately* preceding that in which the application is made for admission.^(d) And, in the King's Bench, where an *attorney's clerk has served part of his time with one [*70] attorney, and part with another to whom the articles were assigned, the name of the assignee must be inserted in the notice of intention to apply for admission.^(a)

Before a clerk can be admitted an attorney or solicitor, he is required to cause an *affidavit*, of himself or the attorney or solicitor to whom he was bound, to be duly made and filed with the proper officer appointed for that purpose, (being, in the King's Bench, the chief clerk or his deputy, and, in the Common Pleas, the clerk of the warrants,) that he hath actually and really served, and been employed by such practising attorney or attorneys, solicitor or solicitors, to whom he was bound as aforesaid, or his or their agent or agents, during the said whole term of five years, according to the true intent and meaning of the statute 22 Geo. II. c. 46, § 10.^(b) And, in the Common Pleas, it is a rule, that "every person who shall be admitted an attorney of that court, not being already an attorney of the King's Bench, or a solicitor in Chancery, or in the court of Exchequer, shall, before he is sworn, file, with the secondary, his articles of clerkship, together with the affidavit of the due execution thereof, and also the affidavit of the due service under such articles, and of the notice having been given pursuant to the

(b) R. T. 31 Geo. III. K. B. 4 Durnf. & East, 379. R. T. 33 Geo. III. K. B. 5 Durnf. & East, 368. And for the form of the notice, and affidavit thereof, see Append. Chap. III. § 4, 5.

(c) R. T. 31 Geo. III. C. P., and see N. M. 2 Geo. II. 2, C. P. Append. Chap. III. § 4. 2 Marsh. 48, (a).

(d) 6 Taunt. 335. 2 Marsh. 48, S. C.

(a) 1 Chit. Rep. 556.

(b) Append. Chap. III. § 5, 6, K. B.

rule of *Trin.* 31 Geo. III.”(c) An *affidavit* is also required to be made by the person to be admitted, of the payment of the duty imposed on the articles or contract of service; in which he shall insert the sum paid in respect thereof, and shall specify the name and place of abode of the person or persons with whom such contract of service was entered into, the time of the execution thereof, and the time of enrolling or registering the same, and, in case such person shall have been previously admitted a solicitor or attorney in some other court, shall also specify in such affidavit the court in which he has been so admitted, and the time of his admission therein;(d) and shall cause the same to be duly filed in the court in which he proposes to be so admitted a solicitor or attorney, with the proper officer appointed for receiving and filing such affidavits; and every such affidavit shall be produced, and openly read in the court in which such person shall be admitted a solicitor or attorney, before he shall be enrolled or registered therein.(e)

The *oath* (or *affirmation*, if by a *Quaker*,) required to be taken before admittance, is that the person to be admitted will truly and honestly demean himself, in the practice of an attorney, according to the best of his knowledge and ability:(f) besides which, he has taken the oaths of allegiance and supremacy, and to subscribe the declaration against popery;(g)

[*71] *or, if a *Roman Catholic*, the declaration and oath prescribed by the statute 31 Geo. III. c. 32, § 1.(a) But the judges of the court, or one or more of them, before they admit any person to take the said oath or affirmation, are to *examine* and inquire, by such ways and means as they shall think proper, touching his fitness and capacity to act as an attorney, and if such judge or judges respectively shall be thereby satisfied, that such person is duly qualified to be admitted to act as an attorney, then, and not otherwise, the said judge or judges are to administer in open court to such person, the said oath or affirmation; and after such oath or affirmation to cause him to be *admitted* an attorney, and his name to be *enrolled* as an attorney in such court, without any fee or reward, other than one shilling for administering the oath or affirmation; which admission shall be written on parchment, in the *English* tongue, in a common legible hand, and signed by such judge or judges respectively, whereon the lawful stamps shall be first impressed, and shall be delivered to the person so admitted.(bb) The stamp duty on admission, by the last general stamp act,(c) amounts to *twenty-five* pounds, unless the person has been before admitted an attorney, in one of the courts mentioned in the statute 2 Geo. II. c. 23, § 5.(d) And the chief clerk or his deputy in the King’s Bench, and clerk of the warrants or his deputy in the Common Pleas, are required, without fee or reward, to *enroll*, the name of every person who shall be admitted an attorney, therein,

(c) R. T. 37 Geo. III. C. P. 1 Bos. & Pul. 90. Append. Chap. III. § 7, 8.

(d) Append. Chap. III. § 9, 10.

(e) 34 Geo. III. c. 14, § 3.

(f) 2 Geo. II. c. 23, § 13. 12 Geo. II. c. 13, § 8. Append. Chap. III. § 11. And for the form of the oath anciently taken, on the admission of attorneys in the Common Pleas, see R. M. 1654, § 26, C. P.

(g) 7 & 8 W. III. c. 24. 13 W. III. c. 6, § 3. These oaths may be taken, and the declaration subscribed, in the King’s Bench, before a single judge, in the bail court, by stat. 1 Geo. IV. c. 55, § 4.

(a) For the form of a rule of court, for the admission of an attorney on this statute, see Append. Chap. III. § 12. And, for the disabilities of *Roman Catholics*, and the statutes which have been passed for their relief, &c., see a very learned and elaborate note by Mr. Butler, in his valuable edition of Co. Lit. p. 391, (a). (bb) 2 Geo. II. c. 23, § 6.

(c) 55 Geo. III. c. 184, *Sched.* Part I. And for the former duty, see the statutes 44 Geo. III. c. 98, *Sched.* A. 48 Geo. III. c. 149, *Sched.* Part I.

(d) *Ante*, 61.

and the time when admitted, in an alphabetical order, in rolls or books to be provided and kept for that purpose in their respective offices; to which rolls or books all persons may have free access, without fee or reward.(e) Anciently it appears there were rolls kept of the attorneys, in the King's Bench; but after the stamp acts, that method was disused, and books kept in lieu of them.(f) These books were considered in one case,(f) merely as minutes to make up the record, and a warrant to the officer for that purpose: But from the evidence given in a subsequent case,(g) it appears that when an attorney is admitted, and takes the oaths, he subscribes a roll, which is the original roll of attorneys; whence the names are copied into the above books. The record of admission is of so high an authority, that if an exemplification of it be annexed to a plea of privilege, the plaintiff must reply *nul tiel record*, and cannot otherwise try the fact of the defendant's being an attorney.(h)

The habitations, however, of many attorneys practising in the court of King's Bench, resident in and near the cities of *London* and *Westminster*, *being often very difficult to be found, whereby it [*72] was impracticable duly to serve them with notices, summonses, orders and rules, to the great delay of the proceedings, a rule was made in this court,(a) that the master should forthwith cause to be prepared a proper alphabetical book, for the purposes after mentioned; and that the same should be publicly kept at the master's office in the King's Bench walk, to be there inspected by any attorney or his clerk, without fee or reward; and that every attorney practising in this court, and residing in *London* and *Westminster*, or within *ten* miles of the same, should before the first day of the then next term, enter in such book, in alphabetical order, his name and place of abode, or some other proper place, within the cities of *London* and *Westminster*, where he might be served with such notices, summonses, orders and rules; and it is thereby required, that "every attorney afterwards to be admitted, and practising and residing as aforesaid, shall, upon his admission, make the like entry; and that as often as any such attorney shall change his place of abode, or the place where he may be so served with notices, summonses, orders and rules, he shall make the like entry thereof, in the said book; and that all notices, summonses, orders and rules, which do not require a personal service, shall be deemed sufficiently served on such attorney, if a copy thereof shall be left at the place lastly entered in such book, with any person resident at or belonging to such place; and if any such attorney shall neglect to make such entry, that then the fixing up of any notice, or the copy of any summons, order or rule, for such attorney, in the said master's office, shall be deemed a sufficient service, unless the matter be such as shall require a personal service." In conformity to this rule, it is usual for practitioners, who live remote from the inns of court or chancery, to add to the place of their abode, the name and place of abode of some other person, where and with whom notices, summonses, orders, rules and other proceedings that do not require personal service, may be left for them, near to such inns:(b) But when the name and place of abode of the attorney are entered, then service at that place is the proper service.(c)

(e) 2 Geo. II. c. 23, § 18.

(f) 1 Str. 76, 7.

(g) 2 Esp. Rep. 526.

(h) 1 Ld. Raym. 336. 7 Mod. 106. 2 Salk. 545. 6 Mod. 305. 2 Ld. Raym. 1172. 1 Str. 76, 532.

(a) R. H. 3 Geo. III. K. B.

(b) Imp. K. B. 10 Ed. 33.

(c) Loft, 357.

An attorney, sworn admitted and enrolled in any of the courts of *law*, mentioned in the statute 2 Geo. II. c. 23, *(d)* may be sworn admitted and enrolled a solicitor, in all or any of the courts of *equity* therein mentioned, *(e)* without any fee for the oath, or stamp on the parchment whereon such admission shall be written: *(f)* And an attorney in any of his majesty's courts of record at *Westminster*, is capable of being admitted to practise as an attorney in any *inferior* court of record, provided he be in all other respects capable and qualified to be admitted an attorney, according to the usage and custom of such inferior court. *(g)* So, a *solicitor* in any of his majesty's courts of equity at *Westminster*, may be [*73] sworn admitted and *enrolled an *attorney* of his majesty's court of King's Bench or Common Pleas at *Westminster*. *(a)* And a solicitor in any of the courts of *equity* mentioned in the statute 2 Geo. II. c. 23, may be sworn admitted and enrolled a solicitor in all or any of the *other* courts of equity, or in any *inferior* court of equity. *(bb)* An admitted attorney of the court of King's Bench may sue out a commission of bankrupt, and maintain an action for his fees and disbursements thereon, although he be not a solicitor in Chancery. *(cc)* But a solicitor on the equity side of the court of Exchequer, is not entitled, as such, to practise in the Court of Chancery; nor, if he do, can he maintain an action for the amount of his bill: *(dd)* And it seems, that a solicitor of the latter court cannot, by consent in writing, authorize a solicitor of the court of Exchequer to practise there in his name. *(ee)*

It is also declared to be lawful, for any person who shall be sworn admitted and enrolled to be an attorney, in any of his majesty's courts of record at *Westminster*, &c. by and with the consent and permission of any attorney, in any of the said other courts of record, &c. such consent being in writing, signed by such attorney, and in the name of such attorney, to sue out any writ or process, or to commence, carry on, prosecute or defend any action or actions, or any other proceedings in such court, notwithstanding such person is not sworn or admitted to be an attorney of such court. *(ff)* And where an attorney acts in the name of another, a demand of costs by the acting attorney is good. *(gg)* But where an attorney's name had been set to process without his authority, the court ordered the proceedings to be set aside, and granted an attachment against the plaintiff's attorney. *(h)* So, where process in the Common Pleas appeared to have been sued out in the name of A. by B., neither of whom were attorneys of this court, and B. had no authority from any other attorney to act in his name, the court set aside the proceedings, and ordered A. and B. to pay the costs. *(i)* And where judgment was entered up by an attorney's clerk, in the name, but without the knowledge or consent of a regular attorney, it was ordered to be set aside. *(k)*

By the statute 2 Geo. II. c. 23, § 17, "if any person, who shall be a sworn attorney of any of the courts of law aforesaid, shall knowingly and willingly permit or suffer any other person or persons to sue out any writ or process,

(d) § 1.

(e) § 3.

(f) § 20, and see stat. 34 Geo. III. c. 14, § 5. 44 Geo. III. c. 98, *Sched. A.* 48 Geo. III. c. 143, *Sched. Part I.*, and 55 Geo. III. c. 184, *Sched. Part I.*

(a) 23 Geo. II. c. 26, § 15.

(g) 6 Geo. II. c. 27, § 2.

(cc) 1 Barn. & Cres. 158. 2 Dowl. & Ryl. 302, S. C.

(bb) 2 Geo. II. c. 23, § 21.

(dd) 4 Taunt. 452, but see 1 H. Blac. 50, *semb. contra.*

(ee) 4 Taunt. 452.

(ff) 2 Geo. II. c. 23, § 10.

(gg) Say. Rep. 95.

(h) 1 Bur. 20.

(i) 4 Moore, 603.

(k) 5 Bur. 2660.

or to commence, prosecute, follow, or defend any action or actions, or other proceedings, in his name, not being a sworn attorney of one of the said other courts of law, or a sworn solicitor of the court of Chancery, or other court of equity, and shall be thereof lawfully convicted, every person so convicted shall, from the time of such conviction, be disabled and made incapable to act as an attorney in any of the courts of law aforesaid; and the admittance of such person *to be an attorney of any of the [*74] said courts of law, shall from thenceforth cease and be void."

And, by a subsequent act, (a) "if any sworn attorney or solicitor shall act as *agent* for any person or persons not duly qualified to act as an attorney or solicitor, or permit or suffer his name to be any ways made use of, upon the account or for the profit of any unqualified person or persons, or send any process to such unqualified person or persons, thereby to enable him or them to appear, act, or practise in any respect as an attorney or solicitor, knowing him not to be duly qualified as aforesaid, and complaint shall be made thereof in a summary way, to the court from whence any such process did issue, and proof made thereof upon oath, to the satisfaction of the court, that such sworn attorney or solicitor hath offended therein as aforesaid, then every such attorney or solicitor so offending shall be struck off the roll, and for ever after disabled from practising as an attorney or solicitor; and in that case, and upon such complaint and proof made as aforesaid, it shall and may be lawful to and for the said court to commit such unqualified person, so acting and practising as aforesaid, to the prison of the said court, for any time not exceeding one year."

The courts, in several recent instances, have proceeded on this statute, by ordering attorneys, who have acted as agents for, or suffered their names to be made use of, upon the account or for the profit of unqualified persons, to be struck off the roll; and the unqualified persons to be committed to prison. (b) And where a bailiff had written to an attorney for writs which the latter sent without knowing anything of the parties or circumstances; but the bailiff had never represented himself, or been considered as an attorney, nor looked for any profit upon the law proceedings; the court of King's Bench held, that though this was not a case within the statute, yet that it was a most improper practice, which the court, in virtue of its general jurisdiction over attorneys, would punish severely. (c) But the court of Common Pleas refused to strike an attorney off the roll, on an affidavit which stated, that the person who had lately been his clerk, and who lived at a town *eight* miles distant from the residence of the attorney, and carried on business at an office, over the door of which was written the attorney's name, but that he only attended on market days, and then transacted all his business at an inn; on the ground that it should have been shown that such person either participated in the profits, or carried on business on his own account. (d) In proceeding against an unqualified person, for practising in the name of an attorney, contrary to the provisions of this statute, the party is not entitled to have the *witnesses in support of the charge examined [*75]

(a) 22 Geo. II. c. 46, § 11. See also the statute 3 Jac. I. c. 7, § 2, and R. M. 1654, § 1, K. B., by which rule, attorneys dismissed by one court from their practice for misdemeanors, are not, after certificate, to be admitted to practise in another court, it being contrary to the intent of the law: And see R. M. 6 & 7 Eliz. § 4. R. M. 15 Eliz. § 8. R. T. 24 Eliz. § 6 R. M. 1654, § 1. R. H. 14 & 15 Car. II. reg. 2, C. P.

(b) 2 Dowl. & Ryl. 64. 1 Barn. & Cres. 270. 3 Dowl. & Ryl. 263, (a), S. C. *Id.* 260. 8 Moore, 214, 322. 1 Bing. 272, S. C., and see 5 Barn. & Cres. 108. 7 Dowl. & Ryl. 548, S. C.

(c) 5 Barn. & Ald. 824.

(d) 9 Moore, 157. 2 Bing. 74, S. C.

viva voce; but after the matter had been referred, by consent of counsel, to the master of the crown office, who reported the party in contempt, the court of King's Bench allowed him to bring the whole of the case under their own consideration, when brought up to be committed. (a) And, in the Common Pleas, after the court had ordered the parties to be attached, and give bail to answer interrogatories before the prothonotary, who reported them to be in contempt, for not having satisfactorily answered the interrogatories put to them; such report was holden not to be conclusive on the parties, but that they might take exceptions to any specific or material parts of it. (b) And where, after the prothonotary had made his report, it appeared that certain books of account had not been laid before him, which tended to support the answers given by one of the parties; the court ordered the prothonotary to inspect them, but would not allow a clerk who had made the entries therein, to be examined by the prothonotary, on an application made by the prosecutor for that purpose. (b)

It will next be proper to consider the *certificates* of attorneys, which were first required by the statute 25 Geo. III. c. 80. And, by a subsequent statute, (c) "every person admitted, sworn and enrolled a solicitor or attorney, &c. in any of his majesty's courts at *Westminster*, &c. or in any other court in *England*, holding place where the debt or damage shall amount to *forty* shillings or more, shall annually, between the *first* day of *November* and the end of *Michaelmas* term then next following, during such time as he shall continue so to practise in any of the said courts, or before such person shall commence, carry on or defend any action or suit, or any proceedings whatsoever, in any of the said courts, deliver in to the commissioners of the stamp duties, or to their officer appointed for that purpose, at the head office of stamps in *Middlesex*, a paper or note in writing, containing the name and usual place of residence of such person: and thereupon, and upon payment of the duties, according to the place of his residence, every such person shall be entitled to a *certificate*, duly stamped, to denote the payment of the said duties; which certificate the said commissioners shall cause to be immediately issued, under the hand and name of the proper officer, in such form as they shall devise." The period fixed for attorneys, &c. to take out their annual certificates, and pay the stamp duty thereon, was altered by the statute 54 Geo. III. c. 144, (dd) by which it is enacted, that "all attorneys, &c. who by the laws in force would be bound to take out stamped certificates, and pay the duty thereon, at the head office of stamps in *Middlesex*, annually, between the *first* day of *November* and the end of *Michaelmas* term following, shall in future take out such certificates, and pay the duty thereon, and do all other acts necessary for that purpose, annually, between the *fifteenth* day of *November* and the *sixteenth* day of *December* in each year; and in default thereof shall be subject and liable to such and [*76] the same penalties, forfeitures* and disqualifications, as they would have been, under the laws then in force, for not taking out such certificates, within the period first above mentioned: And that all certificates, which shall be taken out between the *fifteenth* day of *November* and the *sixteenth* day of *December* in any year, by attorneys, &c., thereby required to take out the same within that period, shall be dated on the *sixteenth* day of *November*; and all certificates which shall be taken out by any such persons at any other time, shall be dated on the day on which

(a) 2 Dowl. & Ry. 64.

(c) 37 Geo. III. c. 90, § 26, 28.

(b) 8 Moore, 214. 1 Bing. 272, S. C. ✓

(dd) § 13, 14.

the same shall be granted; and all such certificates respectively shall have effect and continue in force from the day of the date hereof, until the *fifteenth* day of *November* following, both inclusive, and no longer." But an attorney may sue by attachment of privilege, though his certificate has expired, and not been renewed, if the writ be sued out within a year from the expiration of his certificate.(a)

The *duties* now payable for certificates, under the last general stamp act,(b) are *twelve* pounds yearly, by every person admitted as an attorney or solicitor, in any of his majesty's courts at *Westminster*, &c., if he shall reside in the city of *London* or *Westminster*, or within the limits of the two-penny post in *England*, or within the city or shire of *Edinburgh*, and shall have been admitted, or in possession of his office, for the space of *three* years or upwards; or if he shall not have been admitted or in possession so long, *six* pounds: and if he shall reside *elsewhere*, and have been admitted or in possession of his office, for the space of *three* years or upwards, *eight* pounds; or if he shall not have been admitted or in possession so long, *four* pounds.

And, by the 37 Geo. III. c. 90,(c) "every certificate so to be obtained as therein mentioned, shall be *entered* in one of the courts in which the person described therein shall be admitted and enrolled, with the respective officer or officers of the said courts, appointed by the 25 Geo. III. c. 80, to grant certificates of enrolment or admission, within the time therein before prescribed, or before such person shall be permitted to practise as aforesaid; and the said respective officers shall from time to time, upon payment of the fee of one shilling, enter, in alphabetical order, the names of the persons described in such respective certificates, together with the places of such their residence as aforesaid, and the respective dates of such certificates, in books or rolls to be prepared for that purpose; to which books or rolls, in the said courts respectively, all persons shall and may at seasonable times have free access, without fee or reward."

By the same statute,(d) "if any person shall, in his own name, or in the name of any other person or persons, sue out any writ or process, or commence, prosecute, carry on or defend any action or suit, or any proceedings, in any of the courts aforesaid, for or in expectation of any gain, *fee or reward, or shall do any act in any of the said [*77] courts, as an attorney of such court, without obtaining a certificate in the manner before directed, or without entering the same in one of the courts aforesaid, wherein such person shall be admitted or enrolled as an attorney, &c.; or shall deliver in to any person, at the said head office, any account, containing a place of residence, as the place of his residence, contrary to the directions of the said act of the 25th year of the reign of his late majesty, with intent to evade the payment of the higher duties, every such person shall, for every such offence, forfeit and pay the sum of *fifty* pounds; and shall be made incapable to maintain or prosecute any action or suit, in any court of law or equity, for the recovering of his fees, &c." But it is no ground of objection to bail,(aa) nor for cancelling a bail bond,(b) or setting aside proceedings, that the attor-

(a) 2 Maule & Sel. 605. 5 Maule & Sel. 281.

(b) 55 Geo. III. c. 134, *Sched.* Part I. And, for the former duties, see the statutes 44 Geo. III. c. 98, *Sched.* A. 43 Geo. III. c. 143, *Sched.* Part I.

(c) § 27.

(d) § 30.

(aa) 2 Chit. Rep. 98.

(b) 1 Dowl. & Ryl. 215.

ney by whom the bail was put in, or who sued out the writ, had neglected to take out his certificate: and the circumstance of the plaintiff's cause having been conducted by an attorney, who has not obtained his certificate, does not deprive the plaintiff of his right to full costs against the defendant.(c)

Also, by the statute 44 Geo. III. c. 98, § 14, "every person who shall, for or in expectation of any fee, gain or reward, directly or indirectly, draw or prepare any conveyance of, or deed relating to, any real or personal estate, or any proceedings in law or equity, other than and except serjeants at law, barristers, solicitors, attorneys, notaries, proctors, agents or procurators, having obtained regular certificates, and special pleaders, draftsmen in equity, and conveyancers, being members of one of the four inns of court, and having taken out the certificates mentioned in the schedule to that act annexed, and other than and except persons solely employed to engross any deed, instrument, or other proceedings, not drawn or prepared by themselves, and for their own account respectively, and other than and except public officers, drawing or preparing official instruments, applicable to their respective offices, and in the course of their duty, shall forfeit and pay for every such offence, the sum of *fifty* pounds: Provided always, that nothing therein contained shall extend, or be construed to extend, to prevent any person or persons drawing or preparing any will or other testamentary papers, or any agreement not under seal, or any letter of attorney." The certificates required by the above statute are subject, by the last general stamp act,(d) to the duty of 12*l.* if the party reside in the city of *London* or *Westminster*, or within the limits of the two-penny post in *England*, or 8*l.* if he shall reside *elsewhere*: But, under the latter act, such persons only are qualified to practise, as are members of one of the four inns of court, &c.(e) A certificated conveyancer may maintain an action for his fees.(f)

An attorney is liable to penalties, for practising without obtaining or entering his certificate, according to the provisions of the statute [*78] 37 Geo. *III. c. 90, § 26, 30, though no power to sue is expressly given by that statute; for the 25 Geo. III. c. 80, § 29, which gives that power, and the 37 Geo. III. c. 90, are *in pari materia*.(aa) And if an attorney be in partnership with another, and they carry on their business together, and their joint names are put on their papers in causes in their office, either of them is liable to the penalties of the last mentioned act, for practising as an attorney, without entering his certificate; though it do not appear that one of them had any profit or advantage from the suit for which the *qui tam* action is brought.(bb) The consequence is, and it has been accordingly determined, that two attorneys or proctors cannot be sued together, as for one offence, in practising without having obtained and entered their certificate.(cc) It has likewise been determined, that the certificate act does not extend to the *county* court, though an attorney prosecute a suit there, by virtue of a writ of *justices*, for more than 40*s.*(dd) But, by the statute 44 Geo. III. c. 98, § 10, the penalties incurred by virtue of that

(c) 3 Bing. 9. 10 Moore, 261, S. C.

(d) 55 Geo. III. c. 184, *Sched.* Part I.

(e) Holt. Nl. Pri. 528.

(f) 3 Barn. & Cres. 744. 5 Dowl. & Ry. 648, S. C. 6 Dowl. & Ry. 4, S. P.

(aa) 3 Bos. & Pul. 386. 1 New Rep. C. P. 245, S. P. 2 East, 569, *contra*.

(bb) 4 Esp. Rep. 14.

(cc) 1 New Rep. C. P. 245. 2 East, 569, *contra*.

(dd) 6 Durnf. & East, 663.

or any other act of parliament, relating to the stamp duties, can only be recovered in the name of the attorney general. And acts of indemnity are occasionally passed, to relieve attorneys who have neglected to take out their certificates in due time.(e)

As a further inducement for attorneys to take out their certificates, it is enacted, by the statute 37 Geo. III. c. 90,(f) that "every person admitted, sworn and enrolled in any of the courts therein mentioned, who shall neglect to obtain his certificate thereof, in the manner before directed, for the space of one whole year, shall from thenceforth be incapable of practising in his own name, or in the name of any other person, in any of the said courts, by virtue of such admission, entry and enrolment of such person, in any of the said courts, shall from thenceforth be null and void. Provided always, that nothing therein before contained shall be construed to prevent any of the said courts from re-admitting any such person, on payment to the commissioners, of the duty accrued since the expiration of the last certificate obtained by such person, and such further sum of money, by way of penalty, as the said court shall think fit to order and direct."(g) On the above statute, it has been holden, in the Common Pleas, that where a person is admitted an attorney, and omits to take out his certificate within the year, he must be re-admitted before he can practise, though he should never have practised on his former admission.(h) And, in the King's Bench, where an attorney has *discontinued* practice, after the expiration of his certificate, though in consequence of pecuniary difficulties and *illness,(a) or of absence abroad,(b) a term's notice must be stuck up, and entered at the judges' chambers, for the purpose [*79] of re-admitting him, in like manner as upon original admission.(c)

But where an attorney *continued* to practise, after the expiration of his certificate, through the inadvertence or misconduct of his agent or clerk, in neglecting to get it renewed, the court, on an affidavit of the circumstances, will re-admit him, without giving a term's notice.(d) And where the certificate of an attorney of the Common Pleas, has been, through the mistake of his agent, filed in the King's Bench, where he was not admitted, for *four* successive years, such certificate was allowed to be entered and filed in the Common Pleas, on notice of the application being given to the stamp office.(ee) Where a term's notice was necessary, and the party intending to apply to be re-admitted on the roll, affixed his notice outside the court of King's Bench, in the morning, before the sitting of the court, on the first day of the term of which the notice was intended to be given, this was holden to be a sufficient compliance with the rule.(ff)

In the King's Bench, it is a rule, that where an agent employed to take out an attorney's annual certificate, has neglected to do so, and the attorney has from ignorance of the fact continued to practise, the court will only allow him to be re-admitted, upon payment of a fine, with the arrears

(e) See stat. 7 Geo. IV. c. 44, § 3, and other statutes referred to, *ante*, 64, 5, (h).

(f) § 31.

(g) For the evidence, in an action by an attorney for his fees, as to his not having been re-admitted, after neglecting to take out his certificate, see 5 Barn. & Cres. 38. 7 Dowl. & Ry. 512, S. C.

(h) 6 Taunt. 408. 2 Marsh. 123, S. C., and see 1 Chit. Rep. 729.

(a) 1 Chit. Rep. 207.

(b) *Id.* 208.

(c) *Ex parte Vaughan*, E. 45, Geo. III. K. B. Append. Chap. III. § 4.

(d) 1 Barn. & Ald. 189, 90. 8 Taunt. 129. 3 Moore, 578. 1 Chit. Rep. 163, 673, 692.

(ee) 4 Moore, 347.

(ff) 4 Dowl. & Ry. 646.

of duty.(g) But attorneys have been re-admitted in that court, without paying any fine or arrears, on making it appear that they had never practised,(h) or had discontinued practice after their last certificate had expired,(i) or that they were prevented from practising by illness,(k) or by being reduced to the situation of a clerk : (l) and the distinction is said to be this ; that when the party has been *practising* in the interval, he must pay the arrears of duty ; but not so when he has not practised.(m) So, in the Common Pleas, an attorney who had ceased to practise after the passing of the 25 Geo. III. c. 80, and before the operation of the 37 Geo. III. c. 90, § 31, had commenced, was re-admitted, without paying any penalty, or arrears of duty.(n) And, in a late case,(o) an attorney who had ceased to practise for *six* years, was re-admitted in that court, on payment of a nominal fine, without the arrears of duty ; on an affidavit, stating that he had discontinued to practise, on account of his affairs having become embarrassed, that he had not practised in the interval, and that no misconduct could be imputed to him in his character of an attorney.

*The rule for re-admitting an attorney is a rule to show cause ; [*80] founded on an affidavit, stating the payment of the duty on the articles of clerkship, the admission under them, and up to what time the attorney obtained his certificate. It must also be sworn, that he has since discontinued to practise ; for otherwise he might be criminally culpable : (a) and, where a considerable time has elapsed, the reason of his ceasing to take out his certificate must be stated, and how he has been since employed, in order to show, that he has not been employed in any manner that may unfit him for the duties of his profession.(b) The affidavit then states, that a term's notice has been given, when necessary of his intention to apply to the court ; and that notice of his name and place of abode, &c., has been served on the solicitor to the commissioners of stamp duties.(c) An attorney may be re-admitted on the last day of term, when notice has been stuck up all the term.(d)

An attorney, when duly admitted, enrolled and certificated, is supposed to be always present in court : and on that account has many *privileges* belonging to him, in common with the other officers of the court.[A] Where an attorney of the King's Bench or Common Pleas is *plaintiff*, he is enti-

(g) 4 Barn. & Ald. 90. For the form of affidavit for his admission, on the above ground, and the rule of court thereon, see Append. Chap. III. § 15, 16.

(h) 1 Chit. Rep. 729.

(i) 2 Dowl. & Ry. 238.

(k) 1 Chit. Rep. 101, 692.

(l) 2 Barn. & Ald. 314. 1 Chit. Rep. 102, (a), S. C., and see *id.* 692. 1 Lee's Prac. Dic. 2 Ed. 333, 4 n. 2 Marsh. 123.

(m) 2 Dowl. & Ry. 239, *per* Abbott, Ch. J.

(n) 2 Taunt. 398.

(o) 7 Moore, 410. 1 Bing. 91, S. C., and see 7 Moore, 493, 495.

(a) 1 Chit. Rep. 207, 316, 646.

(b) 2 Smith R. 155. 5 Moore, 141.

(c) For the form of this affidavit, see Append. Chap. III. § 13, and for the rule of court thereon, *id.* § 14.

(d) 1 Chit. Rep. 557, *in notis*.

[A] A plea of privilege is effectual in a suit against an attorney, commenced in a justice's court by summons. *Gilbert v. Vanderpoel*, 15 Johns. 242. *Van Alseyn v. Dearborn*, 2 Wend. 257. *Bridgeport Bank v. Sherwood*, 16 Johns. 43. *Brown v. Childs*, 17 Johns. 1. *King v. Burr*, 20 Johns. 274. The privilege of being sued by bill is personal merely, and the attorney may waive it. *Seal v. Wigram*, 12 Johns. 88. *Cole v. McClellan*, 4 Hill, 59.

tled to sue in his own court, by *attachment* of privilege;(e) and may lay and retain the venue in *Middlesex*.(f) Where he is *defendant*, he must be sued in his own court by *bill*.(gg) even as acceptor of a bill of exchange;(hh) and cannot be arrested, or holden to special bail.(ii) It is also said, that an attorney is entitled to have his cause tried at bar.(k) And as an attorney is not subject to the jurisdiction of the courts of conscience, except where he is expressly made liable thereto, as in *London*.(l) *Westminster*.(m) and the *Tower Hamlets*.(n) he may in all other cases sue,(o) and be sued,(p) in his own court for debts under *forty* shillings. But an attorney *defendant*, has not the privilege of changing the venue into *Middlesex*, when it is laid in another county.(q) In the Common Pleas, the attorneys and officers of the court ought to be sued there by *bill*, because they are supposed to be always present in court; but the serjeants and their clerks, and the clerks of the judges and prothonotaries, are, it is said, privileged to be sued in the Common Pleas by *original writ*, and not by *bill*.(r)

*Where an attorney is arrested upon process issuing out of an *inferior* court, he may sue out his writ of privilege,(a) which [*81] ought to be allowed *instanter*:(b) But if he be arrested upon process issuing out of a superior court, his remedy is by moving the court, to be discharged out of custody on common bail; or by finding special bail, and pleading his privilege in abatement. If an attorney, or other officer of the King's Bench be arrested, by process issuing out of the *same* court, he may move to be discharged on common bail.(c) But an attorney or officer of a *different* court was formerly obliged to find special bail, and plead his privilege in abatement.(d) This distinction however seems to be now abolished: and, in a late case, the court of King's Bench stayed the proceedings in an action brought in that court against an attorney of the Common Pleas, who gave notice of his privilege, but neglected to plead it, after the plaintiff had signed judgment for want of a plea.(e) So, where an attorney of the Common Pleas was arrested, on an attachment of privilege, at the suit of an attorney of the King's Bench, the latter court ordered the bail-bond to be delivered up to be cancelled, on his entering a common appearance;(f) and in a subsequent case, the proceedings were ordered to be set aside for irregularity, with costs.(g) But where an attorney, having been arrested in the beginning of *January*, put in bail above, and did not apply to the court for his discharge until the 3d of *February*, the court

(e) Gilb. C. P. 3.

(f) 2 Salk. 668. 4 Bur. 2027. 2 Blac. Rep. 1065. 3 Durnf. & East, 573.

(gg) 3 Blac. Com. 289. 3 Taunt. 166.

(hh) Doug. 312. 2 Chit. Rep. 63.

(ii) 1 Mod. 10. *Beck v. Lewin*, T. 56 Geo. III. K. B. 4 Dowl. & Ryl. 73.

(k) 6 Mod. 123. (l) Stat. 39 & 40 Geo. III. c. civ. § 10.

(m) 24 Geo. II. c. 42, § 1. Doug. 381. (n) 19 Geo. III. c. 68, § 24.

(o) Doug. 382, *in notis*. *Hussey & another v. Jordan*, T. 25 Geo. III. K. B. 7 East, 47. 3 Smith R. 52, S. C. 5 Moore, 622. 2 Brod. & Bing. 698, S. C.

(p) 2 Wils. 42. Doug. 381, but see 3 Bur. 1583, *contra*.

(q) 4 Bur. 2027. 2 Blac. Rep. 1065. *Sparke v. Stokes*, one, &c., H. 24 Geo. III. K. B. 3 Durnf. & East, 573. 2 Str. 1049, *contra*.

(r) 1 Ld. Raym. 399. 3 Salk. 283, S. C., and see Cas. Pr. C. P. 104, Pr. Reg. 380. Barnes, 371, S. C.

(a) Append. Chap. III. § 17.

(b) Cas. Pr. C. P. 2. 2 Blac. Rep. 1087, but see 10 Moore, 270.

(c) 1 Mod. 10. 2 Salk. 544. 1 Wils. 298.

(d) 2 Salk. 544. 2 Str. 864. 2 Ld. Raym. 1567, S. C. 1 Wils. 306.

(e) *Gwynne v. Toldervy*, one, &c., H. 54 Geo. III. K. B.

(f) *Beck v. Lewin*, T. 56 Geo. III. K. B.

(g) 4 Dowl. & Ryl. 73.

held the application to be too late.^(h) A defendant who is sued by *bill*, as an attorney of the court of King's Bench, not being such, may set aside the proceedings as irregular.⁽ⁱ⁾ But where, in a similar case, a rule was obtained for setting aside the proceedings, on the ground that they were absolutely void, and not merely irregular; the court held, that they were not void, but irregular only; and that the defendant, not having applied in time, could not take advantage of the irregularity.^(kk)

In the Exchequer of Pleas, an attorney, side clerk, or other officer, may sue by *venire facias*, or *capias* of privilege,^(l) and must be sued by *bill*. A person suing there by process of privilege, is entitled to have his writ sealed, without paying fees:^(m) and it is holden, that an attorney of the King's Bench or Common Pleas may be arrested and held to bail, upon a *capias* of privilege issuing out of this court.⁽ⁿ⁾ It also seems that, an officer or accountant, suing with his wife, is entitled to privilege in the Exchequer:^(o) but it is otherwise, when he is sued with her;^(p) for a bill cannot be filed against the wife, as present in court. It should also be observed, that in the Exchequer, a member of either university cannot set up his privilege, *against that of an officer or accountant, or [*82] against any person suing as a debtor; this court not being mentioned in their charter of exemption.^(a) But an attorney, not being one of the sworn attorneys of the court, is not entitled, as such, to the privilege of laying his venue in *Middlesex*.^(b)

An attorney or officer is also, by reason of the supposed necessity of his attendance in court, exempt from all offices that require *personal* service, as *sheriff*,^(c) *constable*,^(d) *overseer of the poor*,^(e) &c.; and formerly, he was not liable to serve in the *militia*;^(f) but several acts of parliament that were passed in the course of the late reign, having allowed personal service in the *militia* to be commuted for a certain sum of money, to be laid out in providing a substitute, it has been holden that this exemption no longer exists.^(g)

These privileges are allowed, not so much for the benefit of attorneys, as of their clients;^(h) and are therefore confined to attorneys who practise,⁽ⁱ⁾ or at least have practised within a year;^(k) for it is a rule, that such attorneys as have not been attending their employment in the King's Bench for the space of a year, unless hindered by sickness, be not allowed their privilege of attorneys:^(l) And an attorney, not having practised for some time previous to the issuing of the plaintiff's writ against him, is not

(h) 1 Chit. Rep. 188.

(i) 5 Maule & Sel. 324. 2 Chit. Rep. 396, S. C., and see 6 Barn. & Cres. 79, (b).

(kk) 6 Barn. & Cres. 77, (b).

(l) 9 Price, 16 Append. Chap. XIV. § 15, 16.

(m) Man. Excheq. 142, 3.

(n) *Id.* 142. 9 Price, 16. 1 Y. & J. 199.

(o) 1 Taunt. 254.

(p) Man. Excheq. 145, 6.

(a) Hadr. 188. Man. Ex. Pr. 145.

(b) 1 Price, 384.

(c) 4 Bur. 2109.

(d) Doug. 538, and see 1 Esp. Rep. 359.

(e) 2 Blac. Rep. 1126. 8 Durnf. & East, 379, (a), and see Append. Chap. III. § 18.

(f) Barnes, 42. Andr. 355. 2 Str. 1143.

(g) *Gerard's Case*, 2 Blac. Rep. 1123.

(h) 2 Wils. 44. 4 Bur. 2113. Doug. 381.

(i) 2 Wils. 232. 4 Bur. 2113. 2 Blac. Rep. 1036. 1 Bos. & Pul. 4. 2 Lutw. 1667, *contra*.

(k) Ridley and Car. E. 1656. 1 Lil. P. R. 142. *Chippendale's Case*, E. 19 Geo. III. K. B. *Sand v. Heysham*, II. 24, Geo. III. K. B. *Chrishop v. Coulthard*, E. 25 Geo. III. K. B.

(l) R. M. 1654, § 1, K. B. & C. P. 2 Maule & Sel. 605. Formerly, if an attorney of the Common Pleas absented himself from the court for two terms together, except it were by occasion of sickness, or other like urgent cause, to be allowed of by the court, he was liable to be forejudged the court, and to be no longer an attorney thereof. R. T. 24 Eliz. § 9, C. P.

privileged from being arrested thereon, and held to bail, on the ground of having recommenced his practice, and taken out his certificate, before he was actually arrested. *(mm)* But an attorney we have seen, *(nn)* may sue by attachment of privilege, though his certificate has expired, and not been renewed, if the writ be sued out within a year from the expiration of his certificate.

When the plaintiff and defendant are attorneys of *different* courts, the plaintiff is allowed his privilege of suing the defendant by attachment; *(oo)* and in this case it is commonly said, that there is no privilege against privilege; or in other words, the privilege of the plaintiff takes away that of the defendant; for the attendance of the plaintiff is as necessary in his court, as that of the defendant in his, and therefore the cause is legally attached in the court where the plaintiff is an officer. *(p)* But where the plaintiff and defendant are both attorneys of the *same* court, the defendant **is* entitled to his privilege of being sued by *bill*; *(a)* and if not so [*83] sued, he may plead his privilege in abatement, or the court on motion will stay the proceedings, but without costs. *(b)* In the King's Bench, where an action is brought by an attorney of that court, against an attorney of the Common Pleas, though the former is entitled to sue in his own court by attachment of privilege, yet he cannot arrest the defendant, and hold him to special bail. *(c)* But in the Exchequer, we have seen, *(d)* an attorney of the King's Bench, or Common Pleas, may be arrested and held to bail upon a *capias* of *privilege*, issuing out of the former court. *(d)* So, in Chancery, it has been determined, that an attorney of the King's Bench, and practising solicitor of the court of Chancery, may be arrested on an attachment of privilege, at the suit of a sworn clerk of the latter court. *(e)* And it has even been holden, that an attorney of the King's Bench may be arrested on an attachment of privilege, issuing out of the court of Common Pleas at *Lancaster*, at the suit of an attorney of that court. *(f)*

An attorney may also *waive* his privilege, either, when plaintiff, by suing as a common person, *(g)* or, when defendant, by not claiming it in due time, or in a proper manner; *(h)* And it seems that an attorney waives his privilege, by entering into a bail bond, on process issuing out of a different court; as he must be sued in the court out of which the process issued. *(i)* Where an attorney of the Common Pleas is in the actual custody of the marshal, he may be sued in the King's Bench as a prisoner, by third persons: *(k)* But where an attorney of the Common Pleas puts in bail, to an action depending in the King's Bench, he does not thereby lose his privilege; but may plead it in that action, or in any other brought against him by the *bye*: for it would be absurd, that he who founds his action on that of another,

(mm) 7 Durnf. & East, 25.

(nn) *Ante*, 76.

(oo) 2 Brownl. 266. 2 Str. 837. 1 Barnard, K. B. 182, 228, S. C. 1 Blac. Rep. 19. Barnes, 44. 2 Blac. Rep. 1325.

(p) 4 Bac. Abr. 227, and see 9 Price, 16.

(a) 2 Str. 1141. 1 Blac. Rep. 19. 2 Blac. Rep. 1085. 6 Durnf. & East, 524.

(b) 6 Durnf. & East, 524. 8 Durnf. & East, 395. Barnes, 53. *Ante*, 81.

(c) *Beck v. Lewin*, T. 56 Geo. III. K. B. 4 Dowl. & Ry. 73, per Bayley, J. *(d)* *Ante*, 81.

(e) *Wainewright v. Smith*, M. 7 Geo. IV. 1 Younge & J. 200, *(b)*.

(f) *Hopkins v. Ferrand*, 1 Younge & J. 204, *(a)*.

(g) 2 Str. 837. 1 Barnard, 228, S. C., and see 1 Bos. & Pul. 629. 2 Bos. & Pul. 29.

(h) 2 Blac. Rep. 1085.

(i) Barnes, 117, and see 3 Wils. 348. 2 Blac. Rep. 838, S. C. 1 H. Blac. 631.

(k) 1 Str. 191. 4 Barn. & Ald. 88.

should be in a better condition than the original plaintiff.^(l) Yet where an attorney, after having put in bail, waives his privilege, by pleading in *chief* in one action, it is construed to be a waiver of privilege, in all other actions brought against him by the *bye*, during the same term.^(l) And if the defendant plead his privilege, after he has waived it, the plaintiff in his replication must show the waiver, and rely upon the estoppel.^(m) It is

likewise settled, that an attorney shall not be allowed his privilege, as against the king;⁽ⁿ⁾ or where he sues or is sued *en auter droit*, as executor or administrator;^(a) or jointly with his wife,^(b) or other person who is not privileged;^(c) or where there would otherwise be a failure or defect of justice, as where an *appeal* is brought in the King's Bench, a *real* action in the Common Pleas, or a *foreign attachment* in the sheriff's court of *London*, against an attorney of a different court.^(d) But an attorney sued by *bill*, jointly with a person having privilege of parliament, does not lose his privilege.^(e)

As an attorney is entitled to many privileges, so he is subject to some *disabilities* and restrictions. By the statute 1 Hen. V. c. 4. "no *under-sheriff*, *sheriff's clerk*, receiver, or *sheriff's bailiff*, shall be attorney in the king's courts, during the time that he is in office:" which statute is enforced by rules of court,^(f) declaring that no under-sheriff, or bailiff of sheriffs or liberties, be admitted, during such their employment, to practise as attorneys, under pain of expulsion from the employment of an attorney, and not to be re-admitted." And by the statute 22 Geo. II. c. 46, § 14, "no *clerk of the peace* or his deputy, nor any under-sheriff or his deputy, shall act as a solicitor, attorney or agent, or sue out any process, at any general or quarter sessions of the peace, to be held for any place where he shall execute his office, upon pain of forfeiting fifty pounds." By rule of *Mich.* 1654, § 1, "no attorney can be *lessee* in ejectionment; or *bail* for a defendant, in any action depending in either court."^(g) By statute 5 Geo. II. c. 18, § 2, "no attorney or solicitor shall be capable to continue or be a *justice of the peace*, in *England* or *Wales*, during such time as he shall continue in the business or practice of an attorney or solicitor."^(h) By other acts of parliament,⁽ⁱ⁾ "no attorney or solicitor, or person practising as such, can be a *commissioner of the land tax*, without possessing one hundred pounds a year." And it was usual to except attorneys, who had embezzled their clients' money, out of the *insolvent debtors' acts*.^(k)

Also, by the statute 12 Geo. II. c. 113, *(l)* "no attorney or solicitor, who

^(l) 27 Hen. VI. 6, a. 31 Hen. VI. 10. Carth. 377. 1 Salk. 1, 2. 1 Ld. Raym. 135, S. C. 12 Mod. 102, 112, 535. 1 Str. 191.

^(m) 1 Ld. Raym. 136.

⁽ⁿ⁾ 1 Ld. Raym. 27. But actions *qui tam* are not considered as the king's actions. T. Raym. 275. 1 Lutw. 196. 3 Lev. 398, S. C. 1 Salk. 30. 2 Salk. 543. 3 Salk. 282. Comb. 319. 12 Mod. 74, S. C. 1 Blac. Rep. 373. Cowp. 367. Barnes, 48.

^(a) Hob. 177. 1 Salk. 2. 1 Ld. Raym. 533, S. C.

^(b) Bro. Abr. tit. Bill, pl. 2. Dyer, 377, *(a)*. 1 Taunt. 254.

^(c) 2 Rol. Abr. 274. 2 Salk. 544. 12 Mod. 163, 4. *Pratt v. Sutt*, H. 8 Geo. II. cited in 4 Bac. Abr. 223.

^(d) 1 Wms. Saund. 5 Ed. 67. 8 Durnf. & East, 417.

^(e) 4 Maule & Sel. 585.

^(f) R. M. 1654, § 1, K. B. & C. P.

^(g) See also Doug. 466.

^(h) But see 3 Taunt. 166, where it was holden, that an attorney, who was a justice of the peace for a borough, if sued by *original*, for an act done in his office as magistrate, might plead his privilege in abatement.

⁽ⁱ⁾ See the statute 30 Geo. II. c. 3, § 87, &c.

^(k) But it seems that an attorney did not come within this exception, unless he were in custody for money recovered by him as an attorney. 2 Blac. Rep. 798.

^(l) § 9.

shall be a *prisoner* in any gaol or prison, or within the limits, rules or liberties thereof, shall, during his confinement, in his own name, or in the name of any other attorney or solicitor, sue out any writ or process, or *commence* or *prosecute* any action or suit, in any courts of law or equity; and all proceedings in such actions or suits, shall be void and of none effect; And such attorney or solicitor, so commencing or **prosecuting* [*85] any action or suit as aforesaid, shall be struck off the roll, and incapacitated from acting as an attorney or solicitor for the future; And any attorney or solicitor, permitting or empowering any such attorney or solicitor as aforesaid, to commence or prosecute any action or suit in his name, shall be punished in like manner. Provided nevertheless, that nothing in the said act contained, shall extend, or be construed to extend, to prevent any attorney or solicitor so confined as aforesaid, from carrying on or transacting any suit or suits, commenced before the confinement of such attorney or solicitor as aforesaid.”(a) This statute has been held to relate only to the *prosecuting*, and not to the *defending* of suits:(b) And an attorney, when in prison, may sue by attachment of privilege, for a debt of his own.(c) So where, after an action commenced by an attorney, he became a prisoner, and then the bail-bond was assigned, and he being still a prisoner, commenced an action on the bail-bond, this was holden to be a continuance of the original suit, commenced before the attorney became a prisoner.(d) But an attorney entering a plaint, and suing out process in the county court, whilst he is a prisoner in gaol, is within the meaning of the above statute, and liable to be struck off the roll.(e)

The principal *duties* of an attorney or agent are care, skill, and integrity:[A] And, if he be not deficient in any of these essential requisites,

(a) § 12.

(b) Barnes, 263. Willes, 288, (b). S. C.

(c) 7 Durnf. & East, 671. 2 Maule & Sel. 605.

(d) Barnes, 46.

(e) 1 Barn. & Cres. 254. 2 Dowl. & Ry. 406, S. C.

[A] “An attorney impliedly undertakes, and is bound to use skill and diligence in the management of the business in which he is employed by his client. It would indeed, be very difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded, or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia*, or *lata culpa*, mentioned in some of the cases for which he is undoubtedly responsible. The cases, however, appear to establish, that an attorney is liable for the consequences of ignorance or non-observance of the rules of practice of the court; for want of care in the preparation of a cause for trial, or of attendance thereon, with his witness, and for the mis-management of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. But, on the other hand, he is not answerable for error, in judgment upon points of new occurrence, or of nice and doubtful construction, or of such as are usually entrusted to men in the higher branch of the profession of the law.

“Besides the ordinary proceedings by action for any breach of duty, and by indictment for any crime, there is a mode of proceeding against attorneys by an application to the summary jurisdiction of the court, which jurisdiction is exercised according to law and conscience and not by any technical rules. The court will, in general, compel the attorney specially to perform his duty if practicable, and will punish him for its breach. The mode of punishment (where the court interferes summarily) is either by fine, attachment, or, in very gross cases, where enough is shown to prove that the attorney is unfit to be a member of the profession, by striking him off the roll, and, if struck off by one court, he will not afterwards be admitted in any other. In some cases, the court think it sufficient to make him pay the costs incurred by the parties, by reason of his misconduct; as, where an attorney put in bail which he knew to be insufficient, and gave notice of their justification, the court ordered him to pay the costs of opposing them. It may be added, that the court will thus interfere, though the attorney may have ceased being such, if he were an attorney

he is not responsible for any error or mistake, arising in the exercise of his profession. To use the words of Lord *Mansfield*, in the case of *Pitt*

at the time the crime or misconduct complained of took place; for this purpose the maxim being, "once an attorney, always an attorney."

"The court will, in general, interfere in this summary way and strike an attorney off the roll or otherwise punish him for gross misconduct, not only in cases where the misconduct has arisen in the course of a suit, or other regular and ordinary business of an attorney, but where it has arisen in any other matter so connected with his professional character as to afford a fair presumption that he was employed in, or intrusted with it in consequence of that character." 1 Archb. Pract. p. 67, 115, 117, 8 Lond. Ed.

An attorney is liable only for gross negligence or gross ignorance in the performance of his professional duties; and this is a question of fact to be determined by the jury, and is sometimes to be ascertained by the evidence of those who are conversant with, and skilled in, the same kind of business; *Pennington v. Yell*, 6 Eng. 212. *Holmes v. Peck*, 1 Rhode Island, 242; and it is a fair presumption that an attorney acts according to the instructions of his client, unless in a case of such gross negligence, that a violation may be inferred. *Id.* *Cox v. Sullivan*, 7 Geo. Rep. 144. *Garrison v. Willcozsen*, 11 *Ibid.* 184. *Nisbit v. Lawson*, 1 Kelly, 275. *Wilson v. Coffin*, 2 Cush. 316. *Wilson v. Russ*, 7 Shep. 421. *Mardis v. Shackelford*, 4 Ala. 493. *Hoey v. Martin*, Riley, 156. *Warren v. Griswold*, 8 Wend. 665. *Gallagher v. Thompson*, Wright, 466. *Evans v. Watrous*, 2 Porter, 209.

The employment of an attorney to conduct a cause is a personal trust and confidence which cannot be delegated to another but by consent of the person interested. *Hitchcock v. McGehee*, 7 Port. 556. *Johnson v. Cunningham*, 1 Ala. 249. But, if made, the party interested may make it binding by his assent with a full knowledge of the facts. Or if he does not dissent on seasonable notice. But where notice was not given until three years after the delegation was made, silence will not be construed a ratification. *Id.*

And the attorney is entitled to the benefit of the rule that every one shall be presumed to have discharged his legal and moral obligations until the contrary shall be made to appear. *Pennington v. Yell*, 6 Eng. 212. And even then the extent of the damages must also be affirmatively shown; as where the amount of a note is alleged to have been lost by his negligence, it must be shown that it was a subsisting debt against the maker, and also that he was solvent. *Id.* And unless the latter be shown, he would be liable only for nominal damages; and under no circumstances would be liable for more than the actual damages that the client has sustained by his negligence. *Id.* *Cox v. Sullivan*, 7 Geo. Rep. 144. When an attorney undertakes the collection of a debt, it becomes his duty to sue out all processes, both mesne and final, necessary to effect that object; and not only the first execution but all such as may become necessary. *Id.* *Dearborn v. Dearborn*, 15 Mass. 316. *Crooker v. Hutchinson*, 2 Chip. 117. 1 Verm. 73, S.C. *Eccles v. Stevenson*, 3 Bibb. 517. But he is not bound to institute new collateral suits without special instructions, such as actions against the sheriff and clerk for the failure of their duty. *Id.* It would seem that he should pursue bail, however, and those who may have become bound with the defendant, in the progress of the suit, either before or after judgment. *Id.* But he is not bound to attend in person to the levy of an execution, or to search out for property, out of which to make the debt; this is the business of the sheriff; nor is he liable for any of the short comings of that officer. *Id.* And as to all professional duties, he will always be justified in ceasing to proceed with his client's cause, unless specially instructed to go on, whenever he shall be *bona fide* influenced to this course by a prudent regard for the interest of his client. *Id.* *Gleason v. Clark*, 9 Cow. 57. *Castro v. Bennett*, 2 Johns. 296. *Benton v. Craig*, 2 Miss. 198.

It has been held that money collected by an attorney for his client, must be demanded, or a direction to remit given and neglected, before a suit can be brought therefor; but where the attorney denies his liability to pay, and sets up a claim against his client, exceeding the amount collected, this amounts to a waiver of a demand. *Walratt v. Maynard*, 3 Barb. Sup. Ct. R. 584. *Krause v. Dorrance*, 10 Barr. 462. And where two attorneys collect and transmit their clients' funds in depreciated bank paper, which the clients refuse to receive, and send back with an offer to return them, and a request to make up the difference, and the attorneys decline to do any thing about it, the clients have a right to sell the paper, and recover the deficiency from the attorneys. *West v. Ball*, 12 Ala. 340. One attorney confided a note to another for collection, and took his receipt therefor, but without giving instructions with respect to the ownership. After the money was collected, it was remitted to the payee of the note, whose name, however, was indorsed on the note. Held, that this remittance (the payee not being the owner,) did not discharge the collecting attorney from liability to his immediate principal; and that the action of the latter, for the money, would not be defeated by proofs that he was himself the agent of the indorsee, unless the indorsee had asserted his right to the money as against his agent. *Lewis v. Peck*, 10 Ala. 142.

v. *Yalden*, (f) "that part of the profession which is carried on by attorneys is liberal and reputable, as well as useful to the public, when they conduct themselves with honour and integrity; and they ought to be protected, where they act to the best of their skill and knowledge: but every man is liable to error:" and his lordship added, "he should be very sorry, that it should be taken for granted, that an attorney is answerable for every error or mistake, and liable to be punished for it, by being charged with the debt sued for. A counsel may mistake, as well as an attorney; yet no one will say that a counsel who has been mistaken, shall be charged with the debt. The advice of a counsel is indeed honorary, and he does

(f) 4 Bur. 2061, and see 4 Barn. & Ald. 202. 3 Barn & Cres. 738. 5 Dowl. & Ryl. 635, S. C. 1 Ry. & Mo. 317. 2 Car. & P. 113, S. C.

It is the duty of an attorney to pay over to his client the money collected for him; and if he has any doubt whether the debts collected belonged to his client, all that he has any right to ask, is indemnity, on paying over the money. *Marvin v. Ellwood*, 11 Paige, 365. Where the evidence of a debt then due is left with an attorney, who gives a general receipt for it, it will be presumed that he received it for the purpose of collection; and if an action be brought against him for his negligence, by which the debt was lost, it is incumbent on him to show that he received it specially, and for some other purpose. *Smedes v. Elmendorf*, 3 Johns. 185. An attorney gave a receipt for certain notes for collection, and after his death an action was brought against his executors for moneys had and received, and the receipt was the only evidence relied on to charge the testator's estate. Held, that this evidence was insufficient, and that the plaintiff was bound to prove the actual receipt of money or other payment, or a discharge by the attorney on account of the notes. *Kuhn v. Hunt*, 2 Brevard, 164. An attorney at law who has collected money for his client, will, if he deliver it to a third person to carry to his client, without authority or directions from the client so to do, be liable to his client for the sum thus collected, if the same be stolen from such third person while on his way with the money, even though such person were trustworthy, and took the same care of the money that he did of his own. *Grayson v. Wilkinson*, 5 Smedes & Marsh. 268. An attorney who has collected money for his client, is bound to notify him within a reasonable time that he has it in his hands; and if he does so the client has no cause of action against the attorney to recover the money until after demand and refusal. *Denton v. Embury*, 5 Eng. 228; *Cummins v. McLain*, 2 Pike, 402; *Mardis v. Shackelford*, 4 Ala. 493; *Rathbun v. Ingalls*, 7 Wend. 320; *Taylor v. Bates*, 5 Cow. 376; *Ferguson's Case*, 6 Cow. 596; *Staples v. Staples*, 4 Greenl. 533; *Taylor v. Armisted*, 3 Call. 290; *Contra, Coffin v. Coffin*, 7 Greenl. 298. But if the attorney does not notify his client that he has collected funds on his account within a reasonable time, he will be liable to an action without special demand. *Ib.* An attorney at law, who undertakes the collection of a debt, and by gross negligence, puts it into such a situation, as to embarrass the creditor in obtaining payment, and to render the debt of less value,—as where an attorney takes the debtor's note for the debt to himself, secured by a mortgage, contrary to the creditor's directions,—is liable to his employer in an action on the case, though the debtor always has been and still is able to pay the debt. *Wilson v. Coffin*, 2 Cush. 316. If an attorney, who has commenced a suit which is alleged to be malicious, knew that there was no cause of action, dishonestly, and for some sinister view, for some ill purpose, or for some purpose of his own, which the law calls malicious, causes a party to be arrested and imprisoned, he will be liable therefor. *Burnap v. Mash*, 13 Ill. 535. When a person places a note in the hands of an attorney for collection, and takes from him a receipt for it in his own name, but does not claim it as his own, nor any lien upon it, and the note itself is payable to a third person, and not indorsed, a payment by an attorney of the proceeds of the note to the payee, will discharge him from all liability to the person who placed the note in his hands. *Peck v. Wallace*, 19 Ala. 219. When an attorney died twelve days before the return day of an execution, in a case where real estate has been attached by the original writ, without having levied the attachment, and the attachment not being subsequently levied, was lost; it was held, that the attorney was not liable for damages for the loss of the attachment. *Holmes v. Peck*, 1 Rhode Island, 242. When an attorney takes the responsibility of dismissing a suit on receiving in payment claims on other parties, he renders himself liable for the amount of the claim on which the action dismissed was founded, unless he proves that a judgment on that claim would have been of no value. *Coopwood v. Baldwin*, 25 Miss. 129.

not demand a fee for it; the attorney may demand a compensation; but neither of them ought to be charged with the debt for a mistake. Not only counsel, but judges may differ, or doubt, or take time to consider: therefore an attorney ought not to be liable, in cases of reasonable doubt." But in ordinary cases, if an attorney be deficient in skill or care, by which a loss arises to his client, he is liable to a special action on the case for damages.(g)[A] And the court, in some instances, will order an [*86] attorney to *pay costs to his own client, for *neglect*; (aa) or to the opposite party, for *vexatious* and improper conduct.(bb) So, if an attorney obtain a rule *nisi*, upon suggestions which turn out to be groundless, the court, in discharging the rule, will make him pay the costs of the application.(cc) And if a rule be made upon an attorney, for the delivery of writings, or payment of costs, &c., and it be not obeyed, the courts will enforce it by *attachment*: which is also the regular mode of proceeding against an attorney, for the non-performance of his undertaking to put in bail, (dd) &c. It is not usual, however, for the court to interfere in a summary way, for a mere breach of promise, where there is

(g) 2 Wils. 325. 8 Moore, 340. 1 Bing. 347, S. C.

(aa) Say. Rep. 50, 172. 3 Taunt. 484, and see 4 Moore, 171.

(bb) 2 Bur. 654, and see Hul. Costs, 2 Ed. 485, &c. 4 Durnf. & East, 371.(b) 3 Taunt. 492. 1 Chit. Rep. 44, 80. 5 Barn. & Ald. 533. 1 Dowl. & Ryl. 142, S. C. 3 Bing. 423.

(cc) 4 Taunt. 191.

(dd) R. M. 1654, § 10, K. B. R. M. 1654, § 13, C. P. 6 Mod. 42, 86. 1 Durnf. & East, 422, and see Cowp. 845. 4 Taunt. 881. 5 Barn. & Ald. 482. 1 Barn. & Cres. 160. 2 Dowl. & Ryl. 307, S. C. 3 Barn. & Cres. 597. 5 Dowl. & Ryl. 389, S. C. 3 Bing. 70. 10 Moore, 360, S. C. but see 8 Moore, 208.

[A] Perhaps, whenever an attorney disobeys the lawful instructions of his client, and a loss ensues, he is responsible for that loss to its actual extent. *Gilbert v. Williams*, 8 Mass. 51. But he is not liable in damages, where he acts honestly, and to the best of his ability. *Lynch v. Commonwealth*, 16 S. & R. 368. See remarks in this case *per Huston, J.*, p. 369. It has been held that the negligence of the attorney of the defendant is not a sufficient cause for setting aside a judgment against him. *Foster v. Jones*, 1 M'Cord, 116. But irregularities which arise from the neglect of attorneys will be corrected in the discretion of the Court. See page 161, note [A]. And a party who suffers injury by an attorney's appearing for him without authority, has a remedy by action. *Field v. Gibbs*, Peters, C. C. 155. *Smith v. Bowditch*, 7 Pick, 138. Whenever a sworn attorney of the court enters his appearance for a party, the latter is bound by any admission made by him, in writing, though out of court, concerning the facts in the cause, until the appearance is withdrawn, or the party revokes the attorney's authority and gives notice of the revocation. Until the appearance is withdrawn or the authority revoked, and the revocation notified, the party cannot give evidence, on the trial of the cause, that the attorney had no authority in fact. *Lewis v. Sumner*, 13 Met. 269.

EXTENT OF LIABILITY.—An attorney who may be chargeable for negligence, is liable only to the extent of the injury his client has received. *Suydam v. Vanee*, 2 M'Lean, 99. As, if he is employed to defend a suit, and fail to do so, he is liable to the party injured, to the extent of the damages actually suffered; if he can show that the defence he was employed to make was not a good one, he would be liable, at most, only to nominal damages. *Grayson v. Wilkinson*, 5 Smedes & Marsh. 268. See preceding note. An attorney is not chargeable with interest on the moneys of his principal, unless he is in default, or has employed the money for the purpose of gain to himself. *Williams v. Storrs*, 6 Johns. Ch. 353. *Roots v. Stone*, 2 Leigh, 680. Though where he is chargeable with negligence, his contract is violated, and an action lies immediately, though, probably, in that event, only nominal damages could be proved or recovered; on the other hand, the proof of actual damage may extend to facts growing out of the injury, even up to the day of the verdict. *Wilcox v. Plummer*, 4 Pet. 172. *Stevens v. White*, 2 Wash. 203. *Palmer v. Ashley*, 3 Pike, 75. And although liable for the debt lost by his negligence, he is not of course liable for the loss of the evidence of the debt; and in a suit against him for such a loss, he may show that the plaintiff had another remedy, which he has successfully pursued. *Huntington v. Rummill*, 3 Day, 390.

nothing criminal;(e) or on account of negligence or unskilfulness,(f) except it be very gross;(g) or for the misconduct of an attorney, independently of his profession.(h)

It was formerly the duty of attorneys to appear personally, in the King's Bench, on or before the fourteenth day of *Michaelmas* term, and the seventh day of every other term:(i) and they are required, when called upon, to attend the court on motions,(k) the judges on summonses, and the master on appointments.(l) And, on every appointment to be made by the master, the party on whom the same shall be served, shall attend such appointment, without waiting for a second; or in default thereof, the master shall proceed *ex parte* on the first appointment.(m)

When an attorney once appears, or undertakes to be attorney for another, he shall not be permitted to withdraw himself;(n) and it is said to be his duty to proceed in the suit, although his client neglect to bring him money:[A] and therefore if, on that account, he neglect to proceed, according to the practice of the court, whereby judgment of *nonpros* is signed against the plaintiff, the court will make a rule upon the attorney to pay the costs of such judgment, together with the costs of the application.(o) It is even said to have been determined, in the Common Pleas, that an attorney having quitted his client before trial, could not bring an action for his bill.(p) So, in Chancery, it has been holden, that a solicitor proceeding to a certain length in a cause, shall not leave it there, but shall go *on:(a) And, in that court, a solicitor having de- [*87]
clined to act for his client, has no lien for his costs upon a fund in court.(b)

When *writings* come to an attorney's hands, in the way of his business as an attorney, the court on motion will make a rule upon him, to deliver them back to the party,(c) on payment of what is due to him;(d) and particularly when he has given an undertaking to re-deliver them:(ee) And an attorney, when ordered to deliver up the papers of his client, must deliver up the drafts and copies of deeds, for which he has charged and been paid, as well as the deeds themselves. 7 Barn. & Cres. 528. 1 Man. & Ryl. 306, S. C. But when they come to his hands in any other manner, or on any other account, the party must resort to his action.(ff) And accordingly, in a late case,(gg) the court refused to proceed summarily against a

(e) 2 Wils. 371, and see 2 Moore, 665. 1 Bing. 102, 105.

(f) 4 Bur. 2060. 2 Blac. Rep. 780. 1 Chit. Rep. 651, but see 3 Atk. 568. 1 Chit. Rep. 651, 2. (a).

(g) Say. Rep. 50, 169.

(h) But see 4 Barn. & Ald. 47. 2 Chit. Rep. 68. 1 Bing. 91.

(i) R. M. 1654, § 1. R. T. 14 Car. II. reg. 2, K. B. R. M. 15 Eliz. § 1. R. M. 1654, § 1 R. E. 12 Jac. I. § 4. R. H. 14 & 15 Car. II. reg. 2, C. P.

(k) R. E. 1656. R. E. 14 Car. II. K. B.

(l) R. H. 14 & 15 Car. II. reg. 1, K. B.

(m) R. H. 32 Geo. III. K. B. 4 Durnf. & East, 580.

(n) 1 Sid. 31.

(o) Say. Rep. 173, but see Man. Ex. Pr. 585, 6.

(p) 14 Ves. 272, 3.

(a) 14 Ves. 196.

(b) *Id.* 271, and see 1 Swanst. 1, 3 Swanst. 93.

(c) 1 Salk. 87. 1 Chit. Rep. 98.

(d) Say. Rep. 1 Ken. 129, S. C. and see 6 Ves. 425, in Chan.

(ee) 1 Str. 621. 8 Mod. 339, S. C.

(ff) 1 Salk. 87.

(gg) 6 East, 404. 2 Smith R. 409, S. C.

[A] Neither will an attorney be allowed, during the pendency of a cause, to extort from his client unreasonable compensation for his services, though after the cause is ended the court will not interfere in respect to any compensation which the client may make. *Phillips v. Overton*, 4 Hay. 291. *Lecatt v. Sallee*, 3 Porter, 115. *Bibb v. Smith*, 1 Dana, 580. *Rose v. Mynatt*, 7 Yerg. 30.

steward, who was an attorney, to compel him to account before the master, for receipts and payments in respect of a mortgaged estate, and to pay the balance to his employer, and deliver up on oath all deeds, writings, &c., relative to the estate; this being the proper subject of a bill in equity, and not a case for a *mandamus*, to compel a steward of a manor to deliver up court rolls, &c. So the court would not compel an attorney, upon a summary application, to deliver up, on payment of his demand, a lease put into his hands, for the purpose of making an assignment of it; there being no cause in court, nor any criminal conduct imputed to him in respect of it: *(h)* Nor will they make an order on an attorney, to deliver up a deed, which he holds as party and trustee. *(i)* And where an attorney had deeds, &c., in his custody, of two co-defendants, the court of Common Pleas would not refer it to the prothonotary, to ascertain which of them he should deliver over to one defendant, on his paying the attorney's debt and costs. *(k)* When something, however, is to be done, for which a *mandamus* would lie, as the giving up of court rolls, &c., the court will entertain a summary jurisdiction over an attorney, in obliging him to deliver them up, on satisfaction of his lien: *(l)* And if a third person appear to be interested therein, the court will take a security, from the person to whom they are delivered, to produce them on demand, for the inspection of such third person. *(l)* And where the employment of an attorney is so connected with his professional character, as to afford a presumption that his employment was in consequence of that character, the court will interfere in a summary way, to compel him faithfully to execute the trust reposed in him: Therefore, where an attorney was employed by A. to collect and get in the effects due to him as administrator of another person, the court compelled the attorney to render an account to the executors of A., of the moneys, &c., received by him, although he had never been employed by A. or his executors, to conduct any suit, in law or equity, on his or their behalf. *(m)* The court [*88] has also, we have *seen, *(a)* a summary jurisdiction over matters in difference between attorneys and their clerks.

For the reformation and punishment of abuses in general, there is an old rule of court, *(b)* which has, however, fallen into disuse, that a jury of able and credible officers, clerks, and attorneys, shall be impanelled once in three years, and sworn to inquire; 1. Of the points usually inquirable by the writ, *viz:* falsities, contempts, misprisions, and offences: 2. Of such who have been admitted attorneys or clerks, and are notoriously unfit; their names to be presented to the court, and they to be punished or removed, as the case shall require: 3. Of new or exacted fees, *(c)* and of those that have taken them, under whatsoever pretence; and to prepare and present a table of the due and just fees, that the same may be fixed and continue in every office; and likewise for the Marshalsea and Fleet prisons: And that some persons

(h) 8 East, 237.

(i) 5 Taunt. 364.

(k) 7 Taunt. 391. 1 Moore, 99. S. C.

(l) 3 Durnf. & East, 275, and see 2 Blac. Rep. 912. 5 Taunt. 206. 6 Taunt. 105.

(m) 4 Barn. & Ald. 47, and see 2 Chit. Rep. 68. 7 Moore, 437. 1 Bing. 91, S. C.

(a) *Ante*, 68.

(b) R. M. 1654, § 3, K. B. & C. P., and see R. E. 9 Eliz. C. P., which contains the writ to summon the jury, and lord chief justice Dyer's charge thereon.

(c) As to the fees of attorneys and officers of the court, see R. T. 35 H. VI. § 5, 6, 7, 8, R. M. 6 & 7 Eliz. § 1, 2. R. M. 15 Eliz. § 5, 6, 11, 12, 13. R. H. 14 Jac. I. reg. 2, § 1. R. M. 17 Jac. I. C. P. See also stat. 3 Geo. IV. c. 69, to enable the judges of the several courts of record at Westminster, to make regulations respecting the fees of the officers, clerks, and ministers of the said courts. 3 Dowl. & Ryl. 602.

be enjoined and sworn to give evidence, *viz.* some clerks of the courts, and some attorneys in every county, not excluding others.

When an attorney is charged by affidavit, with any fraud or malpractice in his profession, contrary to the obvious rules of justice and common honesty, the court, on motion, will order him to answer the matters of the affidavit; [A] and, in general, if he positively deny the malpractices imputed to him, they will dismiss the complaint; but otherwise they will grant an attachment. (d) And where an attorney, required to answer the matters of an affidavit, swore in his exculpation to an incredible story, the court of King's Bench granted an attachment against him, though he positively denied the malpractices with which he was charged. (e) And where an attorney had behaved himself in such a manner, as to afford reasonable ground for thinking that he had misconducted himself in his professional character, although it turned out, upon investigation, that there was no sufficient ground for imputing actual misconduct to him, the court would not give him his costs of the application. (f) But the court will not call upon an attorney summarily, to answer the matters of an affidavit, charging him with an indictable offence; but will leave the parties complaining to prosecute for the same. (g) It has been doubted, whether the affirmation of a *Quaker* is admissible, to call upon an attorney of this court, to answer the matters of an affidavit: (h) and the true distinction, to be collected from all the cases upon the subject, seems to be this; that if the object of the *suit or proceeding be to recover a debt, or to give to a party any [*89] legal civil right, the affirmation of a *Quaker* is admissible; and actions on penal statutes are to be considered as actions for debts; but that where the object is not to give to the party any legal civil right, but to punish a person who has done something wrong, the affirmation of a *Quaker* is not admissible. (a) In the Common Pleas, if an attorney do any thing wrong, *quatenus* an attorney, in an inferior court, the court will oblige him to answer the complaint. (b)

When an attorney has been fraudulently admitted, (c) or convicted (after his admission,) of felony, (d) or other offence which renders him unfit to be continued an attorney, (e) or has knowingly suffered his name to be made use of by an unqualified person, (f) or acted as agent for such person, (g) or has signed a fictitious name to a demurrer, as and for the signature of a barrister

(d) 1 Chit. Rep. 186, and see Bac. Abr. tit. *Attorney*, II. Append. Chap. III. § 19.

(e) 6 Durnf. & East, 701.

(f) 3 Dowl. & Ryl. 226.

(g) 1 Bing. 102. 7 Moore, 424, S. C. 1 Bing. 142.

(h) 1 Dowl. & Ryl. 121.

(a) 1 Dowl. & Ryl. 124, per *Bayley J.*

(b) 2 Wils. 382, and see 3 Dowl. & Ryl. 602.

(c) 2 Blac. Rep. 991. *Ante*, 67.

(d) Cowp. 829.

(e) 6 East, 143, and see 1 Chit. Rep. 557, *in notis.*

(f) *Ante*, 73, 4.

[A] Attorneys and solicitors are public officers, and are under the government of the several courts, in regard to their behaviour to their clients. *Merritt v. Lambert*, 10 Paige, 352, affirmed, *Wallis v. Toulat*, 2 Den. 607. And may be punished for uttering slanderous words. *King v. Wheeler*, 7 Cow. 725. It seems that proceedings on motion against an attorney for money collected, is no bar to a recovery in an action on the case for damages. *Corpund v. Balerin*, 25 Miss. 129. The removal of a solicitor from his office, as solicitor of the court of chancery, for malpractice, deprives him of the power to practise as solicitor, attorney, or counsel, in any other court. *Matter of Peterson*, 3 Paige, C. R. 510. And an attorney may be removed from office, or suspended from practice in the Common Pleas by that court, on good cause shown; but it is said that ignorance of the law is not a good cause. *Bryant's Case*, 4 Foster, 149.

ter, *(gg)* or otherwise grossly misbehaved himself, *(hh)* the court will order him to be struck off the roll. If an attorney practise, after he has been convicted of forgery, perjury, subornation of perjury, or common barratry, he is liable to be transported. *(i)* And where an attorney had been struck off the roll of the court of King's Bench, on the report of the master, for misconduct, the court of Common Pleas on motion, supported by an affidavit of the master's report, struck him off the roll of the latter court. *(k)* But, in a subsequent case, the rule for striking him off the roll was refused; the contents of the affidavits, on which the court of King's Bench acted, not having been stated, and there being no proof or allegation that the attorney had been struck off for a misdemeanor. *(l)* And striking an attorney off the roll is not always understood to be a perpetual disability; for the court have in some instances permitted him to be restored, considering the punishment in the light of a suspension only. *(m)*

An attorney may also be struck off the roll at his own instance, as for the purpose of being called to the bar, *(n)* &c. : and if he be afterwards desirous of being restored, he must, if called to the bar, first apply to the inn of court where he was called, to be debarred: *(o)* But an attorney cannot be struck off the roll at his own instance, though he has never practised, without an affidavit that no proceedings are pending against him. *(p)* The mode of re-admitting an attorney, who has been struck off the roll at his own instance, is pretty much the same with that of re-admitting him, when he has not taken out his certificate, which has been already

[*90] *treated of. *(a)* In general, he must satisfy the court that he ought to be restored; *(b)* and, on one occasion, *(c)* they required the like notice to be stuck up, and entered at the judge's chambers, as upon an original admission: The court will also make him consent to take no advantage of his privilege, in any action then depending. *(d)* But the statute 37 Geo. III. c. 90, § 31, being confined to attorneys who have neglected to take out their certificates, does not apply to those who have been struck off the roll at their own instance; and of course the latter may be re-admitted, without paying any fine or arrears of duty. *(e)*

(gg) 4 Dowl. & RyL. 738.

(hh) *Potter's case*, H. 26 Geo. III. K. B. *Priddle's case*, E. 27 Geo. III. K. B.

(i) Stat. 12 Geo. I. c. 29, § 4.

(k) 1 Brod. & Bing. 522. 4 Moore, 319, S. C.

(l) 3 Brod. & Bing. 257. 7 Moore, 64, S. C. *Ante*, 67.

(m) 1 Blac. Rep. 222. The like was done by the court, in Trin. 37 Geo. III. K. B.

(n) Append. Chap. III. § 21, 2.

(o) Doug. 114.

(p) 1 Chit. Rep. 557, *in notis*, and see *id.* 692. 6 Ves. 11. 8 Ves. 33. Append. Chap. III.

§ 21. *(a)* *Ante*, 79.

(b) *Ex parte Sambridge*, T. 25 Geo. III. K. B., and see 1 Chit. Rep. 692.

(c) *Ex parte Vaughan*, E. 45 Geo. III. K. B. *Ante*, 79.

(d) Doug. 114. Barnes, 42.

(e) 2 Barn. & Ald. 315, *(a)*.

*CHAPTER IV.

Of the MEANS of COMMENCING personal ACTIONS, in the KING'S BENCH, COMMON PLEAS, and EXCHEQUER; and the PROSECUTION and DEFENCE of them in PERSON, or by ATTORNEY: and of PAUPERS, and INFANTS.

THE means of commencing personal actions, in the court of King's Bench, conformable to its jurisdiction,(aa) are—

I. By ORIGINAL WRIT;

1. Against *common* Persons.
2. Against *Peers* of the Realm, and *Members* of the House of Commons.
3. Against *Corporations*, and *Hundredors*.

II. By BILL OF MIDDLESEX, or LATITAT.

III. By ATTACHMENT OF PRIVILEGE, at the suit of *Attorneys*, and *Officers* of the Court.

IV. By BILL;

1. Against *Members* of the House of Commons.
2. Against *Attorneys*, and *Officers* of the Court.
3. Against *Prisoners*, in custody of the Marshal, or Sheriff, &c.

In the Common Pleas, the means of commencing personal actions, are first, by *original writ*, issuing out of Chancery; which is either a *special* original, adapted to the nature of the action, or a *common* original, in *trespass quare clausum fregit*: The former, though it may be had in any case, is only necessary in the first instance against *peers*, *corporations*, and *hundredors*; the latter, not requiring personal service, is sometimes used, when the defendant keeps out of the way, so that he cannot be arrested, or personally served with process: Secondly, by *capias quare clausum fregit*, founded on a supposed original, which is the common mode of commencing actions in this court, and answers to the bill of *Middlesex* or *latitat* in the King's Bench: Thirdly, by *attachment of privilege*, at the suit of *attorneys* and *officers* of the court: Fourthly, by *bill*, which is twofold; first, against *attorneys* and *officers*; and secondly, against *members* of the house of commons.(b) It has been said, that if a man be in the *Fleet*, a plaintiff may have a *bill* of debt against him, in the same manner as, in *the King's Bench, against a man [*92] in custody of the marshal;(a) though *Fitzherbert* adds, that it was not usual. In practice, actions against prisoners in custody of the warden of the *Fleet*, are commenced in the same manner as those against other persons, by *original writ*.

In the Exchequer, the means of commencing personal actions are first, by *venire facias ad respondendum*,(bb) which is in nature of an original

(aa) *Ante*, 37.

(b) 2 *Ld. Raym.* 1442, per *Strange*, arg., and see the case of *Dawkins v. Burridge*, *id. ibid.* 2 *Str.* 734, *S. C.* *Ante*, 38.

(a) *Fitz. Abr. tit. Bill*, 18, 3 *H.* 6, 26, and see 3 *Bos. & Pul.* 12, (a).

(bb) *Append. Chap. VIII.* § 76, &c.

writ; and was the process used at common law, against persons having privilege of parliament: (c) Secondly, by *subpœna ad respondendum*, (d) which is a process directed to the defendant, analogous to the *subpœna* in Chancery, or on the equity side of the Exchequer: Thirdly, by *quo minus capias*, (e) which answers to the bill of *Middlesex* or *latitat* in the King's Bench, and *capias quare clausum fregit* in the Common Pleas: Fourthly, by *venire facias*, (f) or *capias of privilege*, (g) at the suit of *attorneys* and *officers* of the court: and lastly, by *bill*, which is threefold; first, against *attorneys* and *officers*; (h) secondly, against *members* of the house of commons, (i) on the statute 12 & 13 W. III. c. 3, § 2; and thirdly, against *prisoners*, (k) in custody of the sheriff, &c., or warden of the *Fleet*. (l) In an *inferior* court, it is no ground of error, upon a judgment after verdict, that the plaint was levied before the cause of action accrued: (m) But it seems that a custom to issue a summons and attachment at the same time, is bad in law. (n)

In the prosecution and defence of personal actions, the parties must appear in *person*, or by *attorney*: or, in case of infancy, by *prochein amy* or *guardian*.

At common law, the plaintiff and defendant must, in general, have appeared in *person*: and could not have appeared by *attorney*, without the king's special warrant, by writ or letters patent. (o) But a corporation aggregate, not being capable of a personal appearance, could only have appeared by *attorney*, appointed under their common seal. (p) And now, by the statute of *Westm.* 2, (13 Edw. I.) c. 10, a general liberty is given to the parties, of appearing by *attorney*. (q) Yet there are cer-
 [*93] tain persons, such *as *feme covert*s, (a) and *idiots*, (b) who, for want of legal discretion, are incapable of appointing an attorney; and must therefore appear in *person*: And any one else, if he think proper, may still appear and prosecute or defend his suit, in the same manner; (cc) which is usually done by attorneys and prisoners. A plaintiff

(c) Man. Ex. Pr. 32.

(d) Append. Chap. VIII. § 93, &c.

(e) *Id.* § 110, 11. And, for the entry of a *quo minus*, with the sheriff's return of *non est inventus*, and award of *alias*, see *id.* § 112.

(f) Append. Chap. XIV. § 15.

(g) *Id.* § 16.

(h) *Id.* § 29, 30.

(i) *Post*, Chap. VI., and see Man. Ex. Pr. Chap. V.

(k) Append. Chap. XV. § 23, 4.

(l) See further, as to the means of commencing personal actions in the Exchequer, Steph. Pl. 53, 4; 59, 60.

(m) 3 Barn. & Ald. 605, but see Doug. 61.

(n) 3 Barn. & Cres. 772. 5 Dowl. & Ry. 719, S. C.

(o) Co. Lit. 128, a. 2 Inst. 249, 378. F. N. B. 25. 1 Mod. 244. 2 Mod. 83, S. C., and see Steph. Pl. Append. ix. x.

(p) Bro. Abr. tit. *Corporation*, 28. Co. Lit. 66, b. Com. Dig. tit. *Pleader*, 2 B. 2. But see the Mayor of *Thetford's* case, 1 Salk. 192, wherein it was laid down by Holt, Ch. J., that though a corporation cannot do an act *in pais*, without their common seal, yet they may do an act upon record: and that is the case of the city of *London*, every year, who make an attorney by warrant of attorney in the King's Bench, without either sealing or signing: the reason is, because they are estopped by the record, to say it is not their act. And see Man. Ex. Pr. 3.

(q) Gilb. C. P. 32, 3. 2 Inst. 376, F. N. B. 25. *Ante*, 60.

(a) 3 Taunt. 261.

(b) Co. Lit. 135, b, 2 Inst. 390, F. N. B. 27, but see 2 Wms. Saund. 5 Ed. 335, where an *idiot* appeared by her *friend*, and assigned for error, that being an *idiot*, she had previously appeared and defended the action by *attorney*: And note, in Co. Lit. 135, b, it is said, that the suit by *idiots*, &c., must be in their name, but shall be followed by others. *Lunatics*, it is said, if under age, must appear by guardian: if of full age, by attorney. 4 Co. 124, b, and see Bac. Abr. tit. *Idiots* and *Lunatics*, G. 2 Wms. Saund. 5 Ed. 333, (4).

(cc) Say. Rep. 217.

may sue, in the Common Pleas, upon a penal statute, in his own name, without an attorney; and putting "*plaintiff's attorney*" after his name, in the notice on the process, is no irregularity, being only in compliance with the 5 Geo. II. c. 27, § 4.(d)

Attorneys were anciently appointed in court, when actually present:(e) but they are now usually appointed out of court, by *warrant* of attorney;(f) which should regularly be in *writing*; but an authority by *parol* is said to be sufficient to support a judgment;(g) and even if an attorney appear without warrant, it is a good appearance as to the court, though he is liable to an action.(h) So, after an order of *nisi prius* had been made to refer a cause to arbitration, with the consent of the defendant's counsel and attorney the court of Common Pleas would not set it aside, on an affidavit by the defendant, expressly denying his authority to refer.(i) And where an authority was given to an attorney, to protect the defendant from arrests, and before it was countermanded, the attorney gave an undertaking to put in bail for the defendant, the court would not set aside the proceedings, on behalf of the latter, although he disclaimed the authority of the attorney.(k) It seems, however, that when an action is brought by an attorney, without proper authority, the court will set aside the proceedings; for otherwise the defendant might be twice charged.(l) And where an attorney appears without warrant, the court will set aside a judgment entered against the defendant, if the attorney be not responsible; for otherwise the defendant could have no remedy against him.(m)

The warrant of attorney continues in force until the judgment, and for a year and a day afterwards, in order to have execution, &c.(n) unless it be sooner countermanded by the order of the principal, or determined by the death of the attorney. And a defendant, having appeared to the action by one attorney, cannot, in the same cause, make any application to the court by another, without having obtained an order for changing his attorney.(o) But a warrant of attorney for the plaintiff, in the action against the *principal, cannot extend to a *scire facias* against the bail,(a) [*94] or to revive the judgment,(b) but there must be a new warrant of attorney; because this is a new cause, and different record. And, as a *scire facias* is a new action, it may be sued out by a new attorney, without leave of the court for changing the attorney, or giving notice that the old attorney is changed.(c) So the defendant in the original action need not obtain a judge's order to change his former attorney, upon bringing a writ of error.(d) And the plaintiff, in the Common Pleas, may sue out execution by a different attorney from the attorney in the cause, without obtaining an order of court for changing the attorney.(e)

When an attorney having been retained to defend a cause, has undertaken to appear, the defendant is not allowed to countermand the appearance, after

(d) 2 H. Blac. 600.

(e) 1 Wils. 39.

(f) Steph. Pl. 32. Append., Chap. IV. § 1, 2.

(g) 2 Keb. 199. 1 Lil. Pr. 134, 137.

(h) 1 Keb. 89.

(i) 3 Taunt. 486, and see 1 Salk. 86. 1 Chit. Rep. 142.

(k) 1 Chit. Rep. 193.

(l) 1 Durnf. & East, 62. 1 Chit. Rep. 194.

(m) 1 Salk. 88. 6 Mod. 16, S. C.

(n) 2 Inst. 378. Gilb. Exec. 92, 3. Run. Eject. 2 Ed. 428. 2 Bos. & Pul. 357, (b).

(o) 1 Barn. & Cres. 654.

(a) 1 Salk. 89. 2 Salk. 603. 2 Ld. Raym. 1252, 3, S. C.

(b) Cro. Eliz. 177. 2 Ld. Raym. 1043.

(c) Say. Rep. 218.

(d) 7 Durnf. & East, 337.

(e) 2 Bos. & Pul. 357.

his retainer. *(f)* But, after appearance, he may change his attorney by rule of court, or order of a judge, on payment of what is due to him. *(g)* For this purpose, a summons should be taken out, and judge's order obtained thereon; *(h)* a copy of which order should be served on the opposite attorney: and it is not necessary, on changing an attorney, to file a new warrant. *(i)* When an attorney is thus changed, the attorney newly coming in is bound to take notice at his peril, of the rules to which the former attorney was liable: *(k)* And till an order is obtained, the opposite party and his attorney are justified in considering the former attorney as being still employed; and are not bound to take notice of any proceedings in the name of another attorney: Therefore, payment to the plaintiff's late attorney, changed without leave of the court, has been held to be good: *(l)* and notice of justifying bail, *(m)* or a plea put in, *(n)* by a new attorney, without any order for changing the attorney in the cause, is irregular; and the plaintiff is not bound to accept such notice or plea. But the sheriff or his bail may put in and justify bail above, by their own attorney. *(o)* And where the defendant is a prisoner, notice of justification may be given by a new attorney, without an order for changing the attorney before employed. *(p)* So, where a plea had been put in by a new attorney, without any order for changing the attorney, it was holden by the court of Common Pleas, that the plaintiff waived the irregularity, by taking the plea out of the office, and keeping it. *(q)* And a party called upon to show cause, may [*95] oppose the rule in *person*, after an order has been obtained *for changing the attorney, although a copy of it has not been served on the opposite party. *(aa)* If an attorney *die*, pending the suit, his warrant is determined: *(bb)* and by stat. 4 Hen. IV. c. 18, the justices shall make another in his place: In such case, it is necessary to give notice to the opposite party, of the appointment of a new attorney, before any proceedings can be taken by him; *(c)* and if the party who employed him, having notice of his death, will not appoint another attorney, his adversary may proceed in the action. *(d)*

At common law, the warrants of attorney might have been *filed*, and entered of record, at any time before judgment: *(e)* but there are several acts of parliament, *(f)* requiring it to be done sooner, under severe penalties. By the last of these acts it is provided, that "the attorney for the plaintiff shall file his warrant of attorney, with the proper officer, the same term he declares; and the attorney for the defendant, the same term he appears, under the penalties inflicted by former laws." Upon this act of parliament, the court of King's Bench made a rule, *(g)* "that the defendant's attorney, at the time of his appearance, shall give the plaintiff's

(f) R. M. 1654, § 10, K. B. R. M. 1654, § 13, C. P., and see 1 Chit. Rep. 193. *Ante*, 93.

(g) 1 Lil. P. R. 134, 143. 8 Mod. 306. 12 Mod. 440.

(h) Append. Chap. IV, § 6, 7.

(k) R. M. 1654, § 10, K. B. R. M. 1654, § 13, C. P.

(i) 1 Taunt. 44.

(l) 1 Blac. Rep. 8.

(m) 2 Blac. Rep. 1323. Doug. 217. 6 Taunt. 532. 2 Marsh. 257, S. C. 7 Taunt. 48. 2 Marsh. 365, 6, S. C.

(n) 6 East, 549, but see 13 Ves. 161, 195, in Chan.

(o) 7 Taunt. 48. 2 Marsh. 365, 6, S. C. 1 Chit. Rep. 81. 2 Barn. & Ald. 604. 1 Chit. Rep. 329, S. C.

(p) 2 New Rep. C. P. 509.

(q) 1 Chit. Rep. 291.

(bb) 1 Lil. P. R. 141.

(aa) 4 Taunt. 669.

(c) 1 Taunt. 342.

(d) 1 Lil. P. R. 137. Sty. P. R. 13. 2 Keb. 275.

(e) 41 Edw. III. 1, b, but see 1 Wils. 39.

(f) 18 Hen. VI. c. 9. 32 Hen. VIII. c. 30, § 2, 3. 18 Eliz. c. 14, § 3. 4 & 5 Ann. c. 16, § 3.

(g) R. M. 5 Ann. 2 K. B., and see R. H. 2 & 3 Jac. II. C. P.

attorney, the warrant of attorney for the defendant; and at the time of delivering the copy of the declaration, or taking it out of the office, when filed, shall pay *four* pence for the said warrant: which warrant of attorney the plaintiff's attorney shall file, with the officer appointed for filing it, at the same time he files, or ought to file, the warrant of attorney for the plaintiff. And if the defendant's attorney refuse to pay the same, the plaintiff's attorney may sign judgment." Notwithstanding these regulations, however, it has been determined, that the warrants of attorney may be *filed*, so as to support the proceedings, at any time *pendente lite*, or before final judgment; though the attorney may be fined, for not filing them in due time.^(h) And the plaintiff, in the King's Bench, cannot now sign judgment, for the defendant's refusing to pay *four* pence for the warrant of attorney, when a copy of the declaration is delivered to him.⁽ⁱ⁾

It was anciently the course of the King's Bench, to *enter* the warrants of attorney on a particular roll, kept for that purpose:^(k) but this course was altered in the time of *Wright*, Ch. J., who caused them to be entered on the top of the issue roll,^(l) as the practice is at this day. In the Common Pleas, they are still entered by the clerk of the warrants, on distinct rolls,^(m) which are filed in the bundle of *common* rolls in that court: And it is a rule, that "the clerk of the treasury shall not sign or seal any *record of *nisi prius*, unless the same be first signed [*96] or stamped by the clerk of the warrants, or his deputy; nor shall the *exigenter* receive any *pluries capias*, in order to make an *exigent* or proclamation thereon, before the same is so signed or stamped:"^(a) And no judgment whatever, (except final judgments upon *postea* and writs of inquiry, and *nonprosses*,) shall be signed by any of the prothonotaries, unless the stamp of the clerk of the warrants be first impressed on the paper, whereon such judgment is to be signed, whereby it may appear that warrants of attorney are duly filed.^(b) The *want* of a warrant of attorney is *aided*, after verdict, by the statutes of jeofails:^(cc) and by the statute of 8 Hen. VI. c. 12, § 2, a misprision of a clerk in the warrant may be *amended*, in affirmance of the judgment.^(d)

The warrant of attorney was formerly subject to a stamp duty:^(e) And it was enacted, by the statute 25 Geo. III. c. 80, § 13, that "no attorney should sue out any writ or process, or commence, prosecute, or defend any action, unless he should have delivered to the officer, or his deputy, appointed to sign or issue the first process for the plaintiff, or to enter, file or record the bail or appearance for the defendant, a *memorandum*, or minute of his warrant, duly stamped with a *five* shilling stamp: containing the names of the parties, the court, and the attorney, and where a *præcipe* was required, (except for an *original*, the nature and denomination of the process, and the return of it;^(f) which *memorandum* or

(h) Dyer, 180, 225. Cro. Jac. 277. March, 121. 8 Mod. 77. 1 Str. 526. 2 Str. 807. 2 Ld. Raym. 1533, 4. Fitzgib. 191. 1 Wils. 39, 183.

(i) 4 Durnf. & East, 370.

(k) 1 Salk. 88.

(l) *Id. ibid.* R. E. 4 Jac. II. K. B.

(a) R. H. 2 & 3 Jac. II. C. P.

(m) Append. Chap. XXX. § 50.

(b) R. M. 5 Geo. II. C. P., and see R. T. 35 Hen. VI. § 4. R. H. 14 & 15 Car. II. reg. 2, C. P.

(cc) 32 Hen. VIII. c. 30, § 1. 18 Eliz. c. 14, § 1, and see 1 Wils. 85.

(d) Doug. 114. And see further, as to the warrant of attorney, and when it shall be entered or filed, Com. Dig. tit. *Attorney*, B. 7, 8.

(e) 25 Geo. III. c. 80, § 1. 44 Geo. III. c. 98, *Sched. A.* 48 Geo. III. c. 149, *Sched. Part II.* § III. 55 Geo. III. c. 184, *Sched. Part II.* § III.

(f) Append. Chap. IV. § 3, 4. *Post*, Chap. XII.

minute the said officer or his deputy should receive, and forthwith enter or file of record, and sign thereon the day of delivering it." A similar memorandum or minute was required, by the same act, previous to entering up judgment on a *cognovit actionem*, or warrant of attorney.(g) But the stamp duty on warrants of attorney being repealed, by the statute 5 Geo. IV. c. 41, the filing of a memorandum, or minute of the warrant, seems to be no longer necessary.

Attorneys residing in the country frequently employ *agents* in town, to prosecute and defend suits; on the other hand, attorneys in town sometimes employ agents in the country to superintend the execution of writs, &c. And an attorney employing an agent to do business for his client, is *prima facie* liable to the agent for his bill, although the latter knew the business to be done for the client; but to whom the credit was given, is a question for the jury.(h) When country attorneys are concerned as *principals*, declarations, pleas, and other proceedings should not be delivered and carried on in the country, but by the agents in [*97] town;(i) to whom all *notices in the cause should likewise be given:(a) And if the agent of the plaintiff's attorney give the agent for the defendant time to plead, the country attorney cannot sign judgment till that time be expired.(b) In the King's Bench, notice of trial or inquiry,(c) or a countermand or continuance of notice of inquiry,(dd) must be given in town; but a countermand of notice of trial may be given in the country.(ee) In the Common Pleas, it seems that notices of trials and countermands, and notices of executing writs of inquiry and countermands, may be given either to the attorney in the country, or to the agent in town; but of those things which are to be done only in town, notice must be to the agent: and all notices where the party has a known attorney, must be given to that attorney or his agent, and not to the party himself.(ff) Payment to the attorney is payment to the principal;(gg)[A]

(g) *Id.* § 5.

(h) 2 Barn. & Cres. 11. 3 Dowl. & Ry. 195, S. C.

(i) Imp. K. B. 10 Ed. 46. Imp. C. P. 7 Ed. 38, 187, and see Barnes, 311. Pr. Reg. 124, S. C. Cas. Pr. C. P. 94, 101, 109. Pr. Reg. 280, 81. Barnes, 251. Cas. Pr. C. P. 123, S. C.

(a) 1 Durnf. & East, 711. 3 East, 569.

(b) In the Common Pleas, if an appearance be entered in the name of an agent to the defendant's attorney, judgment cannot be signed, though the plea be delivered in the name of the latter. 3 Bos. & Pul. 111.

(c) 3 East, 568.

(dd) Imp. K. B. 10 Ed. 415, and see Lee's Prac. Dic. 2 Ed. 29, 30.

(ee) 2 Str. 1073. Cas. temp. Hardw. 369, S. C. Imp. K. B. 10 Ed. 46.

(ff) Barnes, 306.

(gg) 1 Blac. Rep. 8.

[A] AUTHORITY OF ATTORNEY.—The plaintiff's attorney, as such merely, has no authority to discharge the defendant from a *ca. sa.* without satisfaction. *Jackson v. Bartlett*, 8 Johns. 361. *Kellogg v. Gilbert*, 10 Johns. 220. *Simonton v. Barrell*, 21 Wend. 362. But he may direct the sheriff to suspend proceeding under an execution, pending a negotiation with the defendant on a compromise. *Corning v. Southland*, 3 Hill, 552. Neither is it his duty to direct or control the sheriff in the discharge of his duty under the execution; and if he does so, and is sued, he is not entitled to double costs under the statute. *Ray v. Birdeye*, 5 Denio, 619. Although he may, under his general authority to collect a note, receive payment of part in money, and the residue in a new note for two or three days of a person of undoubted responsibility. *Livingston v. Radcliff*, 6 Barb. 201. It may however be stated as the result of the cases, that his power is confined to the prosecution of a suit, and the incidents properly connected therewith; it does not extend to compromising and discharging his client's cause of action, unless specially authorized, without receiving his full claim. *Vail v. Jackson*, 15 Verm. 314. *Briggs v. Georgia*, 10 Ib. 68. A client has no right to control his attorney in the due and orderly conduct of a suit; and it is the attorney's duty to do what he has no doubt the court would order to be done, though his client instruct him otherwise. *Anon.* 1 Wend. 103.

but it is otherwise of payment to an agent, employed by the plaintiff's attorney.(h) And where the plaintiff's attorney was indebted to the plaintiff, in a greater sum than the amount of the attorney's costs in the cause, the court of Common Pleas held, that the agent, to whom the plaintiff's attorney was indebted on a general account, in a sum greater than the amount of such costs, could not, as against the plaintiff, retain out of the sum recovered by the latter, more than the charge for agency in that particular cause.(i)

When the plaintiff is a *pauper*, and will swear that he is not worth *five* pounds, after all his debts are paid, except his wearing apparel, and the subject matter of the action,(k) he may be admitted to sue *in formâ pauperis*. [A] But the *defendant* in a civil action is never allowed to defend it as a *pauper*.(l) It was formerly a rule,(m) that none could be admitted to sue *in formâ pauperis*, out of court; but now, if a plaintiff will make *affidavit*,(n) that he is not worth *five* pounds, &c., he may, upon *petition*(o) to the chief justice, (supported in the King's Bench,) by counsel's opinion(p) of his cause of action, be admitted out of court;(q) which admission may be *either at the commencement of the suit, or [*98] afterwards *pendente lite*:(a) and upon his being so admitted, an attorney and counsel shall be assigned him, pursuant to the statute 11 Hen. VII. c. 12; and he shall be permitted to carry on the proceedings *gratis*, without using stamps,(b) or paying fees to the officers of the court unless he obtain a verdict for more than *five* pounds, and then the officers shall be paid their court fees, and for passing the record, &c. But the opinion of counsel, or a certificate under his hand, that he thinks the party has merits, is necessary, as well as an affidavit that he is not worth *five* pounds, before the court will permit a person to sue *in formâ pauperis*.(c) It seems, that an action for penalties is not within the statute 11 Hen. VII. c. 12:(d) And if it appear that the plaintiff has no meritorious cause of action, the court will discharge an order, authorizing him to sue *in formâ pauperis*;(d) though a judge's order for that purpose must be made a rule of court, before the court will entertain a motion to discharge it.(d)

A *pauper* is not liable to pay costs to the defendant, if he be non-suited, or have a verdict against him: for, by the statute 23 Hen. VIII. c. 15,(e) which gives costs to the defendant upon a nonsuit or verdict, it is provided that "every poor person, being plaintiff in any action of *debt*," &c., "who,

(h) Doug. 623, 4, and see Paley's law of Principal & Agent, 182, (l).

(i) 1 Bing. 20. 7 Moore, 249, S. C. And see 6 Price, 203. 2 Dowl. & Ry. 6, *accord.* 6 Dowl. & Ry. 384.

(k) R. II. 3 & 4 Jac. II. *reg.* 1, (a). K. B. Hul. Costs, 2 Ed. 222; but see 1 Lil. P. R. 633, where the sum is said to be *ten* pounds.

(l) Hul. Costs, 2 Ed. 228, 9. Barnes, 328.

(m) R. II. 3 & 4 Jac. II. *reg.* 1. K. B.

(n) Append. Chap. IV. § 9.

(o) *Id.* § 8.

(p) *Id.* § 10.

(q) R. II. 3 & 4 Jac. II. *reg.* 1, (a). K. B. For the form of judge's order, for admitting the plaintiff to sue *in formâ pauperis*, see Append. Chap. IV. § 15.

(a) Say. Costs, 90. 3 Wils. 24, and see Com. Dig. tit. *Formâ Pauperis*. McClel. & Y. 282.

(b) Stat. 5 Wm. & M. c. 21, § 14, &c., and see the statutes 44 Geo. III. c. 98, § 19. 48 Geo. III. c. 149. Sched. Part II. § V. 55 Geo. III. c. 184. Sched. Part II. § V.

(c) *Goodtitle v. Mayo*, II. 25 Geo. III. K. B.

(d) 1 Younge & Jerv. 10.

(e) § 2.

at the commencement of his suit, shall be admitted, by the discretion of the judge or judges where the action is pursued, to have his process and counsel of charity, without paying money or fee for the same, shall not be compelled to pay any costs by virtue of that statute, but shall offer other punishment, as by the discretion of the justices before whom the suit shall depend, shall be thought reasonable." It has been said, that if a pauper be nonsuited, he shall pay costs, or be whipped; *(f)* but this punishment does not appear to have been ever inflicted. *(g)* If the pauper give notice of trial, and do not proceed, or be otherwise guilty of improper conduct, the court will order him to be dispaupered; *(h)* but until this be done, they will not make any rule about costs. *(i)* And unless the pauper's conduct appear to have been vexatious, the court will not stay the proceedings in a second action, until the costs are paid of a nonsuit in a prior one, for the same cause; *(k)* nor, if the pauper should succeed in the second action, will they deduct the costs of the first, out of those recovered in [*99] the second. *(l)* In a second *ejectment* by a *pauper, the court refused to grant a rule for staying the proceedings, until the costs were paid of a prior *ejectment* for the same cause: *(a)* but it was admitted, that he would not in such second action be allowed to sue *in formâ pauperis*. *(a)* And where an order was made *pendente lite*, admitting the plaintiff to prosecute his action *in formâ pauperis*, and an application by the defendant for security for, and taxation of the costs previously incurred, was not made till nearly two years afterwards; the court of Exchequer refused the application, and allowed a retrospective operation to the order. *(b)* If a pauper be admitted to defend a suit in Chancery, *in formâ pauperis*, his solicitor can only recover of him money actually paid out of pocket, for the defence of the suit. *(c)* And though a pauper be not liable to pay costs, yet he is entitled to receive them from his adversary. *(d)*

An *infant*, or person under the age of twenty-one years, not being capable of appointing an attorney, must sue by his *prochein amy* or *guardian*, *(e)* [A] unless where he sues as co-executor with others, in which case it is holden that the executors of full age may appoint an attorney for themselves and the infant, as they make together but one representative. *(ff)* [B] And

(f) 1 Sid. 261. 2 Salk. 506. 7 Mod. 114. *(g)* *Id. ibid.*

(h) 2 Lil. Pr. 633. 2 Salk. 506. 1 Str. 420. 2 Str. 983, 1122. 3 Wils. 24. 1 Bos. & Pul. 40. 6 East, 505. 2 Smith R. 676, S. C.

(i) 2 Str. 878, 983. 3 Wils. 24. 1 Bos. & Pul. 40. 6 East, 505. 2 Smith R. 676, S. C., but see Cas. Pr. C. P. 47. Pr. Reg. 405, S. C. 1 Str. 420, *semb. contra.*

(k) 2 Str. 878, 1121. 3 Wils. 24. *Hutton v. Colboys*, E. 35 Geo. III. K. B., but see 2 Durnf. & East, 511,

(l) 2 Str. 891.

(a) *Goodtitle v. Mayo*, H. 29 Geo. III. K. B., and see 2 Str. 1121.

(b) *McClell. & Y.* 282.

(c) 1 Car. & P. 533.

(d) 1 Bos. & Pul. 39.

(e) Co. Lit. 135, b. 2 Inst. 261, 390, F. N. B. 27, 2 Wms. Saund., 5 Ed. 117, *f.* (1).

(ff) 2 Wms. Saund. 5 Ed. 212, 13, (6). But see Com. Dig. tit. Pleader, 2 C. I., where it is said, that if several sue jointly, and some are within age, and some of full age, and all appear by attorney, it is no error; for those of full age may make an attorney for all. The authorities cited, however, do not support this doctrine.

[A] See page 101, note [p].

[B] See 2 Troub. & Haley's Pr. 512, 3d Ed.

hence, he cannot be an informer upon a penal statute;(*gg*) for, by the 18 Eliz. c. 5, § 1, “every informer upon a penal statute must exhibit his suit in proper person, and pursue the same only by himself or his attorney.” An infant defendant must in all cases appear and defend by guardian, even where he issued as co-executor with others:(*hh*) And common bail cannot be filed for him under the statute, though he be sued jointly with other defendants.(*i*) If he appear by attorney, it is error;(k)[A] though if an infant plaintiff appear by attorney, it is cured by the statutes of jeofails.(*l*) It also seems, that in an action against baron and feme, the feme being under age, she ought to appear by guardian.(*m*)

To constitute a *prochein amy* or guardian, the person intended, who is usually some near relation, should come with the infant before a judge at his chambers; or else a petition(*n*) should be presented to the judge on behalf of the infant, stating the nature of the action, [*100] and, if for the defendant, that he is advised and believes he has good defence thereto; and praying, in respect of his infancy, that the person intended may be assigned him, as his *prochein amy* or guardian, to prosecute or defend the action. This petition should be accompanied with an agreement,(*a*) signifying the assent of the intended *prochein amy* or guardian, and an affidavit,(*b*) made by some third person, that the petition and agreement were duly signed. On being applied to in either of these ways, the judge will grant his fiat;(c) upon which a rule or order should be drawn up, with the clerk of the rules, in the King's Bench, for the admission of the *prochein amy* or guardian.(*d*) In the Common Pleas, the order for the admission is made by the judge, and entered by the prothonotaries on their remembrance roll: which admission is either *special*, to prosecute or defend a particular action, or *general*, to prosecute or defend all actions whatsoever;(e) though it is said, that, by the practice of the King's Bench, a *special* admission of a guardian, to appear in one cause, will serve for others.(*f*) The infant's father is usually appointed his *prochein amy*: but where the father, being a necessary witness for the infant, cannot be appointed, the court of King's Bench, on motion, will appoint some other person, with the father's consent.(*g*)

The rule or order for the admission of a *prochein amy*, should be obtained before declaration, and a copy thereof annexed to it; or the defendant is not compellable to plead:(*h*) and the attorney for the plaintiff, if required, must give notice to the defendant's attorney, of the place of abode of the *prochein amy*.(*ii*) In like manner, the rule or order for the admission of a guardian should be obtained before plea, and a copy of it annexed thereto; for if an infant defendant appear by attorney, though it be in consequence of common process, with a notice requiring him to

(*gg*) Say. Rep. 51.

(*hh*) 2 Str. 784.

(*i*) *Bligh v. Minster & others*, T. 28 Geo. III. K. B.

(*k*) 8 Co. 58, b. 9 Co. 30, b. 2 Wms. Saund., 5 Ed. 212, (4, 5.) Barnes, 413, 418. 2 Wills. 50.

(*l*) 21 Jac. I. c. 13. 4 & 5 Ann. c. 16.

(*m*) 1 D'Anv. Abr. 602.

(*n*) Append. Chap. IV. § 11, 12.

(*a*) Append. Chap. IV. § 13.

(*b*) *Id.* § 14. (c) *Id.* § 16.

(*d*) *Id.* § 17, 18.

(*e*) 1 Str. 364. Append. Chap. IV. § 19.

(*f*) 1 Str. 305.

(*g*) 1 Dowl. & Ry. 13. (h) Sty. P. R. 264.

(*ii*) 1 Wills. 246.

[A] See accord *Sheppard v. Hibbard*, 19 Wend. 96. *White v. Albertson*, 3 Dev. 241. *Hamilton v. Foster*, 1 Brevard, 464. *Bedell v. Lewis*, 4 J. J. Marshall, 452. *Nicholson v. Wilson*, 13 Geo. Rep. 467.

appear in that manner, the plaintiff may obtain an order for striking out the appearance, and that the defendant appear by guardian within a certain time, being usually *four* or *six* days; or, in default thereof, that the plaintiff may be at liberty to name a guardian, to appear and defend for him: *(kk)*[A] And a similar order may be obtained, where the defendant neglects to appear at all. *(ll)* If a *prochein amy* or guardian be changed, pending an action, the fact ought to be stated by an entry on the record. *(mm)*[B]

An infant *plaintiff* cannot be compelled to give security for costs, on the ground of the insolvency of his *prochein amy*: *(n)* and the latter alone is liable to the payment of costs; *(o)*[c] and if he refuse to pay [*101] them on demand, *he may be proceeded against by attachment. *(a)* Yet, where an infant plaintiff was taken in execution for costs, the court refused to discharge him on motion. *(b)* And it has been adjudged, that costs are payable by an infant *defendant*. *(c)*[D]

(kk) Barnes, 413, 418. 7 Taunt. 488. 1 Moore, 250, S. C., and see 2 Chit. Rep. 22, *(a)*. 3 Bing. 609.

(ll) 2 Str. 1076. 2 Wils. 50.

(mm) 4 Taunt. 765.

(n) 1 Marsh. 4, and see 2 Chit. Rep. 359.

(o) Cro. Eliz. 33. 1 Str. 548. 2 Str. 708. And the *prochein amy* is *primâ facie* liable to the plaintiff's attorney for his costs, as well as to the defendant. 2 Esp. Rep. 473.

(a) Cas. Pr. C. P. 32. Wiles, 190. Barnes, 128. Pr. Reg. 102, S. C.

(b) 2 Str. 1217. 13 East, 6, and see Barnes, 183. 1 Bos. & Pul. 480.

(c) Dyer, 104. 1 Bulst. 189. 2 Str. 1217.

[A] See 2 Troub. & Haley's Pract. 513, 3d Ed.

[B] See *Shuttlesmith v. Hughes*, 6 Rich. 329.

[c] Where an infant suing by his *prochein ami* recovers a judgment, which is reversed, the judgment and costs shall be against the *prochein ami*. *Yerger v. Stone*, 7 Monr. 119.

[D] An infant may bring an action on a contract, but he must sue by guardian, or next friend. *McGiffin v. Stout*, Cox, 92. *Doe v. Brown*, 8 Blackf. 443, or he will be nonsuited, at the trial. *McDaniel v. Nicholson*, 2 Rep. Con. Ct. 344. In Connecticut, in an action by a minor, an express admission of a *prochein ami* to prosecute seems to be unnecessary; the admission of the *prochein ami* named in the writ being implied, until disallowed. *Judson v. Blanchard*, 3 Conn. 579. It is not the province of the court to appoint a guardian or next friend to sue for, but only to defend an infant party. *Priest v. Hamilton*, 2 Tyler, 49. Nor can an infant appear or plead by attorney. *Jeffrey v. Robideaux*, 3 Mis. 33. *Clark v. Turner*, 1 Root, 200. *Moekey v. Grey*, 2 Johns. 192. And as defendant he must appear by guardian. *Knapp v. Crosby*, 1 Mass. 479. *Miles v. Boyden*, 3 Pick. 213. *Alderman v. Tirrell*, 8 Johns. 418. *Bedell v. Lewis*, 4 J. J. Marsh. 562. *Comstock v. Carr*, 6 Wend. 526. *Meredith v. Sanders*, 2 Bibb, 101. There should be no judgment by default, unless there is a guardian *ad litem*. *Chalfant v. Monroe*, 3 Dana, 35. *Young v. Whitaker*, 1 A. K. Marshall, 398. *Rowland v. Cook*, *ib.* 453. If an infant defendant does not appear upon service of the summons, the plaintiff may have a rule to assign a guardian and enter an appearance. *Judson v. Storer*, 2 South. 544. The power of a next friend commences with the suit, and he can therefore maintain a suit for such causes of action only as may be prosecuted without a previous special demand, unless the defendant has waived the necessity of a demand. *Miles v. Boyden*, 3 Pick. 213. *Brown v. Hull*, 16 Verm. 673. The next friend and guardian will be admitted by the court without any other record than a recital in the count. *Clark v. Gilmanton*, 12 New Hamp. 515. A *prochein ami* is one admitted by the court to prosecute for an infant, because otherwise the infant might be prejudiced by the refusal or neglect of his guardian. He is but a species of attorney, who may prosecute a right for an infant, but can do nothing to operate to his injury, and therefore cannot release or compromise a suit prosecuted on behalf of a minor. *Isaacs v. Boyd*, 5 Port. 388. The suit of an infant may be dismissed without the consent of the *prochein ami*. The court may control him, as well as a guardian *ad litem*, and should permit or direct what is most for the interest of the infant. *Longnecker v. Greenwade*, 5 Dana, 516. A judgment irregularly obtained against an infant, is erroneous, and may be set aside, after he has attained full age, on motion and rule; the fact of infancy must be tried in such case *per pais*, and not by inspection. *Haigler v. Way*, 2 Rich. 324. It seems, however, that the court is not bound to set aside the judgment, after the infant has attained full age, but may consider lapse of time, the conduct of the

*CHAPTER V.

Of the ORIGINAL WRIT; and PROCESS thereon, previous to the CAPIAS, in the KING'S BENCH and COMMON PLEAS.

AN *original writ* is a mandatory letter from the king in Chancery, sealed with his great seal; (*aa*) and, in the King's Bench, may be the means of commencing all personal actions, against every person not being an attorney or officer of the court, or a prisoner in the actual custody of the marshal. Formerly, indeed, it was not usual to proceed in the King's Bench, by original writ, in *debt*, *detinue*, or other action of a mere civil nature: (*bb*) but the modern practice is different; (*cc*) and, in Lord Mansfield's time, where the defendant pleaded to the jurisdiction, in an action of *debt* commenced by original writ, the court gave judgment on demurrer for the plaintiff: and declared, that if such a plea should come before them again, they would inquire by whom it was signed. (*d*) On the other hand, an original writ seems to have been formerly the only way of proceeding against *peers*, and *members* of the house of commons; (*e*) as it is still, against the former, (*f*) and also against *corporations*, or *hundredors*, (*g*) on the statute 7 & 8 Geo. IV. c. 31; or where, by reason of the defendant's being abroad, or keeping out of the way, he cannot be arrested or served with process.

Another benefit attending this mode of proceeding in the King's Bench is, that after judgment in an action by *original*, a writ of error will not lie in the Exchequer chamber, where it is often brought for the mere purpose of delay, but only in parliament. (*h*) The reason is, that at common law, no writ of error lay, except in Parliament, from the judgment of this court; and the statute (*i*) which gave a writ of error in the Exchequer chamber, only extends to such actions as are *first* commenced in the King's Bench: therefore, though a writ of error will lie in the Exchequer chamber, on a judgment by *bill*, which originates in the King's Bench, yet it is otherwise where the judgment is upon an *original writ*, which issues out of Chancery, where the action in that case is first commenced. (*k*)

*But, in order to save the great and unnecessary expense of suing forth *special writs* in small and trifling suits, it was enacted [*103]

(*aa*) Finch, L. 237. 3 Blac. Com. 273. Steph. Pl. 5.

(*bb*) 4 Inst. 76. Trye, 55, 77, and see Lord Hale's Treatise, in 1 Harg. Law tracts, 360, 362, 364. 2 Blac. Rep. 850. 3 Blac. Com. 42.

(*cc*) Cas. temp. Hardw. 317.

(*d*) See also the statute 13 Car. II. stat. 2, c. 2, § 6, which speaks of actions of *debt*, &c., depending by *original writ* in the King's Bench, as well as in the Common Pleas.

(*e*) Trye, 9, 13. Lil. Ent. 21. 2 H. Blac. 267, 299.

(*f*) 3 Maule & Sel. 88.

(*g*) Trye, 11. Barnes, 415.

(*h*) 1 Sid. 424. Trye, 6. 2 H. Blac. 304.

(*i*) 27 Eliz. c. 8.

(*k*) Run. Eject. 205, 6. Gilb. K. B. 319.

defendant, and other circumstances as confirming the judgment, or rendering the interference of the court improper. *Ib.* The proper practice, in such cases, appears to be, on affidavit of the defendant's infancy, to order a rule to show cause, on the return of which the judgment may be set aside, or an issue made up to try the fact of infancy, or such other material fact as the case may present. *Ib.*

by the statute 5 Geo. II. c. 27, § 5, that “no special writ or process should be issued out of any superior court, where the cause of action should not amount to the sum of *ten* pounds or upwards.”(a) And, by the statute 7 & 8 Geo. IV. c. 71,(b) “where the cause of action in any court shall not amount to the sum of *twenty* pounds, exclusive of any costs, charges and expenses, that may have been incurred, recovered or become chargeable, in or about the suing for or recovering the same, or any part thereof, no *special* writ or writs, nor any process specially therein expressing the cause or causes of action, shall be sued forth or issued from any court, in order to compel any person or persons to appear thereon in such court; and all proceedings and judgments that shall be had on any such writ or process, shall be, and are thereby declared to be void and of no effect:” But a bailable writ is not necessarily a *special* writ, within the meaning of the above statutes.(c) It is also a rule of the Court of King’s Bench,(d) that “in all actions in which the plaintiff shall proceed against the defendant by special *original* writ, and shall recover less than the sum of *fifty* pounds, he shall not, on taxing costs, be allowed any more or other costs, than he would have been entitled to, in case he had proceeded by *bill*; except in such actions, in which he could not proceed by bill, or in which any defendant shall be actually outlawed.” But the costs of a special original were allowed, in an action brought on a bond, the penalty of which was more than *fifty* pounds, though the sum found due was only *twenty* pounds.(e)

Original writs are calculated for the *commencement* or *removal* of actions.(f) And they are either *de cursu*, or *magistralia*:(g) the former were framed in the king’s court, before the division of it by *magna charta*,(h) and are to be found in the *register* of original writs:(i) the latter were made out by the *masters* in chancery, pursuant to the statute of Westm. 2, (13 Edw. I.) c. 24, by which it is enacted, that “whenever it shall happen in Chancery, that in one case a writ is found, and not in a similar case, falling under the same law, and requiring the like remedy, the clerks of the Chancery shall agree in making a writ, or refer the plaintiffs to the next parliament.” Of the *register* of original writs, upon which Fitzherbert’s *natura brevium* is a comment, it has been said,(kk) that every man who is injured will be sure to find in it a method of relief, exactly adapted to his own case, described in the compass of a few lines, and yet without the omission of any material circumstance. So that the wise and equitable provision of the statute Westm. 2, for framing new writs when wanted, is almost rendered useless by the very great [*104] perfection *of the ancient forms. And indeed, says the learned commentator,(a) “I know not whether it is a greater credit to our laws, to have such a provision contained in them, or not to have occasion, or at least very rarely, to use it.”

(a) 3 Bur. 1484.

(b) § 1, and see stat. 51 Geo. III. c. 124, § 1, continued by 57 Geo. III. c. 101.

(c) 1 Barn. & Ald. 393.

(d) R. M. 23 Geo. III. K. B.

(e) 2 Chit. Rep. 148.

(f) Trye, 1, 12, 93.

(g) Gilb. K. B. 312. 1 Inst. 54, b. 73, b. 2 Inst. 407, 670. 7 Co. 4, a. 8 Co. 48, 9.

(h) Chap. 11.

(i) 1 Inst. 16, b. 54, b. 73, b. Gilb. C. P. 4, 5. 3 Blac. Com. 183.

(kk) 3 Blac. Com. 183, 4.

(a) 3 Blac. Com. 184, and see 1 Madd. Chan. 5, &c. as to the Chancellor’s common law authority in ordering original writs to be made out by the cursitors.

In actions of *account*, *covenant*, *debt*, *annuity*, and *detinue*, the original writ is called a *præcipe* ;(b) by which the defendant has an *option* given him, either to do what he is required, or show cause to the contrary: but in *assumpsit*, and actions for wrongs, it is called a *pone*, or *si te fecerit securum* ;(c) by which the defendant is *peremptorily* required to show cause in the first instance. In point of form, the original writ is special or general, *nominatum vel innominatum* :(d) The former contains the time, place, and other circumstances of the demand, very particularly; the latter, only a general complaint, without expressing the particulars, as the writ of trespass *quare clausum fregit*, &c.

In the Common Pleas, we have seen,(e) an original writ is either a *special* original, adapted to the nature of the action, or a *common* original in *trespass quare clausum fregit* ;(f) and there is a rule in that court,(g) that "no attorney shall deliver or receive any declaration, without an *original*, proper to the cause of action, being first sued forth to warrant the same:" which rule is now disused. A *special* original, however, is, in that court, seldom issued in the first instance, except in cases where it is absolutely necessary, as in proceeding against *peers*, *corporations*, and *hundredors*, who are not subject to a *capias* ; but the usual mode of commencing actions in this court, is by issuing out a writ of *capias quare clausum fregit*, which is founded on a supposed original, and answers to the bill of *Middlesex* or *latitat* in the King's Bench.(h) Before the statute 19 Hen. VII. c. 9, a practice had been introduced, of commencing an action in the Common Pleas, by bringing an original writ of trespass *quare clausum fregit*, for breaking the plaintiff's close, *vi et armis* ; which, by the old common law, subjected the defendant's person to be arrested by writ of *capias* ; and then afterwards, by connivance of the court, the plaintiff might proceed to prosecute for any other less forcible injury.(i) This practice appears to have been formerly discountenanced by the court ;(k) but was afterwards revived, and may still in strictness be resorted to, in cases where the defendant keeps out of the way, so that he cannot be arrested upon, or served with process against his person.

The original writ(l) is issued by the *cursitor*, who is so called from the writs *de cursu* ; and where no *capias* lies, as against *peers* or members of the house of commons, or against corporations, or hundredors on the statute *7 & 8 Geo. IV. c. 31, it is necessarily the first pro- [*105] ceeding in the cause. And where a *capias* lies, but the defendant absconds or keeps out of the way, so that he cannot be arrested or served with process against his *person*, it is usual to sue out an original writ, in order to proceed to *outlawry*. But in all other cases, the practice is for the plaintiff's attorney to make out a *præcipe*(a) for an original writ, and deliver it to the *filacer*, who thereupon issues the *capias* in the first instance, keeping the *præcipe* as instructions for the original, which is not in fact issued, unless it become necessary, in consequence of a writ of error after a judgment by default.(b) There being no *cursitor* for, an original

(b) Append. Chap. V. § 2, 4.

(c) *Id.* § 10, and see Finch, L. 257.

(d) 1 Bac. Abr. 29. Gilb. C. P. 3.

(e) *Ante*, 91.

(f) Append. Chap. V. § 12.

(g) R. M. 30 Car. II. C. P. and see R. T. 1649, C. P.

(h) *Ante*, 91.

(i) 3 Blac. Com. 281.

(k) R. II. 2 Car. I. § 1. C. P.

(l) Append. Chap. V. § 12.

(a) Append. Chap. V. § 1, 3, 9, 11.

(b) And see further, as to the *præcipe* for an original writ, 1 Chit. Pl. 4 Ed. 220. Steph. Pl. 26, 7.

writ cannot be issued into a county palatine; but when the cause of action, being of a transitory nature, arises therein, an original writ may be issued into another county; and the defendant, if he reside in a county palatine, may be brought into court on a *testatum capias*; and if he afterwards move to change the venue into the county palatine, the court will make him undertake not to assign for error the want of an original.(c) It is also a rule, in the common pleas, that when a judge's order is granted for time to plead, in an action laid in a county palatine, the defendant shall be bound not to assign the want of an original as error.(d) On suing out the original writ or *capias*, where the plaintiff's demand exceeds *forty* pounds, a *fine* is payable to the king, by way of composition for the liberty of suing in his court;(e) which fine is estimated according to the amount of the demand, being six shillings and eight pence for every hundred marks, or ten shillings for every hundred pounds.(f) The original writ should be *directed* to the sheriff, or sheriffs, of the county where the action is brought, and intended to be tried; and it should be *tested* or witnessed in the king's name, at *Westminster*, or wherever else the chancery is holden;(g) and as that court is supposed to be always open, it may be tested in vacation, as well as in term-time:(h) but a private seal is frequently necessary for passing it in vacation.

The *terms* are those times or seasons of the year, which are set apart for the dispatch of business, in the superior courts of common law. The history of these terms is given by Sir *Henry Spelman*,(i) who has clearly and learnedly shown, that they were gradually formed from the canonical constitutions of the church; being indeed no other than those leisure seasons of the year, which were not occupied by the great festivals or fasts, or which were not liable to the general avocations of rural business. There [*106] *are *four* term in the year; which are called, from some festival or saint's day preceding their commencement, the terms of Saint *Hilary*, of *Easter*, of the Holy *Trinity*, and of Saint *Michael*. *Hilary* term begins on the octave of Saint Hilary, or the eighth day inclusive after the feast day of that saint, which falling on the 13th of January, the octave therefore, or first day of Hilary term is the 20th of January; and it ends on the 12th of February following, unless it happen on a Sunday, and then on the 13th of February.(aa) *Easter* term begins in fifteen days of Easter, being the *Sunday* fortnight after that festival, and ends on *Monday* before Whitsunday. *Trinity* term, which was abridged by the statute 32 Hen. VIII. c. 21, begins on the morrow of the Holy Trinity, being the *Monday* next after Trinity Sunday; and ends on the *Wednesday* three weeks after, unless it happen on the 24th of June, and then on the day following.

(c) 1 Sel. Pr. 2 Ed. 251. *Marsden v. Bell*, H. 28 Geo. III. C. P. Imp. C. P. 7 Ed. 218. 1 Taunt. 120. 13 Price, 52.

(d) 7 Moore, 311, 12.

(e) Gilb. C. P. 7.

(f) Trye, 58, 9, R. H. 6 W. & M. K. B. Append. Chap. V. § 13. A fee of 6s. 8d. is also payable to the king, on every writ of *recordari*, *pone*, *accedas ad curiam*, (except of cattle and chattels,) *attaint*, *conspiracy*, *false judgment*, and *dedimus potestatem*. Same rule, (a).

(g) Finch. L. 237. 3 Blac. Com. 274.

(h) Trye, 59, 60. Sty. Rep. 402. 3 Keb. 214. And see further, as to the *teste* of original writs, 1 Madd. Chan. 15.

(i) *Jan. Ang. l. 2*, § 9, and see 3 Blac. Com. 275.

(aa) In *Hilary* term, the first day of full term, is the 23d of *January*, if not *Sunday*; and if *Sunday*, the next day after: and this term always begins that day *eight* weeks, on which *Michaelmas* term ended, and ends *fourteen* weeks after *Michaelmas* term began. Man. Excheq. Append. 2.

Michaelmas term, which was abridged by the statute 16 Car. I. c. 6, and still further by the 24 Geo. II. c. 48, begins (five weeks after *Michaelmas* day,) on the morrow of All Souls, being the 3d of November, and ends on the 28th of November following, if not a *Sunday*, otherwise on the 29th. Of these terms it may be observed, that *Michaelmas* and *Hilary* are *fixed* terms, and invariably begin on the same date of the year; but *Easter* and *Trinity* terms are *moveable*, their commencement being regulated by the feast of Easter. After *Hilary* and *Trinity* terms, the judges go their *circuits*, for the trial of causes wherein issues have been previously joined; and hence they are called *issuable* terms.

In each of these terms, there are stated days, called *general* or *common* return days; of these there are *four* in each term, except *Easter*, which has *five*. In *Hilary* term, the general or common return days are, in eight days of Saint Hilary, in fifteen days of Saint Hilary, on the morrow of the Purification, and in eight days of the Purification. In *Easter* term, they are, in fifteen days of Easter, in three weeks after Easter, in one month after Easter, in five weeks from Easter day, and on the morrow of the Ascension. In *Trinity* term, they are, on the morrow of the Holy Trinity, in eight days of the Holy Trinity, in fifteen days of the Holy Trinity, and in three weeks after the Holy Trinity. And in *Michaelmas* term, they are, on the morrow of All Souls, on the morrow of St. Martin, in eight days of St. Martin, and in fifteen days of St. Martin. *(b)* Some of these return days happen on a *Sunday*: and anciently, when writs were formed, courts of justice did actually sit on that day; but that practice having been long disused, it is not holden that an appearance cannot be entered, nor any judicial act done, or supposed to be done by the court, till the *Monday*. *(c)*

*On one or other of these return days, all *original* writs, and pro- [*107] cess thereon, must be made returnable; in the King's Bench, *ubique*, &c., or wheresoever the king shall then be in *England*, *(a)* or, in the Common Pleas, before the king's justices at *Westminster*. The first general return day of the term is usually called the *essoïn day* of that term; and formerly, when essoins were allowed in personal actions, if the defendant did not appear, or cast an essoin on that day, the plaintiff, on the next day, might have entered an exception, and obtained an order that his essoin should not be received; *(bb)* and from this exception, so taken and entered, the second day after the return of the writ was called the *day of exception*. The third day, the sheriff returned his writs into court, which were delivered to the *custos brevium* and thence this day was called the *day of retorno brevium*; and then it was that the court was seised of the cause, by possession of the writ. The fourth day was called the *appearance day*, or *dies amoris*, *(cc)* which was the day given, *ex gratiâ curiæ*, for the defendant's appearance: and this, which is denominated the *quarto die post*, is now the first day in *full* term, on which the court sits for the dispatch of business, except in *Trinity* term, when the court, by act of parliament, does not sit till the *fifth* day. The first and last days of every term are days of appearance.

The original writ should always be *tested* after the cause of action ac-

(b) For a table of the *Terms* and *Returns*, see Append. Chap. V. § 32.

(c) Regist. 19. W. Jon. 156. 2 Salk. 627. 6 Mod. 250. 3 Bur. 1596. 1 Blac. Rep. 496, 526, S. C.

(a) Trye, 2, and see 1 Chit. Rep. 323.

(bb) Gilb. C. P. 13.

(cc) Co. Lit. 135, a.

crued; (*d*) except in the court of Common Pleas at *Lancaster*, where by stat. 39 & 40 Geo. III. c. 105, the parties are allowed to declare upon, plead and give evidence of any cause of action, or any matter or thing in bar or preclusion of any personal suit or action, or any other matters or things, provided the same shall have accrued or happened prior to the day of the actual signing and issuing of the writ of *capias ad respondendum* or other process first actually issued forth in such suit or action; notwithstanding the same shall not have accrued prior to the *teste* and return of the original writ, whereupon such suit or action shall either really or by fiction of law be grounded. And there must, in general, be *fifteen* days at least between the *teste* and return of the original writ; (*e*) the law requiring that distance of time between the *service* and return: though if there be less, it will be aided by the defendant's appearing, and pleading in chief; (*f*) and, by the statute 24 Geo. II. c. 48, § 5, "all writs and process, having day from the *quarto die post* of the morrow of the *Ascension*, to the morrow of the holy *Trinity*, shall be good and effectual in law, notwithstanding there be not *fifteen* days between the *teste* and return of the said writs." (*g*) In proceeding to outlawry, if the instructions be carried to the cursitor within the first week of a term, (*h*) or even after that time, and the cause of action arose early enough, he will, for the sake of expedition, make the original returnable on the first or any other return of the pre-
 [*108] ceding *term; otherwise, it is usually made returnable in the same or the next term; or, as it does not affect the liberty of the defendant, it may be made returnable at the distance of two or three terms. (*a*)

The *want* of an original writ is aided, after verdict, by the 18 Eliz. c. 14, but not after judgment by default, or confession; (*b*) or upon demurrer, or *nul tiel record*. And it has been holden, that an original writ which is bad in substance, or a good one which warrants not the declaration, is not aided by this statute. (*c*) Where the original however differs from the declaration, and is not between the same parties, (*dd*) in the same county, (*ee*) of the same term, (*ff*) or for the same cause of action, (*gg*) the court, on a writ of error, will *primâ facie* intend that it is not the original upon which the action was brought; and where it is certified to be the same, if the defendant in error come in upon the *scire facias ad audiendum errores*, and allege for diminution that it was not the original upon which he declared, the court will grant a new *certiorari*; and if, upon such writ, there appear to be a good original, the plaintiff in error will not be suffered to make any allegation to the contrary. (*h*)

When all the proceedings are of the same term, an original writ of that

(*d*) 2 Burr. 967, and see 2 Ken. Chan. Cas. 24, as to ante-dating original writs.

(*e*) 2 Inst. 567. Booth on real actions, 5 Gilb. C. P. 9. 3 Blac. Com. 275.

(*f*) 1 Salk. 63. 1 Ld. Raym. 671, S. C.

(*g*) And see stat. 16 Car. I. c. 6, § 7.

(*h*) Trye, 60, and see Barnes, 322.

(*a*) Dyer, 175.

(*b*) Stat. 4 Ann. c. 16, § 2.

(*c*) 5 Co. 37, b. Cro. Eliz. 722. Yelv. 108. Cro. Jac. 185. Cro. Car. 282. 1 Lev. 69. 1 Sid. 84. 2 Ld. Raym. 1209; but see the stat. 5 Geo. I. c. 13, by which *any* defect or fault, either in form or substance, in the original writ, or any variance therefrom, is aided after verdict.

(*dd*) Cro. Eliz. 204. Hob. 251.

(*ee*) Cro. Jac. 654, 5, 675. Palm. 428. 2 Rol. Rep. 382, but see Cro. Jac. 479, *contra*.

(*ff*) Cro. Car. 272, 327. 3 Mod. 136.

(*gg*) 10 Mod. 318. 11 Mo. 382.

(*h*) Cro. Jac. 597. Palm. 428. 11 Mod. 382, and see Run. Eject. 2 Ed. 142, 3.

term will warrant them;(*i*) and the cursitor will make it out, as a matter of course, at any time before the essoin day of the ensuing term. But an original writ of the term wherein final judgment, is given, will not warrant the judgment, if it appear upon record, that there have been proceedings of a preceding term.(*k*) And it is a rule in Chancery, that no cursitor shall make original writs of any return past, unless he receive instructions within the term wherein they are to be returnable, or at furthest on or before the session day of the next succeeding term, without warrant from the lord chancellor, or master of the rolls.(*l*)

If the defendant therefore bring a writ of error, after judgment by default, &c. it is usual for the plaintiff to present a *petition* to the master of the rolls, setting forth the proceedings in the action, and the bringing of the writ of error, and that the petitioner hath not sued out an original writ to warrant the judgment, which he is advised is necessary; and that the time for applying for the same in ordinary course being expired, the cursitor cannot make it out, without an order for that purpose.(*m*) On this petition, the master of the rolls will grant his *fiat*;(n) upon which an *order*(*o*) *is drawn up, agreeably to the prayer of the [*109] petition, that the cursitor of the county where the venue is laid, do issue out an original writ, with a proper return; and that the petitioner pay the plaintiff in error his costs, if he do not proceed further, after having had notice of the order.

An original writ was not *amendable* at common law, in the case of a common person.(*a*) But it may be amended, by the statute 8 Hen. VI. c. 12, for the *misprision* of the clerk, in not following his instructions, or on account of his *nescience*, or want of skill, in matters of form, though not in substance.(*b*)[A] When the cursitor or his clerk has been guilty of a mistake, in making out the original variant from the *præcipe*, which is the warrant for the original, the practice of the office is to set it right as a matter of course, and re-seal the writ;(c) Or the amendment may be made on *motion*, or by *petition* to the master of the rolls;(d) and it seems that before the return of the writ, the motion should be made in Chancery,(e) but afterwards, in the court where the writ is returnable.(f)

The first *process*, or proceeding upon the original writ, in actions of *account*, *covenant*, *debt*, *annuity*, and *detinue*, is a *summons*,(g) or warning to appear according to the exigency of the writ; which is made out by the plaintiff's attorney for the sheriff, and delivered by one of his officers to the defendant, or left at the usual place of his abode.

The defendant being summoned, was formerly allowed to cast an

(i) 1 Keb. 327.

(k) 1 Wils. 181.

(l) Lord *Clarendon's* Orders in Chancery.

(m) Law and Prac. of *Error*, 29, 30, and see 1 P. Wms. 411, 12, 13. 3 P. Wms. 314. Append. Chap. V. § 33.

(n) Append. Chap. V. § 34.

(o) *Id.* § 35.

(a) 8 Co. 156, b. 1 Salk. 49. 1 Ld. Raym. 564, S. C.

(b) 8 Co. 159. Gilb. C. P. 117. Barnes, 9, 10, 16, 22.

(c) 3 Atk. 599.

(d) 2 Wils. 395. 6 Durnf. & East, 544. 7 Durnf. & East, 300. Append. Chap. V. § 36, 37.

(e) 3 Atk. 596, and see 1 Madd. Chan. 16, 17.

(f) Barnes, 10, 16, 22.

(g) Finch. L. 305, 352.

[A] See post, p. 161 Note [A].

essoin, (h) or send an excuse by his servant for not appearing; and that being done, it was the plaintiff's duty to adjourn it to some day, appointed by the court, in the next term; (i) if he did not, he was liable to be *non-processed*. But no *essoin* was ever allowed in *personal* actions, on the return of a *capias*; (k) nor even on a *summons*, where the defendant was seen in court, or appeared by attorney: (l) and as a corporation aggregate could not appear in any other manner, they were not entitled to an *essoin*. (m) At this day, the defendant being in general at liberty to appear by attorney, no *essoin* is allowed in any *personal* action whatsoever, even when a peer or member of parliament is defendant. (n) When an *essoin* is cast, and neither quashed nor adjourned to a particular day, the plaintiff, in the King's Bench, may declare the first day of the next term, and the defendant is not entitled to an *imparlance*. (o)

[*110] *If the defendant appear, on or before the *quarto die post* of the return of the original, he should cause an appearance to be entered with the *filacer*, who is so called from the *files* of the *custos brevium*, which are warrants for him to continue the process. (a) If he made default, and the sheriff returned that he was summoned, (b) the practice formerly was, for the *filacer* to issue an *attachment*; (c) which was a judicial writ, commanding the sheriff to put the defendant by gages and safe pledges; that is, to take certain of his goods, which were forfeited if he did not appear, or to make him find personal pledges or sureties, who were amerced in case of his non-appearance: (d) And this is still the first and immediate proceeding upon the original in trespass *vi et armis*, (e) &c., where the violence of the wrong requires a more speedy remedy; and therefore the original writ commands the defendant to be at once attached, without any previous warning. But it seems that, in an *inferior* court, a custom to issue a summons and attachment at the same time, is bad in law. (f) Upon process of attachment, it seems that the sheriff may either *summon* the defendant, or take gages for his appearance at the return of it. (g) But a sheriff's officer cannot justify entering the defendant's house, under an original writ of trespass *quare clausum fregit*, and continuing there till the defendant paid him a sum of money, as and by way of surety for his appearance. (hh) The sheriff's return to the attachment is, either that he has attached the defendant, (ii) or that he has nothing by which he can be attached: in the latter case, the plaintiff may have a *testatum pone*, or attachment. (kk) If the defendant, being attached, still neglected to appear, the plaintiff might formerly have proceeded, in all cases, to compel his appearance by *distringas*, (ll) or distress infinite; which was a process commanding the sheriff to distrain the defendant by all his lands and chattels, and to answer for the *issues* (mm) or profits of the same.

(h) 2 Inst. 125, b. 137.

(i) Cro. Eliz. 367. Gilb. C. P. 13.

(k) 2 Str. 1194.

(l) 2 Wils. 165.

(m) Bro. Abr. tit. *Corporation*, 28, Cas. Pr. C. P. 8. *Argent v. Dean & Chapter of St. Paul's*, E. 23 Geo. III. K. B. cited in 2 Durnf. & East, 16, and 16 East, 8, *in notis*.

(n) See 2 Durnf. & East, 16. 16 East, 7, (a).

(o) 2 Durnf. & East, 16. *Crookson v. Lord Lonsdale*, H. 29 Geo. III. K. B. cited in 16 East, 7, (a), and see 1 Moore & P. 2, as to the adjournment of an *essoin*, on a writ of right.

(a) Gilb. C. 14, Trye, *in pref.*

(b) Append. Chap. V. § 7.

(c) *Id.* § 20.

(d) Gilb. Dist. 18, &c. Run. Eject. 2 Ed. 136. 3 Blac. Com. 280.

(e) Finch, L. 355.

(f) 3 Barn. & Cres. 772. 5 Dowl. & Ryl. 719, S. C.

(g) Bro. Abr. tit. *Attachment*, pl. 9, and see Dalt. Sher. Chap. 32, p. 154, &c.

(hh) 6 Durnf. & East, 137.

(ii) Append. Chap. V. § 21.

(kk) *Id.* § 22.

(ll) *Id.* § 23, 4.

(mm) Finch, L. 352. Stat. Westm. 2, c. 39. 2 Inst. 453. 5 Mod. 117.

In the King's Bench, the sheriff, on the first *distringas*, usually returned issues to the amount of forty shillings: and this was so much of course, that no more could have been levied by the sheriff in the first instance; and therefore the levying of the whole debt at once, on a *testatum distringas*, has been deemed irregular: (n) And where the defendant was called in the writ by a wrong name, the sheriff was holden not to be justified in taking his goods under it. (o) If the defendant did not appear, before or on the *quarto die post* of the return of the first *distringas*, the plaintiff sued *out an *alias distringas*, (a) and there- [*111] upon moved the court to increase the issues; a proceeding that seems to have come in lieu of the writ of *averment*. (b) In general, if the debt were small, the court would order issues to be returned at once to the amount of it; but otherwise, on the defendant's non-appearance, the plaintiff sued out a *pluries*, (c) or *testatum* (d) *distringas*, and moved the court a second time, and so *toties quoties*, until issues were returned to the amount of the debt. When that was done, the plaintiff applied to the court, for a rule for sale of the issues, (e) under the statute 10 Geo. III. c. 50, § 3, which enacts, that "the court out of which the writ proceeds, may order the issues, levied from time to time, to be sold, and the money arising thereby to be applied, to pay such costs to the plaintiff, as the said court shall think just, under all the circumstances, to order; and the surplus to be retained, until the defendant shall have appeared, or other purpose of the writ be answered:" which statute was construed to extend to all writs of *distringas*, and not to be confined to such as concerned privilege of parliament only. (f) And the costs of a *distringas*, &c., were directed to be taxed, and that the sheriff should sell the issues to pay such costs, though the defendant had appeared after the issues were levied, but before they were sold. (g)

The process upon an original writ of trespass *quare clausum fregit*, in the Common Pleas, was similar to that in the King's Bench. And, for expediting the proceedings, writs of *distringas*, in the Common Pleas, might have been made returnable on any day in term, (h) and need not have had fifteen days between the *teste* and return; (i) and it was a rule, (k) that upon all writs of *distringas*, returnable the last day of term, the plaintiff should be at liberty, at the rising of the court, to move to increase issues on the *alias* or *pluries distringas*, to be issued thereupon on the following day, in case no appearance should have then been entered; and also that in like cases, where a *distringas* should be returnable on the last day of term, and issues thereupon levied, the plaintiff should be at liberty, at the rising of the court, to move for leave to sell such issues, to pay the costs of such *distringas* or *distringases*." Where the debt was small, the court of Common Pleas usually ordered the issues to be increased to the full amount of it, on the second or *alias distringas*; but if it were large, they would order 40*l.* or 50*l.* to be levied on the second, and the remainder on the third or *plu-*

(n) 4 East, 162.

(o) 6 Durnf. & East, 234, and see 8 East, 328. 2 Campb. 270. 3 Campb. 108. 2 Taunt. 399. 1 Marsh. 75. 1 Moore, 105. 1 Barn. & Ald. 647. 1 Chit. Rep. 282. 2 Chit. Rep. 357. 6 Price, 34. 8 Moore, 300, 301. 1 Bing. 316, S. C.

(a) Append. Chap. VI. § 5.

(b) *Thes. Brev.* 144, 5.

(c) Append. Chap. VI. § 5.

(d) *Id.* § 6. 4 East, 162.

(e) Append. Chap. VI. § 7, 8, 9.

(f) 5 Bur. 2726, 7.

(g) 2 Chit. Rep. 36.

(i) *Id. ibid.* in marg.

(h) Imp. C. P. 7 Ed. 593.

(k) R. T. 38 Geo. III. C. P. 1 Bos. & Pul. 312.

ries distringas; (l) and it was in the discretion of the court, to put the defendant under terms of pleading *instante*, and taking short notice of trial, when he moved to have the issues levied upon several *distringases* restored to him on his appearance, according to the stat. 10 Geo. III. c. 50, § 4.(m)

[*112] *When a defendant resided abroad, and no person here had an authority to appear for him, his goods could not, it seems, have been taken under a writ of *distringas*, issuing out of the court of Common Pleas, to compel his appearance.(a) So, where a plaintiff sued a defendant who was out of the country, for a debt contracted here by his wife in his absence, and proceeded by *distringas*, that court ordered the writ to be set aside, and the issues levied under it to be restored.(b) And in another case,(c) they set aside a *distringas*, executed upon the goods of the wife of a surgeon in the navy, serving on a foreign station, the debt not being contracted in the wife's trade. But where the defendant quitted the kingdom before the action commenced, leaving another in possession of his house and goods, and the plaintiff, having served a summons to appear at the house, distrained the defendant's goods to compel an appearance, the court held it to be regular.(d) So where the defendant, residing abroad, carried on trade in *England*, a plaintiff might have proceeded, notwithstanding his absence, to compel an appearance by *distringas*; particularly if the plaintiff did not know, at the time of giving credit, that the defendant was out of the realm.(e) And where three partners (two of whom resided abroad, and one in *England*,) were sued for a partnership debt, and the partner resident in *England* appeared to the action, but refused to appear for the partners who resided abroad, the sheriff, under a *distringas* issuing out of the Common Pleas against the two partners, might have taken partnership effects, though paid for by the partner resident in *England* alone, to whom the partnership was largely indebted; and the court would not have relieved him from such distress.(f) But where an action had been commenced against two partners, one of whom resided abroad, and the other, who was resident here, appeared for himself only, the court of Common Pleas set aside a *distringas* and subsequent proceedings thereon, against the latter defendant, and ordered the issues levied upon his separate property to be restored: So that where there are no partnership effects, there is no other mode of proceeding in such case, than by outlawing the defendant who is abroad.(g)

The method of proceeding by summons, attachment, and distress infinite, is not affected by the statutes for preventing frivolous and vexatious arrests;(h) which only relate to process against the *person*. And as no *capias* lay, it was the *only* method of proceeding against *peers* of the realm, *corporations*,(i) and *hundredors* on the statutes of hue and cry,(k) &c., as it is now on the statute 7 & 8 Geo. IV. c. 31. But this method of proceeding being found extremely dilatory and expensive, as well as

[*113] oppressive to the *defendant, particularly when he resided abroad,

(l) Imp. C. P. 4 Ed. p. 617, 18.

(m) 1 Bos. & Pul. 81.

(a) *Webster v. M'Namara*, T. 32 Geo. III. C. P. Imp. C. P. 7 Ed. 594.

(b) 1 Taunt. 485.

(c) 3 Taunt. 146.

(d) 1 Bos. & Pul. 200.

(e) 1 Taunt. 487.

(f) 3 Bos. & Pul. 254, and see 5 Price, 522.

(g) 4 Taunt. 299.

(h) 12 Geo. I. c. 29, § 1, 2. 5 Geo. II. c. 27. Barnes, 407, 8, 9, and see the preamble to e second section of the statute 51 Geo. III. c. 124, which is now expired.

(i) Com. Dig. tit. *Plader*, 2 B. 2. 6 Mod. 183.

(k) 3 Keb. 126.

a rule of court was made in the Common Pleas, *(aa)* calculated to prevent surprise on the defendant; whereby it was ordered, that "in every action to be commenced by original writ of *quare clausum fregit*, there should be written or printed, under the summons to be served by the sheriff's officer on such writ, a notice similar to that required on other serviceable process, of the intent and meaning of such service; and that upon every *distringas*, to be issued in default of the defendant's appearance to such *quare clausum fregit*, there should, at the time of the execution of such *distringas*, be served by the sheriff's officer on the defendant, if he could be met with, or if not, left at his dwelling house or place where such *distringas* should be executed, a written or printed notice, apprising him of the cause of the distress, and that in default of his appearance at the return of the writ, he would be liable to be distrained upon for such further sum as the court should order."

At length, it was enacted by the statute 7 & 8 Geo. IV. c. 71, *(bb)* that "in all cases where the plaintiff or plaintiffs shall proceed by original or other writ, and summons or attachment thereupon, or by *subpoena* and attachment thereupon, in any action at law, against any person or persons not having privilege of parliament, no writ of *distringas* shall issue for default of appearance; but the defendant or defendants shall be served personally with the summons or attachment, at the foot of which shall be written a notice, informing the defendant or defendants of the intent and meaning of such service, to the effect following." *(c)*

'C. D. [*naming the defendant*]. You are served with this process, at the suit of A. B. [*naming the plaintiff or plaintiffs*], to the intent that you may appear by your attorney, in his majesty's court of ——— at *Westminster*, at the return hereof, being the ——— day of ———, *(d)* in order to your defence in this action: And take notice, that in default of your appearance, the said A. B. will cause an appearance to be entered for you, and proceed thereon, as if you had yourself appeared by your attorney.'

"But in case it shall be made appear to the satisfaction of the court, or, in the vacation, of any judge of the court from which such process shall issue, or into which the same shall be returnable, that the defendant or defendants could not be personally served with such summons or attachment, *(e)* and that such process had been duly executed at the dwelling house or place of abode of such defendant or defendants, that then it shall and may be lawful for the plaintiff or plaintiffs, by leave of the *court, *(a)* or [*114] order of such judge as aforesaid, *(a)* to sue out a writ of *distringas*, *(b)* to compel the appearance of such defendant or defendants; and that at the time of the execution of such writ of *distringas*, there shall be served on the defendant or defendants, by the officer executing such writ, if he she

(aa) R. II. 49 Geo. III. C. P. 1 Taunt. 204, 505, and see *id.* 59.

(bb) § 5, and see stat. 51 Geo. III. c. 124, § 2, continued by 57 Geo. III. c. 101, but which had expired before the passing of the 7 & 8 Geo. IV. c. 71.

(c) Append. Chap. V. § 14.

(d) These blanks must be filled up with the *day of the month* when the process is returnable; it having been holden, that notice to appear at the return of the writ, being "from *Easter day* in one month," is bad. 4 Taunt. 751.

(e) Append. Chap. V. § 17. And for the forms of returns to the original, on the above statute, see *id.* § 15, 16.

(a) For the form of the rule of court, and judge's *fiat in vacation*, see Append. Chap. V. § 18, 19.

(b) Append. Chap. V. 23, 24.

or they can be met with; and if he she or they cannot then be met with, there shall be left at his her or their dwelling house, or other place where such *distringas* shall be executed, a written notice in the following form:”(c)

‘In the court of———[specifying the court in which the suit shall be depending.] Between A. B. plaintiff, and C. D. defendant. [naming the parties.] Take notice, that I have this day distrained upon your goods and chattels, for the sum of forty shillings, in consequence of your not having appeared by your attorney in the said court, at the return of a writ of ——, returnable there on the —— day of ——; and that in default of your appearing to the present writ of *distringas*, at the return thereof, being the —— day of ——, the said A. B. will cause an appearance to be entered for you, and proceed thereon, as if you had yourself appeared by your attorney.’

E. F.

[The name of the sheriff's officer.]

‘To C. D. the above-named defendant.’

“And if such defendant or defendants shall not appear at the return of such original or other writ, or of such *distringas*, as the case may be, or within *eight* days after the return thereof, in such case it shall and may be lawful to and for the plaintiff or plaintiffs, upon affidavit being made and filed in the proper court, of the personal service of such summons or attachment,(d) and notice written on the foot thereof as aforesaid, or of the due execution of such *distringas*,(c) and of the service of such notice as is thereby directed on the execution of such *distringas*, as the case may be, to enter a common appearance for the defendant or defendants, and to proceed thereon, as if such defendant or defendants had entered his her or their appearance, any law or usage to the contrary notwithstanding; and that such affidavit or affidavits may be made before any judge or commissioner of the court, out of or into which such writs shall issue or be returnable, authorized to take affidavits in such court, or else before the proper officer for entering common appearances in such court, or his lawful deputy; and which affidavit is thereby directed to be filed *gratis*.”

The provisions of this statute extend to the process by *subpoena* and attachment, and also, as it seems, to the process by *distringas* in the Exchequer, as well as in the other superior courts at *Westminster*:(f) [*115] And the *court of Common Pleas will not grant a *distringas* against a defendant who has gone abroad, without proof of his having absented himself with intent to avoid the process.(a) To ground a motion for a *distringas* on the above statute, an affidavit must be made by the sheriff's officer, or person employed to serve the *venire*, stating that he has endeavored to serve it on the defendant personally, for which purpose he has made *three* several applications at least at his dwelling house or place of abode, the last of which was on the return day of the writ, when he left the summons, or copy of the *venire*, with one of the defendant's family, or the person with whom he lodged; but that he could not be personally met with, and that deponent believes the defendant kept out of the way, to

(c) *Id.* § 25.

(d) *Id.* § 29.

(e) *Id.* § 30, 31. And for the forms of return to the *distringas*, on the above statute, see *id.* § 26, 7, 8.

(f) 5 Taunt. 71, (a), but see 3 Price, 263. *Id.* 266, n. 5 Price, 522, 639. *Post*, Chap. VIII. by which it seems, that the ancient practice of issuing writs of *distringas*, after service of the *venire facias*, in the Exchequer, still continues.

(a) 5 Taunt. 703. 1 Marsh. 292, S. C.

avoid being served, (b) with his reason for such belief: (c) and the affidavit must set forth the tenor of the summons, (d) and notice subscribed to the process, *in hæc verba*. (e) This clause of the statute, however, does not extend to the process by attachment on a *justicies*, in a county palatine; (f) nor to persons having privilege of parliament, the proceedings against whom will be considered in the following chapter. And the method of proceeding by summons or attachment and *distringas*, subject to the restrictions of the statute, may still be used against other persons, where they keep out of the way, so that they cannot be arrested, or served with process.

CHAPTER VI.

[*116]

Of the PROCEEDINGS in ACTIONS against PEERS of the REALM, and MEMBERS of the HOUSE of COMMONS; and against CORPORATIONS, and HUNDREDORS.

AT common law, it seems that *peers* of the realm, and *members* of the house of commons, not being subject to a *capias*, could only have been sued by *original writ*. But now, by statute 12 & 13 W. III. c. 3, § 2, (a) “any person or persons having cause of action against any knight, citizen or burgess of the house of commons, or any other person entitled to privilege of parliament, may prosecute such knight, &c. in his majesty’s court of King’s Bench, Common Pleas, or Exchequer, by *summons* and distress infinite, or by original *bill* and summons, attachment, and distress infinite; which the said respective courts are empowered to issue against them, or any of them, until he or they shall enter a common appearance, or file common bail to the plaintiff’s action, according to the course of each respective court.”

And, for preventing inconveniences arising from merchants, and other persons within the description of the statutes relating to bankrupts, being entitled to privilege of parliament, and becoming insolvent, it is enacted, by the statute 6 Geo. IV. c. 16, (b) that “if any trader, liable to become bankrupt, having privilege of parliament, shall commit any of the acts of bankruptcy therein mentioned, a commission of bankrupt may issue against him; and the commissioners, and all other persons acting under such commission, may proceed thereon, in like manner as against other bankrupts; but such person shall not be subject to be arrested or imprisoned, during the time of such privilege, except in cases thereby made felony. And if any creditor or creditors of any such trader, having privilege of parliament, to such amount as is thereafter declared requisite to support a commission, shall file an affidavit or affidavits, in any court of record at *Westminster*, that such debt or debts is or are justly due to him or them respectively, and

(b) 4 Taunt. 156, and see 8 Taunt. 57, 171.

(c) 5 Taunt. 520. 1 Marsh. 267, S. C., and see *id.* 268, (a). 5 Taunt. 853. 8 Taunt. 57, 171. *Id.* 693. 3 Moore, 23, S. C.

(d) 4 Taunt. 619.

(e) 5 Taunt. 853.

(f) *Id.* 69.

(a) For the history of this statute, and the alterations it underwent in the House of Lords, see 2 H. Blac. 273, 4, 300, &c.

(b) § 9, and see stat. 4 Geo. III. c. 33. 45 Geo. III. c. 124, § 1.

that such debtor, as he or they verily believe, is such trader as aforesaid, and shall sue out of the same court a summons, or an original bill and summons, against such trader, and serve him with a copy of such summons, if such trader shall not, within one calendar month after personal [*117] service of such summons, pay, *secure, or compound for such debt or debts, to the satisfaction of such creditor or creditors, or enter into a bond with such sum, and with two sufficient sureties, as any of the judges of the court out of which such summons shall issue shall approve of, to pay such sum as shall be recovered in such action or actions, together with such costs as shall be given in the same, and within one calendar month next after personal service of such summons, cause an appearance or appearances to be entered to such action or actions, in the proper court or courts in which the same shall have been brought, every such trader shall be deemed to have committed an act of bankruptcy, from the time of the service of such summons: and any creditor or creditors of such trader, to such amount as aforesaid, may sue out a commission against him, and proceed thereon, in like manner as against other bankrupts.”(a) This clause appears to have been taken from a similar one in the statute 4 Geo. III. c. 33; upon which it was holden, that a bond given under the latter statute, is analogous to a recognizance of bail in error: and therefore, where a member of parliament had given a bond, with two sureties conditioned for payment of the sum to be recovered in the action, and before trial became bankrupt, the court refused to order the bond to be delivered up to be cancelled.(b)

By a subsequent clause, in the statute 6 Geo. IV. c. 16,(c) it was enacted, that “if any decree or order shall have been pronounced in any cause depending in any court of equity, or any order made in any matter of bankruptcy, or lunacy, against any such trader having privilege of parliament, ordering such trader to pay any sum of money, and such trader shall disobey, the same having been duly served upon him, the person or persons entitled to receive such sum, under such decree or order, or interested in enforcing the payment thereof, pursuant to such decree or order, may apply to the court by which the same shall have been pronounced, to fix a peremptory day for the payment of such money, which shall accordingly be fixed by an order for that purpose; and if such trader, being personally served with such last mentioned order, *eight* days before the date therein appointed for payment of such money, shall neglect to pay the same, he shall be deemed to have committed an act of bankruptcy, from the time of the service thereof; and any such creditor or creditors as aforesaid may sue out a commission against him, and proceed thereon, in like manner as against other bankrupts.”

Since the making of the statute 12 & 13 W. III. c. 3, § 2, *members* of the house of commons may be sued by *bill* and summons, &c., as well as by *original writ*.(d) And if a person having privilege of parliament be in the King’s Bench prison, a declaration may be filed against him, as being in the custody of the marshal; and no summons need be issued.(e)

[*118] There *are also two cases, in which it has been determined, that

(a) § 10.

(b) 3 Barn. & Ald. 273. 1 Chit. Rep. 731, S. C., and see 5 Barn. & Ald. 250.

(c) § 11, and see stat. 47 Geo. III. sess. 2, c. 40.

(d) 2 Ld. Raym. 1442. 2 Str. 734, S. C. But this mode of proceeding is not allowed, as against unprivileged persons. *Whitworth v. Richardson*, E. 23 Geo. III. K. B.

(e) 5 Durnf. & East, 361.

a peer of the realm may be sued in the King's Bench, by *bill* and summons,(a) &c. But in a subsequent case,(b) it was the opinion of the judges, on a question referred to them in the house of lords, that these cases were not to be considered as decisive authorities on the subject; though, after pleading in chief, it was too late for the defendant to object to the jurisdiction of the court.(c) It seems therefore that, notwithstanding the above statute, the only regular mode of proceeding against a peer, is by original writ.(d) And if a peer be sued jointly with others, by bill of *Middlesex*, the court will set aside the proceedings, as against the peer.(e) But the motion for this purpose must be made as soon as may be, and before interlocutory judgment.(f) And if an *Irish* peer be sued by bill, the court of Common Pleas will not set aside the proceedings on motion; but leave him to plead his privilege in abatement.(g) It was formerly doubted, whether a member of the house of commons was entitled to his privilege, when sued with a common person;(h) but it is now settled, that his privilege shall be allowed him.(i) And where an action is brought against a peer or member of the house of commons, jointly with other persons, the original writ or bill should be against all the defendants; upon which the peer or member should be summoned, and a *capias* issued against the others.

The original writ against a peer, or member of the house of commons, is the same as against other persons;(k) only that when it is issued against a peer, the sheriff is commanded to *summon* him by good summoners; and after describing the defendant by his proper title, these words are added, "*having privilege of peerage*," or, against a member of the house of commons, "*having privilege of parliament*." And it is said, that a peer or peeress cannot be *attached*, but should be brought in by *summons*:(l) Yet, where a declaration in *case* against an earl, stated him to have been *summoned* to answer, instead of *attached*, it was holden to be bad, on special demurrer.(m) In proceeding by *original writ*,(n) against a peer or member of the house of commons, the original should issue into that county where the defendant lives; and a *summons* is made out thereon by the plaintiff's attorney, and delivered to the sheriff, who serves it on the defendant personally, or by leaving it at his dwelling house, or last place of abode.(o) And where, upon process, by *original writ*, against a member of the house of commons, the summons omitted to describe him as having privilege of parliament, and the notice at the foot stated, that in default of his appearance, on the return day of the writ, the plaintiff would cause *an appearance to be entered for him; the court held, that [*119] the summons was sufficient.(aa) Before or on the *quarto die post* of the return of the original, the defendant either appears or makes default; for he cannot cast an *essoin*.(bb) If he make default, the plaintiff may sue

(a) Say. Rep. 63, 4. Cowp. 844.

(b) 2 H. Blac. 267, 299, and see 3 Bos. & Pul. 7, 9, (b). 12, (a).

(c) See also Bro. Abr. tit. *Bill*, pl. 6, and *Responder*, pl. 30.

(d) 2 H. Blac. 267, 299. Lil. Ent. 21.

(e) 3 Maule & Sel. 88.

(f) Lady *Napier's* case, T. 21 Geo. III. K. B.

(g) 7 Taunt. 679. 1 Moore, 410, S. C.

(h) 1 Taunt. 256.

(i) 4 Maule & Sel. 585.

(k) Append. Chap. V. § 1, &c.

(l) 1 Str. 225.

(m) 2 Chit. Rep. 638, 9.

(n) For the form of a *præcipe* for an original writ in *debt*, or *case*, against a peer, or member of the house of commons, see Append. Chap. VI. § 1, 2, 3.

(o) 2 Crompt. 3 Ed. 138.

(aa) 5 Maule & Sel. 221.

(bb) *Ante*, 109.

out a *testatum* summons, *(cc)* or (which is more usual,) a *distringas*, *(dd)* and after that, (if necessary,) an *alias* or *pluries distringas*; *(e)* upon which he may move to increase and sell the issues, as was formerly usual in other cases: *(f)* Or, upon an affidavit of the personal service of the summons, he may proceed against members of the house of commons, by entering an appearance, in the manner pointed out by the statute 45 Geo. III. c. 124, § 3. *(g)* If the sheriff return upon the *distringas*, *&c.*, that the defendant hath nothing by which he can be distrained, the plaintiff may have a *testatum distringas* into another county. *(h)* And after a summons and *distringas* had issued against a privileged defendant, in the county where the action was brought, but in which he did not reside, and of which process he had no notice, and returns were made of *non est inventus* and *nulla bona*, it was holden, that a *testatum distringas* might regularly issue into the county in which he resided and had property, without any new summons in such county. *(i)*

The *distringas* and other subsequent process upon the original, state the cause of action at large *(k)* and must be made returnable, in the King's Bench, on a general return-day, *ubicunque*, or *wheresoever* the king shall then be in *England*; or, in the Common Pleas, before the king's justices at *Westminster*. Each succeeding writ must be tested on the *quarto die post* of the return of the preceding one; and there must be *fifteen* days at least between the teste and return. *(l)*

If the defendant appear upon any of these writs, he should enter his appearance with the *filacer*; and when the purpose of the writ is thus answered, the issues, (if any have been levied,) are directed to be returned; or if sold, what shall remain of the money arising by such sale is to be repaid to the party distrained upon. *(m)* But the plaintiff in such case is entitled to his costs: And where he had obtained rules for selling the issues levied upon a *distringas*, *alias*, and *pluries*, and also a rule for an attachment against the sheriff, but the defendant appeared *before any issues had been actually levied*, the court ordered, that upon payment of the costs of issuing the writs, the rules should be discharged; being of opinion, that these costs were not to abide the event of the suit, but were to be paid to the plaintiff immediately and at all events, whether he should finally succeed in the suit or not. *(n)*

[*120] *The *bill* against a member of the house of commons, is a complaint in writing, describing the defendant as *having privilege of parliament*; *(a)* and concludes with a prayer by the plaintiff, or process to be made to him, according to the form of the statute, &c. This bill is filed, in the King's Bench, with the clerk of the declarations, in the King's Bench office: And if the bill be filed in *vacation*, for a cause of action

(cc) Append. Chap. VI. § 20.

(dd) Trye, 9. Append. Chap. VI. § 4.

(e) Append. Chap. VI. § 5.

(f) *Ante*, 110, 11. Append. Chap. VI. § 7, 8, 9.

(g) *Post*, 120, 21.

(h) Trye, 10, 127. Append. Chap. VI. § 6.

(i) 4 East, 162.

(k) Trye, 127. Append. Chap. VI. § 4, &c.

(l) But see the statutes 16 Car. I. c. 6, § 7. 24 Geo. II. c. 48, § 5. *Ante*, 107.

(m) Stat. 10 Geo. III. c. 50, § 4.

(n) 5 Bur. 2725.

(a) Say. Rep. 64, and see Append. Chap. VI. § 12, 13, 14, 15. *Ante*, 118.

arising after the term, there should be a special *memorandum*, stating the day of bringing the bill into the office of the clerk of the declarations. In the Common Pleas, the bill is filed with the filacer of the county where the venue is laid: In the Exchequer, it is filed with the master. And the first process thereon, in all the courts, is a writ of *summons*; (b) which is a judicial writ, issuing out of the King's Bench or filacer's office, or office of pleas in the Exchequer, on a proper *præcipe*; (c) and directed to the sheriff of the county where the venue is laid, commanding him to summon the defendant: Or, if the defendant reside in a different county, the plaintiff may sue out a writ of *testatum* summons into that county. (d) Upon one or other of these writs the defendant should be summoned, in like manner as upon an original; and if he do not appear, within *four* days after the return of it, is subject to the process of *attachment* and *distringas*; (e) &c. If he appear, his appearance should be entered, in the King's Bench, with the clerk of the common bails; in the Common Pleas, with the filacer of the county into which the summons issued; or, in the Exchequer, in the appearance book in the office of pleas.

The writ of summons, and other subsequent process upon the *bill*, differ from the process by *original*, in the following particulars: first, that they do not state the cause of action at large, but only require the defendant to answer the plaintiff generally, in a *plea of trespass on the case*, (according to the plea,) *to his damage of, &c., as he can reasonably show that thereof he ought to answer*; (f) secondly, that they are tested on the very return, and not on the *quarto die post* of the return of each other; thirdly, that they are made returnable on days *certain*, and not on *general* return days; and fourthly, that there need not be *fifteen* days between the teste and return of them.

The mode of proceeding by *distringas*, against members of the house of commons, being found extremely dilatory and expensive, it was enacted by the statute 45 Geo. III. c. 124, § 3, that "when any summons, or original bill and summons, shall be sued out against any person having privilege of parliament, and no such affidavit shall be made and filed as therein is mentioned, if the defendant or defendants shall not appear at the return of the summons, or within *eight* days after such return, the plaintiff or plaintiffs, upon affidavit being made and filed in the proper court, of the personal service of such summons, which affidavit shall be **filed gratis*, may enter an appearance or appearances for the defendant or defendants, and proceed thereon, as if such defendant or defendants had entered his or their appearance." [*121]

The defendant having appeared, or the plaintiff appeared for him according to the above statute, the plaintiff proceeds to *declare* against him. (a) The time allowed for declaring against a peer of the realm, or member of the house of commons, is the same as in other cases. But in assigning the breach in *assumpsit*, against a peer of the realm, the plaintiff must not charge the defendant with *contriving and fraudulently intending, craftily*

(b) Imp. K. B. 10 Ed. 515, 16. 8 Mod. 228, and see Append. Chap. VI. § 17, 18, 19.

(c) Append. Chap. VI. § 16, 21.

(d) *id.* § 20, and see 4 East, 162.

(e) *Id.* § 22, &c.

(f) 2 Crompt. 3 Ed. 138. Trye, 127.

(a) For the form of a note of appearance for, and beginning of a declaration by *original* against a peer, or member of the house of commons, see Append. Chap. VI. § 10, 11, and for the beginning of a declaration by *bill*, against a member of the house of commons, after appearance, in C. P. see *id.* § 27, and for the entry of a bill and process against a member, to save the statute, in K. B. see *id.* § 28.

and subtilly to deceive and defraud him; for the house of lords have adjudged it a very high contempt and misdemeanor, to charge a member of their house with any species of fraud or deceit.(bb)

All further proceedings against peers of the realm, and members of the house of commons, are the same as against other persons;(c) only it should be remembered, that as no *capias* lies against them, they cannot be taken in execution, unless where the judgment is obtained upon a statute staple, or statute merchant, or upon the statute of *Acton Burnel*,(d) in which case a *capias* lies, even against peers of the realm.

In proceeding against a *Corporation*, the process should be served on the Mayor, or other head officer;(e) and if the defendants do not appear, before or on the *quarto die post* of the return of the original, by an attorney regularly appointed, (for they cannot appear in person),(f) the next process is a *distringas*, which should go against them in their public capacity:(g) and under this process, the sheriff may distrain the lands and goods, which constitute the common stock of the corporation.(h) If they have neither lands nor goods, there is no way to compel them to appear, at law or in equity,(i) but only in parliament;(k) for it is a rule, that for a public concern, the sheriff cannot distrain any private person, who is a member of the corporation.(l)[A]

(bb) 2 Crompt. 3 Ed. 141.

(c) 8 Mod. 229.

(d) 11 Edw. I.

(e) Sty. Rep. 367. Prac. in Chan. 131. 1 Chan. Cas. 206.

(f) *Ante*, 92.

(g) 1 Vent. 351.

(h) Skin. 27, and see 1 Bot. 143, pl. 178.

(i) *Id.* 1 Vern. 122. Skin. 84, S. C. 2 Vern. 394. Prec. in Chan. 129, S. C.

(k) 1 Chan. Cas. 204.

(l) Bro. Abr. tit. *Trespass*, 135. 1 Vent. 351. Cowp. 85. Sty. Rep. 367, *contra*; and see 1 Lev. 237. Finch. Rep. 83, 4, S. C. And for the form of a note of appearance for, and beginning of a declaration against a *corporation*, see Append. Chap. VI. § 29, 30.

[A] Actions against corporations must be instituted by summons in the name which is given to them in their several charters. But a foreign attachment lies against a corporation incorporated by the laws of another state, to attach its property in this state; but on giving bail for the payment of the debt, interest and costs, that may be recovered by the plaintiff, the court will permit it to appear, and on motion will dissolve the attachment. 2 Troub. & Haley, Pract. 459, 3d ed.

It is said in the English books that no precedent of an *original writ*, in the common law sense of that term, has ever been known in practice to be issued against a corporation, and it is laid down as an universal rule, that the process must be by summons, and cannot be by attachment. Bro. Abr. tit. "Corporation," pl. 43. 2 Impey's C. B. Pract. 675, note. Com. Dig. tit. "Pleader," 2 B. 2. 1 Bac. Abr. tit. "Corporation," 507. 2 Sell. Pract. tit. "Corporation," 148. Ang. & Ames on Corp. § 637, note, 4th ed.

It has also been held, and at common law it is not to be disputed, that the service of the summons on the chief officer must also be within the jurisdiction of the sovereignty where the artificial body exists. *MQueen v. The Manufacturing Company*, 16 Johns. Rep. 6. *Nash v. The Rector, &c.*, 1 Miles, Rep. 78, per Pettit, P. J. *Dawson v. Campbell*, 2 Id. 171. *Combs v. The Bank of Kentucky*, 3 Penn. L. Jour. 38, per Kennedy, J. *Lehigh County v. Kleckner*, 5 Watts & Serg. 187, per Rogers, J. *Brobst v. The Bank of Penn.*, 5 Id. 380, per Sergeant, J. *Bank of Virginia v. Adams*, 1 Parsons Sel. Eq. Cas. 534, per King, P. J. *Bank of Augusta v. Earle*, 13 Peters, S. C. Rep. 588. *Peckham v. Haverhill*, 16 Pick. 286. This principle of the common law has been much broken in upon by statutory enactment in this country. Pennsylvania seems to have departed widely from the common law. By the act of June 16, 1836, § 41, *Purd. Dig.* p. 49, 7 Ed. p. 168, 8 Ed., *Dunlp.* 470, it is provided that any corporation shall answer upon a writ of summons (except counties and townships), and that service shall be sufficient, if made on the president or other principal officer, or on the cashier, treasurer, secretary, or chief clerk; and by § 42, *Id.* it is further provided, that in actions occasioned by trespass done by a corporation, if none of the officers shall reside in

*The statutes of *hue and cry*, (a) *riot*, (b) and *black*, (cc) acts, and [*122] various other statutes, (dd) on which the hundred were formerly

(a) 13 Edw. I. st. 2, c. 1, 2. 23 Edw. III. c. 11. 27 Eliz. c. 13. 8 Geo. II. c. 16. 22 Geo. II. c. 24. For the proceedings in general on these statutes, see 2 Wms. Saund. 5 Ed. 374, (1,) to 377, b. (12,) 423, (1,); and for the evidence in support of actions thereon, Peake Evid. 5 Ed. 295, &c., 2 Phil. Evid. 6 Ed. 209, &c.

(b) 1 Geo. I. st. 2, c. 5, § 4 & 6. For the proceedings in general on this act, see 2 Wms. Saund. 5 Edw. 377, b, to 378, b; for the form of a declaration thereon, 2 Chit. Pl. 4 Ed. 832; for the evidence in support of it, 2 Phil. Evid. 6 Ed. 216; and for cases determined thereon, Doug. 699. 5 Durnf. & East, 14, 341. 7 Durnf. & East, 496. 1 East, 615, 636. 1 Price, 343. Holt Nl. Pri. 201, 203, (n). 1 Barn. & Ald. 487. 2 Chit. Pl. 4 Ed. 832, (a), and Moore Dig. tit. *Riot*.

(cc) 9 Geo. I. c. 22. For the proceedings in general on this act, see 2 Wms. Saund. 5 Ed. 378, b, c, d, e; for the forms of declarations thereon, 2 Chit. Pl. 4 Ed. 828, 830; and for cases determined on this act, 1 Durnf. & East, 71; 2 Durnf. & East, 255. 3 East, 400, 457. 8 East, 173. 3 Moore, 319. 1 Brod. & Bing. 64, S. C. 1 Barn. & Cres. 304. 2 Dowl. & Ryl. 439, S. C. 2 Barn. & Cres. 254. 3 Dowl. & Ryl. 489, S. C. 6 Dowl. & Ryl. 10. 4 Barn. & Cres. 167. 6 Dowl. & Ryl. 247, S. C. 4 Barn. & Cres. 913. 2 Chit. Pl. 4 Ed. 828, (a). Pratt Dig. tit. *Black Act*.

(dd) 1 Geo. I. st. 2, c. 48. 6 Geo. I. c. 16. 8 Geo. II. c. 20. 10 Geo. II. c. 32, (except § 10). 11 Geo. II. c. 22, § 5, to the end. 13 Geo. II. c. 21. 14 Geo. II. c. 6. 22 Geo. II. c. 46, § 34. 29 Geo. II. c. 36, § 6, 7, 8, 9. 9 Geo. III. c. 29. 36 Geo. III. c. 9, § 3, to the end. 41 Geo. III. c. 24, (U. K.). 52 Geo. III. c. 130. 56 Geo. III. c. 125. 57 Geo. III. c. 19, § 33, and 3 Geo. IV. c. 33. And for cases determined on, 6 Geo. I. c. 16, see 11 East, 349; on 52 Geo. III. c. 130, § 2. 1 Barn. & Ald. 146; on 57 Geo. III. c. 19, § 38. 2 Stark. Nl. Pri. 504. 3 Dowl. & Ryl. 96. 3 Barn. & Cres. 147. 4 Dowl. & Ryl. 778, S. C.; and on 3 Geo. IV. c. 33. 4 Barn. & Cres. 913.

the county in which such trespass was done, the writ may be served upon any officer or agent, at any office or place of business within the county, or it may be served upon any of the officers in any county or place where they may be found, which is almost a transcript of the act. This act of 1817, in these particulars, has been held to extend to domestic corporations only. *Bushel v. The Com. Ins. Co.*, 15 S. & R. 183, opinion per *Duncan, J.*, recognized in *Nash v. The Rector, &c.*, 1 Miles, 82, per *Pettit, J.* *Dawson v. Campbell*, 2 Id. 170. *Combs v. The Bank of Kentucky*, 3 Penn. L. J. 58. By the theory of the law, and by the various statutory provisions, it is clear that the corporation can act only by its own principal officers; that its responsibilities and rights are thrown upon them, and that they cannot be legally called upon to answer through the medium of their inferior officers. *Brobst v. The Bank of Pennsylvania*, 5 W. & S. 381. Such appears to have been the law prior to the act of March 21, 1849, P. L. 216. *Purd. Dig.* 1187, 7 Ed. *Dunlp.* 1149. *Purd.* 169, 8 Ed. By this act it is provided, that in actions brought against any foreign corporation every judgment shall be final, unless on appeal, bail absolute shall be given, and that process may be served "upon any officer, agent, or engineer of such corporation, either personally or by copy, or by leaving a certified copy at the office, depot, or usual place of business of said corporation." Under this act some cases have already arisen. *Kennard v. The Railroad*, before the District of Philadelphia, March 4, 1850, is an important one. In this case the sheriff made the following return: "Served by leaving a true and attested copy of the within writ with an agent of the defendants, and by leaving a certified copy in the office attached to the depot." In point of fact, as appeared by the affidavits, the service was made on an agent, and at a depot of a different corporation. The counsel for the defendant moved to set aside the return of service of the writ on this ground. But the court were of opinion that they could not go beyond the face of the return, and the return was held good. The following is the opinion of the court, per *Sharswood, J.*:—

"This was a rule to show cause why the service of process should not be set aside. It is an action against the New Jersey Railroad Company, in which the summons was served by leaving a certified copy at the office attached to the depot. It is important in practice to show for what causes a court will set aside the service of a writ by the sheriff. It would seem, according to principles laid down, that the court should not go beyond the face of the return, nor admit extraneous evidence.

"In *Kleckner v. County*, 6 Wh. 66, where the return was, that the writ was served upon two of the commissioners of the county, and the motion was to set aside the service of the writ, as not having been legal, evidence was taken in the court below to show that the persons served were not commissioners. The service of the summons was set aside; but the Supreme Court reversed the judgment, holding that the court below erred in setting aside the writ. In *Combs v. Bank of Kentucky*, 3 P. A. Law Journal, 58, the defendant was a foreign corporation, which certainly was an extraneous fact. In the case before us, that extraneous

liable for damages arising from malicious injuries to property,[A] having been repealed by the statute 7 & 8 Geo. IV. c. 27, the remedies against

fact does not impeach, but support the writ. We think that the sheriff's service of a writ should not be set aside, unless from something on the face of it. This does not interfere with the practice long used in this and other courts, to open a judgment by default, and let the party take defence upon the merits. We must take it as true, in point of fact, that the summons was served upon an agent of the company; that it was left at a depot; that it was left with a competent person, and that the depot was the depot of the defendants. The return is, in the language of the act of March 21, 1849, (Pamph. L. 216, Brightley's Sup. 1849, 124,) which enacts, that in the commencement of any suit or action against any such foreign corporation, process may be served upon any officer, agent, or engineer of such corporation, either personally or by copy, or by leaving a certified copy at the office, depot, or usual place of business of said corporation; and such service shall be good and valid in law to all intents and purposes. We discharge this rule."

In a still later case before the same court, *Patton v. The Ins. Co.* September, 1852, upon a rule taken to set aside the service of the writ, the same ground was stated and sustained by the court. The return in this case was: "Served a true and attested copy of the within writ personally on Alfred Edwards, an agent of the within named defendants, and made known to him the contents thereof." Edwards, it was agreed, was an agent of the defendants in New York, and was one of the directors, but it was agreed that he was not an agent in Pennsylvania, because he had not complied with the provisions of the act of Jan. 24, 1849. *Purd. Dig.* 1349. The following is the opinion of the court, September 18, 1852, per *Sharswood, P. J.*:—

"This motion is, why the return of service should not be set aside. The service itself is an act *in pais*—it is with the record only that we have to do. This court has more than once decided that upon this motion the parties are concluded by the facts stated in the sheriff's return, although where a judgment has been taken by default, and an appeal is made to the discretion of the court to open the judgment and let the defendant into a defence, they will allow him in that case to contradict the sheriff's return by parol evidence, and show that in point of fact he had no actual notice of the suit. The difference between that case and the one now before the court is very palpable.

"In *Klechner v. The County of Lehigh*, (6 Whart. 66,) in which the sheriff returned that he served the writ on two persons *said to be* commissioners of the county, and the court below had heard evidence as to whether the parties were commissioners, the Supreme Court said, 'As the return must be considered absolute and conclusive between the parties to the action, the court erred in setting aside the service of the writ by the introduction of extraneous proofs.' The authority of this case is conclusive, as the order of the court upon this motion would undoubtedly be examined on writ of error.

"It remains then to consider the return in this case: 'Served,' &c. It is not denied that the defendants are a foreign corporation. By the 3d section of the act 21 March, 1849, it is provided that, 'in the commencement of any suit or action against a foreign corporation, process may be served upon any officer, agent, or engineer, of such corporation, either personally or by copy, or by leaving a certified copy at the office, depot, or usual place of business of said corporation; and such service shall be good and valid in law to all intents and purposes.' It is unnecessary to inquire here what is meant by the word 'agent.' The sheriff, by returning that he has served on Edwards, an agent, has certainly assumed that he is such an agent as is contemplated by the act. Rule discharged."

It would thus seem to be well settled, that the sheriff's return is conclusive and not traversable: the only remedy the defendant has is by an action for a false return. *Salkill v. Le Sig. Howard*, 2 Rolle, R. 128. *Palmer v. Potter*, Cro. Eliz. 512. *Madox v. Young*, Hob. 209. *Steward v. Floyd*, 12 Mod. 311. *Hawkins v. Mildmay*, Cro. Eliz. 730. *Wordall v. Smith*, 1 Camp. 332. *Slayton v. Chester*, 4 Mass. 478. *Bott v. Eurnell*, 9 Id. 96. *Bean v. Parker*, 17 Id. 591. *Bank of Gallipolis v. Donagan*, 12 Ohio, 220. *Palmer v. Crane*, 8 Miss. 619. *Humphries v. Lawson*, 2 Eng. (Ark. Rep.) 341. It is even said by Sewell on Sheriff, p. 387, that the court will not try on affidavits whether a return by the sheriff to a writ is false, even though a strong case is made out showing fraud and collusion, but the party must resort to his remedy by action. See *Anony. Lofft*. 371. *Shaw v. Simpson*, 1 Ld. Raym. 184. *Goulot v. De Crouy*, 2 Dowl. P. C. 86. 1 Cr. & M. 772. *Barber v. Mitchell*, 2 Dowl. P. C. 574.

There has been much statutory change in this country as to service of process on corporations, both foreign and domestic. Perhaps the enactments in New York, Pennsylvania, and Ohio may be considered as general exponents of the legislation. See 2 Troub. & Haley's Pract. 458, by Wharton, 3d Ed. *Purd. Dig.* p. 168, tit. Corporations, Brightly's Ed. 1853. Curwen's Laws of Ohio, p. 1171, 1174. Blatchford's Gen. Stat. p. 506, 507. It is for this

[A] See next page.

the hundred for damages occasioned by persons riotously and tumultuously assembling, for which alone the hundred are now liable, were amended, and consolidated into one act, by the 7 & 8 Geo. IV. c. 31; which commenced on the *first* day of *July*, 1827.(e) By the latter statute,(f) "if any church or chapel, or any chapel for the religious worship of persons dissenting from the united church of *England* and *Ireland*, duly registered or recorded, or any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn or granery, or any building or erection used in carrying on any trade or manufacture, or branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam engine, or other engine, for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, wagon-way, or trunk for conveying minerals from any mine, shall be feloniously demolished, pulled down, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled

(e) § 1.

(f) § 2.

reason that the Pennsylvania legislation has been so fully considered in this note, and the points adjudicated so fully stated.

"The ancient doctrine was, that the action of *assumpsit* could not be supported against a corporation, unless in the case of promissory notes, and other contracts sanctioned by particular legislative provisions. And as late as 1799, in a case in the Supreme Court of Pennsylvania, the question arose upon a special verdict whether an action of *indebitatus assumpsit*, upon an implied promise, could be maintained against an incorporated turnpike company, as a corporation could only contract by deed under the corporate seal; and the court held that, on the ground stated, the company was not liable to be sued in that form of action. But it having since become well settled, by the more recent decisions of the courts of the United States, that corporations may act by parol, it has resulted, as a matter of course, that *assumpsit* will lie against a corporation; and such is now the established doctrine in this country. The Supreme Court of Massachusetts, a number of years since, decided that *assumpsit* would lie against a corporation, where there is an express promise by an agent of the corporation, or a duty arising from some act or request of such agent within the authority of the corporation. And in a very late case, in the same State, it was held, that either an action of debt or of *assumpsit* may be maintained upon an implied promise, for labour done and materials found, under a special contract, which has not been performed on the part of a corporation. In a case in the Supreme Court of the United States, an attempt was made to distinguish between express and implied promises, as to the liability of corporations to be sued in *assumpsit*; but the distinction was disregarded, and the court went the whole length of giving the same remedies against incorporated companies, in matter of contract, as against individuals. The old cases are there reviewed, showing that the law has been progressively altering, with respect to the validity of acts done by corporations not under their seal. The court observe, upon the English authorities referred to, that, as soon as it was settled that a regularly appointed agent of a corporation could contract in its name without a seal, it was impossible to maintain any longer that a corporation was not liable upon promises; otherwise there would be no remedy against the corporation; and the court concluded by saying, that it is a sound rule of law, that whenever a corporation is acting within the scope of the legitimate purposes of the corporation, all parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed upon them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action will lie. In the Supreme Court of New York, also, Mr. Chief Justice Thompson held expressly that *assumpsit* will lie against a corporation on an implied promise. In this case a turnpike company covenanted to pay money, and a part had been paid; *assumpsit*, the court held, would lie on the implied promise to pay the balance. And in another case in New York, it was held, that *assumpsit* would lie against the corporation on the implied promise to pay the amount of damages assessed by a jury, for the land of the plaintiff taken by the corporation. The same is the general rule in Pennsylvania and in New Jersey, and, we believe, throughout the country. And in an action of *assumpsit* against a corporation, it makes no difference whether the agent who makes the contract in behalf of the corporation was appointed under seal or by vote." Angell & Ames on Corp. § 379, and cases there cited, 4th Ed.

[A] See Pard. Dig. p. 600, Ed. 1853.

together, in every such case the inhabitants of the hundred, wapentake, ward, or other district in the nature of a hundred, by whatever name it shall be denominated, in which any of the said offences shall be [*123] committed, shall be liable to yield full *compensation to the person or persons damnified by the offence; not only for the damage so done to any of the subjects thereinbefore enumerated, but also for any damage which may at the same time be done by any such offenders, to any fixture, furniture, or goods whatever, in any such church, chapel, house, or other buildings or erections aforesaid."

"Provided always, that no action or summary proceeding, as therein-after mentioned, shall be maintainable by virtue of that act, for the damage caused by any of the said offences, unless the person or persons damnified, or such of them as shall have knowledge of the circumstances of the offence, or the servant or servants who had the care of the property damaged, shall, within *seven* days after the commission of the offence, go before some justice of the peace, residing near, and having jurisdiction over the place where the offence shall have been committed; and shall state upon oath, before such justice, the names of the offenders, if known, and shall submit to the examination of such justice, touching the circumstances of the offence, and become bound by recognizance before him, to prosecute the offenders, when apprehended: Provided also, that no person shall be enabled to bring any such action, unless he shall commence the same within *three* calendar months after the commission of the offence."(a)

The service of process, and mode of proceeding to judgment, in an action against the hundred, on this statute, are regulated by § 4, which enacts, that "no process for appearance, in any action to be brought by virtue of that act, against any hundred or other like district, shall be served on any inhabitant thereof, except on the high constable, or some one of the high constables, if there be more than one; who shall, within *seven* days after such service, give notice thereof to two justices of the peace of the county, riding or division, in which such hundred or district shall be situate, residing in or acting for the hundred or district; and such high constable is thereby empowered to cause to be entered an appearance in the said action, and also to defend the same, on behalf of the inhabitants of the hundred or district, as he shall be advised; or, instead of defending the same, it shall be lawful for him, with the consent and approbation of such justices, to suffer judgment to go by default; and the person upon whom, as high constable, the process in the action shall be served, shall, notwithstanding the expiration of his office, continue to act, for all the purposes of that act, until the termination of all proceedings in, and consequent upon such action; but if such person shall die before such termination, the succeeding high constable shall act in his stead."

And "wherever the plaintiff in any such action shall recover judgment, whether after verdict or by default, or otherwise, no writ of execution shall be executed on any inhabitant of the hundred, or other like [*124] *district, nor on such high constable; but the sheriff, upon the receipt of the writ of execution, shall (on payment of the fee of *five* shillings, and no more,) make his warrant to the treasurer of the

county, riding or division, in which such hundred or other like district shall be situate, commanding him to pay to the plaintiff, the sum by the said writ directed to be levied; and such treasurer is thereby required to pay the same, as also any other sum ordered to be paid by him by virtue of that act, out of any public money which shall then be in his hands, or shall come into his hands before the next general or quarter sessions of the peace for the said county, riding or division; and if there be not sufficient money for that purpose, before such sessions, he shall give notice thereof to the justices of the peace at such sessions, who shall proceed in the manner thereafter mentioned.”(a)

For the purpose of indemnifying the high constable and county treasurer, it is enacted, that, “if such high constable of the hundred, or other district sued, shall produce and prove before any two justices of the peace of the county, riding or division, residing in or acting for such hundred or district, an account of the just and necessary expenses, which he shall have incurred in consequence of any such action as aforesaid, such justices shall make an order for the payment thereof, upon the treasurer of the county, riding or division, in which such hundred or district shall be situate; and if, in any such action, judgment shall be given against the plaintiff, the high constable shall, in like manner, be reimbursed for the just and necessary expenses by him incurred in consequence of such action, over and above the taxed costs to be paid by the plaintiff in such case; and if it shall be proved to any two such justices, that the plaintiff in the action is insolvent, so that the high constable can have no relief as to such taxed costs, such justices shall make an order upon the treasurer of the county, riding or division, as aforesaid, for the payment of the amount of such taxed costs: And the justices of the peace, at the next general or quarter sessions of the peace to be holden for any such county, riding or division, or any adjournment thereof, shall direct such sum or sums of money as shall have been paid, or ordered to be paid, by the treasurer, by virtue of any such warrant or order as thereinbefore mentioned, to be raised on the hundred, or other like district, against the inhabitants of which any such action shall have been brought, over and above the general rate to be paid by such hundred or district, in common with the rest of the county, riding or division, under the acts relating to county rates; and such sum or sums shall be raised, in the manner directed by those acts, and shall be forthwith paid over to the treasurer.”(b)

It being deemed expedient to provide a *summary* mode of proceeding, where the damage is of small amount; the costs of an action in such case *greatly exceeding, in many instances, the amount of [*125] the damage; it is enacted by the statute 7 & 8 Geo. IV. c. 31,(a) that “it shall not be lawful for any person to commence any action, against the inhabitants of any hundred, or other like district, where the damage alleged to have been sustained, by reason of any of the offences in that act mentioned, shall not exceed the sum of *thirty* pounds: but the party damnified shall, within *seven* days after the commission of the offence, give a notice in writing of his claim for compensation, according to the

(a) § 6.

(b) § 7. And for the mode of reimbursement, in liberties, &c., not within any hundred, but contributing to the county rate, and in counties of cities, and liberties, &c., not contributing thereto, see § 14, 15.

(a) § 8, 9, 10, and see stat. 3 Geo. IV. c. 33.

form of the schedule thereunto annexed, to the high constable, or some one of the high constables, if there be more than one, of the hundred, or other like district, in which the offence shall have been committed; and such high constable shall, within *seven* days after the receipt of the notice, exhibit the same to some two justices of the peace of the county, riding or division, in which such hundred or district shall be situate, residing in or acting for such hundred or district; and they shall thereupon appoint a special petty session of all the justices of the peace of the county, riding or division, acting for such hundred or district, to be holden within not less than *twenty*, nor more than *thirty* days next after the exhibition of such notice, for the purpose of hearing and determining any claim which may be then and there brought before them, on account of any such damage; and such high constable shall, within *three* days after such appointment, give notice in writing to the claimant, of the day and hour, and place appointed for holding such petty session, and shall, within *ten* days, give the like notice to all the justices acting for such hundred or district; and the claimant is thereby required to cause a notice in writing, in the form in the schedule thereunto annexed, to be placed on the church or chapel door, or other conspicuous part of the parish, township or place, in which such damage shall have been sustained, on two *Sundays* preceding the day of holding such petty session.

“And it shall be lawful for the justices, not being less than *two*, at such petty session, or any adjournment thereof, to hear and examine upon oath or affirmation, the claimant, and any of the inhabitants of the hundred, or other like district, and their several witnesses, concerning any such offence, and the damage sustained thereby; and thereupon the said justices, or the major part of them, if they shall find that the claimant has sustained any damage, by means of any such offence, shall make an order for payment of the amount of such damage to him, together with his reasonable costs and charges, and also an order for payment of the costs and charges, if any, of the high constable, or inhabitants; and shall direct such order or orders to the treasurer of the county, riding or division, in which such hundred or district shall be situate, who shall pay the same to the party or parties therein named, and shall be reimbursed for the same, in the manner thereinbefore directed. And if any high constable shall refuse or

neglect to exhibit or give such notice as is required in any of the [*126] cases aforesaid, it shall be lawful for the party *damified to sue him for the amount of the damage sustained, such amount to be recovered by an action on the *case*, together with full costs of suit.”

Where any of the offences, for which compensation is granted by virtue of that act, are committed in the county of a city or town, or in any such liberty, franchise, city, town or place, as either does not contribute at all to the payment of any county rate, or contributes thereto, but not as being part of any hundred, or other like district; it is enacted that “the inhabitants thereof shall be liable to yield compensation, in the same manner, and under the same conditions and restrictions in all respects, as the inhabitants of the hundred; and every thing in that act in any wise relating to a hundred, or to the inhabitants thereof, shall equally apply to every county of a city or town, and to every such liberty, franchise, city, town and place, and to the inhabitants thereof; and where the justices of the peace of the county, riding or division, are excluded from holding jurisdiction in any such liberty, franchise, city, town or place, in every

such case, all the powers, authorities and duties by that act to or imposed on such justices, shall be exercised and performed by the justices of the peace of the liberty, franchise city, town or place, in which such offence shall be committed; and where the offence shall be committed in a county of a city or town, all the like powers, authorities and duties, shall be exercised and performed by the justices of the peace of such county of a city or town; And in every action to be brought, or summary claim to be preferred, under that act, against the inhabitants of a county of a city or town, or of any such liberty, franchise, city, town or place, the process for appearance in the action, and the notice required in the case of the claim, shall be served upon some one peace officer of such county, liberty, franchise, city, town or place: And all matters which by that act the high constable of a hundred is authorised or required to do, in either of such cases, shall be done by the peace officer so served, who shall have the same powers, rights and remedies, as such high constable has, by virtue of that act, and shall be subject to the same liabilities; and shall, notwithstanding the expiration of his office, continue to act, for all the purposes of that act, until the termination of all proceedings in, and consequent upon such action or claim; but if he shall die before such termination, his successor shall act in his stead.”(a)

In following up a writ of execution to its consummation, under the statute of hue and cry, 8 *Geo.* II. c. 16, which the subsequent statute of 19 *Geo.* II. c. 34, § 6, refers to, and adopts as the mode of proceeding in case of a penalty recovered by the executor of a revenue officer killed in pursuit of smugglers, against the inhabitants of the hundred, (or of a *Lathe*, in *Kent*,) and which latter statute is not repealed by 7 & 8 *Geo.* IV. c. 27, it is sufficient for the sheriff, to whom the writ had been delivered, to return, even after the expiration of *sixty* days given him by the *act to return the writ, that he had delivered it to the [*127] justices of the peace of the hundred, &c. who are charged with the duty of directing the levy on the inhabitants, and that they had done nothing upon it; and the court of King’s Bench will not thereupon attach the sheriff, for not returning the writ, but the next proceeding is against the magistrates, to oblige them to do their duty.(aa)

*CHAPTER VII.

[*128]

Of the CAPIAS by ORIGINAL, and PROCESS of OUTLAWRY, in the KING’S BENCH, and COMMON PLEAS.

AT common law, the defendant was not liable to be arrested, upon mesne process, for civil injuries unaccompanied with force.(a) This immunity of the defendant’s person, in case of peaceable though fraudulent injuries, producing great contempt of the law in indigent wrongdoers, a *capias* was allowed to arrest the person, in actions of *account*, though no breach of the peace were suggested, by the statutes of *Marlbridge*, (52 *Hen.* III.) c. 23,

(a) § 12.

(aa) 13 *East*, 544.(a) 3 *Co.* 12.

and Westm. 2. (13 Ed. I.) c. 11, in actions of *debt* and *detinue*, by statute 25 Edw. III. stat. 5, c. 17, and in all actions on the *case*, by statute 19 Hen. VII. c. 9.(b)

In ordinary cases therefore, if the sheriff return, on the original writ, or process of attachment, that the defendant has nothing by which he can be summoned or attached, a *capias* may be sued out, in order to arrest his person.(c) And where a *capias* lies, it is now generally issued in the first instance, without previously suing out the original;(d) in like manner as in Chancery, it was usual to issue the *subpœna*, without first bringing in the bill.(e) The *capias* is a judicial writ, issued by the filacer, and directed to the sheriff or sheriffs of the same county as the original; commanding them to take the defendant, if he be found in their bailiwick, and safely keep him, so that they may have his body in court, at the return of the writ, to answer the plaintiff in the action: and it is usually called a special *capias ad respondendum*.(f) If the sheriffs return to this writ, that the defendant is not found in their bailiwick, the plaintiff may have an *alias* or *pluries capias*, directed to the same sheriffs, commanding them, as *before*, or as *oftentimes* they have been commanded, to take the defendant,(g) &c.: or he may have a *testatum capias*, directed to the sheriffs of a different county, (and afterwards, if necessary, an *alias* or *pluries testatum capias*,) suggesting that the defendant lurks and wanders in that county.(h) In any of these writs, if the defendant be within a liberty, it is usual to insert a clause of *non omittas*;(i) which clause may be inserted in the first process: So that, under particular circumstances, it may be necessary for the plaintiff to have [*129] recourse to an *alias* or *pluries testatum, non omittas, *capias ad respondendum*, which is the most special writ of any against the defendant's person; and commands the sheriffs, as *before*, or as *oftentimes* they have been commanded, not to *omit* by reason of any liberty, but to *take* the defendant, &c. it being *testified* that he lurks and wanders in their county. As an original writ cannot be issued,(aa) so there cannot be a *capias*, into a county palatine; but on an original sued out in another county, a *testatum capias* may be issued into a county palatine,(bb) for bringing in the defendant. In the courts of great sessions in *Wales*, by a late act of parliament,(c) writs may issue from one county to another.

In a personal action, brought by two or more executors, there may be *summons* and *severance*; that is, if one or more of them will not join with the rest in prosecuting the action, the court will issue a writ of *summons ad sequendum simul*,(d) and upon their non-appearance at the return of it, will give judgment of *severance*,(e) so as to enable the rest to proceed without them.

The process upon the original should be *tested* in the name of the chief justice, or senior judge of the court, if there be no chief justice. The *capias* should regularly be *tested* in term-time but not on a *Sunday* or other *dies non juridicus*: And where the plaintiff means to proceed to outlawry, the *capias* should be *tested* on the *quarto die post* of the return of the original,(f) the *alias* on the *quarto die post* of the return of the *capias*,

(b) 3 Blac. Com. 281.

(c) Com. Dig. tit. *Pleader*, 2 W. 2 Gilb. C. P. 14. 3 Blac. Com. 279, &c. Steph. Pl. 25.

(d) *Ante*, 104.

(e) Trye, 59.

(f) Append. Chap. VII. § 1.

(g) *Id.* § 3.

(h) *Id.* § 4.

(i) *Id.* § 6.

(aa) *Ante*, 105.

(bb) Append. Chap. VII. § 5.

(c) Stat. 5 Geo. IV. c. 106, § 13.

(d) Append. Chap. VII. § 7.

(e) *Id.* § 8, and see Bac. Abr. tit. *Summons* and *Severance*, F.

(f) Trye, 191.

and the *pluries* on the *quarto die post* of the return of the *alias*;(g) and there must be *fifteen* days at least between the teste and return of each writ.(h) In the Common Pleas it is said, that suing out the *capias*, *alias*, and *pluries* together, is regular, and warranted by constant practice.(i) And unless the plaintiff mean to proceed to outlawry, the *capias* may be *tested* before the original, and even before the cause of action accrued, provided it be actually taken out afterwards; and it is not necessary, in other cases, that the *alias* or *pluries* should be *tested* on the *quarto die post* of the return of the preceding writ:(k) for as the mesne process never appears on the record, no error can be assigned therein;(l) and the defendant cannot have *oyer* of it, so as to plead in abatement.(m) These several writs must be made returnable like the original, in the King's Bench, on a general return day,(n) *ubique*, or *wheresoever* the king shall then be in *England*, or, in the Common Pleas, before the king's justices at *Westminster*, in the same, *or the next term; for where a whole term intervenes, [*130] between the teste and return of the *capias* it is null and void:(a) and a *testatum capias*, by original, made returnable at *Westminster*, instead of "*wheresoever*, &c." is irregular.(b)

The process by *original* may in general be amended, as well as the process by *bill*. Thus, leave has been given to amend a special *capias*, in one of the defendant's names, in order that an application might be made to the master of the rolls, to procure a new original.(cc) So a special *capias*, omitting the christian names of two of the defendants, was amended by inserting them, though there was nothing to amend by, on payment of costs.(dd) If there be less than *fifteen* days between the teste and return of process by original, it may be amended in the Common Pleas:(ee) And where a *capias* is made returnable on a day *certain*, instead of a *general* return day, that court will allow it to be amended, even after a rule *nisi* obtained to quash the writ for irregularity, on payment of costs.(f) So, where an attachment of privilege was returnable after the *essoin* day, and before the *quarto die post*, instead of being returnable on a day certain in full term, an amendment was allowed, on payment of costs.(g) But the courts will not in general allow an amendment of process, to the prejudice of the bail.(h)

When the defendant absconds, or keeps out of the way, so that he cannot be arrested or served with process, the plaintiff, on the return of *non est inventus* to the *pluries capias*, may have a writ of *exigi facias* and proceed to *outlawry*:(i) Or, if there be several defendants in a joint action, and

(g) *Wright and another v. —*, T. 44 Geo. III. K. B.

(h) Trye, 60. 2 Wils. 117. 1 H. Blac. 222, but see the statutes 16 Car. I. c. 6, § 7. 24 Geo. II. c. 48, § 5. *Ante*, 107.

(i) Barnes, 322.

(j) 3 Wils. 454.

(k) *Wright and another v. —*, T. 44 Geo. III. K. B.

(m) *Per Cur.* E. 18 Geo. III. 2 Crompt. 3 Ed. 37, 8; and see 1 Bos. & Pul. 342, 3.

(n) And a *testatum capias* in the Common Pleas, having been made returnable on a day certain, instead of a general return day, was held irregular. 2 New Rep. C. P. 133, and see 5 Taunt. 853. 1 Marsh 399, S. C.

(a) 2 Blac. Rep. 845. 3 Wils. 341, S. C.

(b) 1 Chit. Rep. 323.

(cc) 7 Durnf. & East, 299; and see 1 Bos. & Pul. 481. 2 Bos. & Pul. 109.

(dd) 2 Smith R. 392.

(ee) 3 Wils. 454. 2 Blac. Rep. 918, S. C. 1 H. Blac. 291. 1 Bos. & Pul. 342.

(f) 5 Taunt. 853. 1 Marsh. 399, S. C. and see 1 Moore & P. 28.

(g) 6 Moore, 113. 3 Brod. & Bing. 25, S. C.

(h) 2 New Rep. C. P. 135. *Wood and others v. Hindley*, 57 Geo. III. K. B. 1 Chit. Rep. 323, and see *id.* 371. 1 Moore & P. 28.

(i) 3 Blac. Com. 283. Gilb. C. P. 15.

one of them abscond or keep out of the way, the plaintiff may have a writ of *exigi facias* against that defendant; ^(k) and must proceed to outlawry against him, before he can go on against the others. ^(l) In declaring against A. upon a joint contract by A. and B. it is not enough to allege that B. was *in due manner* outlawed, without adding that he was outlawed *in that suit*. ^(m) And where, in a joint action against two, it appeared that one of the defendants had been outlawed upon different process from that by which the other was brought into court, and no connexion was shown between the several writs of *capias* against each, as referable to the same *original*; as where one was outlawed upon process by *original*, tested the 10th April, returnable on the first return of *Easter* term, and continued regularly down to the time of the outlawry, and the other was arrested on a special *testatum capias*, issued on the 24th April in *Hilary* vacation, to which bail

was put in, and the plaintiff declared against him alone, *alleg-
[*131] ing the outlawry of the other defendant *in the same suit*; the court of King's Bench set aside the declaration for irregularity. ^(a) But an allegation that a co-defendant was by due course of law outlawed, at the suit of the plaintiff, *in this plea and suit*, is sufficient without a *prout patet per recordum*. ^(b)

Outlawry, in civil actions, is putting a man out of the protection of the law, so that he is incapable of suing for the redress of injuries, and may be imprisoned: and he forfeits thereby all his goods and chattels, and the profits of his lands; his *personal* chattels, *immediately* upon the outlawry, and his chattels *real*, and the profits of his lands, when found by inquisition. ^(c) So penal were the consequences of an outlawry, that until some time after the conquest, no man could have been outlawed except for felony, the punishment whereof was death: But in *Bracton's* time, ^(d) and somewhat earlier, process of outlawry was ordained to lie in all actions *vi et armis*: and since, by a variety of statutes, (the same as introduced the *capias*,) process of outlawry lies in *account*, *debt*, *detinue* and divers other common or civil actions. ^(e)

If the defendant be a woman, the proceeding is called a *waiver*; for as women were not sworn to the law, by taking the oath of allegiance in the leet, (as men anciently were, when of the age of *twelve* years or upwards,) they could not properly be *outlawed*, or put out of the law, but were said to be *waived*, that is *derelectæ*, left out, or not regarded. ^(f) And for the same reason, an *infant* cannot be outlawed under the age of *twelve* years. ^(g)

Outlawry is either upon *mesne* process before, or upon *final* process after judgment. ^(h) Upon *mesne* process, the plaintiff cannot proceed to outlawry, unless the action were commenced by *original* writ; ⁽ⁱ⁾ nor can the defendant be outlawed after judgment, unless the action were so commenced: therefore, where the defendant was outlawed after judgment, in an action commenced by *bill* of privilege, it was holden that process of

(k) Trye, 155.

(l) 1 Str. 473. 1 Wils. 78. 2 Str. 1269. 1 Blac. Rep. 20. 4 Bro. Parl. Cas. 604, S. C.

(m) 3 East, 144, but see Co. Lit. 128, b. 352, b.

(a) 15 East, 1.

(b) 7 East, 50.

(c) 1 Salk. 395. 1 McCl. & Y. 196.

(d) Bract. lib. v. p. 425.

(e) Co. Lit. 128, b. Trye, 72 Gilb. C. P. 15, Fort, 37.

(f) Lit. § 186. Co. Lit. 122, b. Trye, 66.

(g) Co. Lit. 128, a.

(h) Trye, 77. 1 Moore & P. 28.

(i) 1 Sid. 159.

outlawry did not lie, as there was no *capias* in the original action.(k) After judgment, the plaintiff may have an *exigi facias*, and proceed to outlawry, upon the return of *non est inventus* to a writ of *capias ad satisfaciendum*, without an *alias* or *pluries*;(l) because the defendant, having been already in court before judgment, and having conusance of the debt, ought to pay it on the first suing out of the *capias*, and his not performing the judgment is a contumacy, for which he is put out of the king's protection. And no writ of *proclamation* is required upon an *exigent* after judgment, but only upon mesne process.(m) In the Common Pleas, the defendant may *be outlawed on a common original, in *trespass quare clausum fregit*, or on a special original, adapted to [*132] the nature of the action.(a) But, in the Exchequer, the defendant cannot be outlawed; as the plaintiff cannot proceed therein, by original writ.(b)

The writ of *exigi facias* is a judicial writ, made out by the *filacer*, as clerk of the *exigents*,(c) in the King's Bench, or by the *exigenter* in the Common Pleas, and directed to the sheriff of the county where the action is laid;(d) commanding him to cause the defendant to be *required* from county court to county court, or from *husting to husting*, if in London,(e) that is, at five *successive* (ff) county courts or hustings, until he be outlawed, if he do not appear, and if he appear, to take him,(gg) &c. This writ should be tested on the *quarto die post* of the return of the *pluries capias* before, or of the *capias* after judgment: and if there be not *five* county courts between the teste and return of it, there issues, upon the sheriff's return thereto,(hh) an *exigent de novo*, with a clause (whence it is called an *allocatur exigent*,) directing the sheriff to *allow* the several county courts, at which the defendant has been already required.(ii) The writ of *exigent* upon an outlawry, must be in the hands of the sheriff, at the time the defendant is demanded; and therefore, where a sheriff returned to a writ of *exigent* and *allocatur exigent*, that he had demanded a defendant at the hustings, upon *five* several days, on *three* of which the writs could not by possibility have been in his hands, the court held that the returns were irregular.(kk) In the Common Pleas, no *exigenter* shall receive any *pluries capias*, in order to make an *exigent* or *proclamation* thereon, before the same is signed or stamped by the clerk of the warrants, or his deputy, to the end it may thereby appear that the warrants of attorney therein are duly filed:(l) and therefore the practice in this court is, to take the *pluries*, when returned by the sheriff, with a warrant of attorney, to the clerk of the warrants, who will mark it, on being paid for filing the warrant.(m)

In addition to the *exigent*, a writ of *proclamation*(n) was introduced by

(k) 1 Leon. 329, Cro. Eliz. 216.

(l) Gilb. C. P. 17. Trye, 77, 124.

(m) Cro. Jac. 576, 7.

(a) Barnes, 320, 324.

(b) 1 Price, 309. *Ante*, 38.

(c) Trye, *in pref.*

(d) Fitz. Abr. tit. *Exigent*, 26. Bro. Abr. tit. *Exigent & Capias*, 19, Dyer, 295, but see 3 Bac. Abr. 769. Gilb. C. P. 15, Cromp. *Introd.* 3 Ed. xcv. *semb. contra.*

(e) In London, the hustings are holden once every fortnight; on which account the action is generally laid there, when the plaintiff intends to proceed to outlawry. Trye, 66. 3 Lev. 245.

(ff) Plowd. 371.

(gg) Trye, 112, and see Append. Chap. VII. § 9.

(hh) *Id.* § 10.

(ii) Trye, 114. Rast. Ent. 189, 355, and see Append. Chap. VII. § 11.

(kk) 3 Dowl. & Ryl. 55.

(l) R. II. 2 & 3 Jac. II. C. P. and see R. II. 14 & 15 Car. II. reg. 2, C. P. *Ante*, 96.

(m) Imp. C. P. 7 Ed. 566, 7.

(n) Gilb. C. P. 19. Trye, 113. *Thes. Brev.* 68, and see Append. Chap. VII. § 12.

the statute 6 Hen. VIII. c. 4, which, except in *London* or *Middlesex*, required it to be directed to the sheriff of the county of which the defendant was called or described in the original, for there he was supposed to dwell; and if he did not in fact dwell there, he might have avoided the outlawry, by the statute of additions: (o) And where the *exigent* [*133] was *directed into *London* or *Middlesex*, and the defendant called therein "late of *London* or *Middlesex*," but did not dwell there, the writ of proclamation was required to be directed to the sheriff of the county where the defendant was dwelling at the time of the *exigent* awarded, or if the king's writ did not run there, to the sheriff of the next adjoining county. But the writ of proclamation is at present governed by the statute 31 Eliz. c. 3, § 1, which enacts, that "in every action personal, wherein any writ of *exigent* shall be awarded out of any court, a writ of *proclamation* shall be awarded and made out of the said court, having day of *teste* and return as the said writ of *exigent* shall have, directed and delivered of record to the sheriff of the county where the defendant, at the time of the *exigent* so awarded, shall be dwelling; which writ of proclamation shall contain the effect of the same action: And that the sheriff of the county, unto whom any such writ of proclamation shall be delivered, shall make *three* proclamations, *one* in the open county court, *another* at the general quarter sessions of the peace, in those parts where the defendant at the time of the *exigent* awarded shall be dwelling, and the *third*, one month at the least before the *quinto exactus* by virtue of the said writ of *exigent*, at or near the most usual door of the church or chapel of that town or parish where the defendant shall be so dwelling; and if the defendant shall be dwelling *out* of any parish, then in such place as aforesaid, of the next adjoining parish in the same county, and upon a *Sunday*, immediately after divine service, and sermon (if there be one), and if there be no sermon, then forthwith after divine service: And that all outlawries had and pronounced, whereupon no writs of proclamations shall be awarded and returned according to the form of this statute, shall be utterly void and of none effect." (a) This writ should have the same *teste* and return as the *exigent*; and if the defendant reside in a different county from that into which the *exigent* issued, the writ is called a *foreign* proclamation. (b) The sheriff's return to this writ is, that he has caused the defendant to be proclaimed; and that either generally, according to the effect of the statute, (c) or specially, setting forth the time and places when and where the proclamations were made. (d) But where the proclamations returned by the sheriff could not by possibility have been made between the day of issuing the writ and the day of the return, inasmuch as there was no county court or general quarter sessions of the peace held, at which the defendant could have been proclaimed, while the writ was running, the court seemed to think that the proceedings were irregular. (e) When the *exigent* and writ of proclamation are returned, they should be taken to the *filacer*, in the King's Bench; but, in the Common Pleas, the *exigent* is taken to the clerk of the *outlawries*, and the writ of proclamation filed with the *exigenter*.

(o) Dyer, 214.

(a) This act of parliament is enforced by the court rules of M. 1654, § 6, K. B. and M. 1654, § 9, C. P.

(b) Append. Chap. VII. § 13.

(c) *Id.* § 14.

(d) *Id.* § 15.

(e) 3 Dowl. & Ryl. 55.

*Upon the defendant's being put in *exigent*, he is either taken by the sheriff, appears voluntarily, or makes default. If he be [*134] taken, he either remains in custody of the sheriff, or gives bail, &c. as upon a common arrest. Formerly, if the defendant had appeared voluntarily, at any time before the return of the *exigent*,^(a) or *quarto die post* of the return in the Common Pleas,^(a) he might have obtained a writ of *supersedeas*,^(b) from the *filacer*, as clerk of the *supersedeases*^(c) in the King's Bench, or from the *exigenter* in the Common Pleas, on entering a common appearance of the term in which the *exigent* issued.^(d) In the Common Pleas, the *supersedeas* is itself an appearance, if delivered to the sheriff before the *quarto die post* of the return of the *exigent*:^(ee) And, in that court, after the return of the *exigent*, but whilst it remained in the sheriff's hands, and before the defendant was returned outlawed, the court made a rule, that a *supersedeas* to the *exigent* should be allowed, on payment of costs.^(f) This practice of granting a *supersedeas* still continues, in cases which do not require *special* bail. But upon a question agitated some years ago, in the court of King's Bench, whether, in a case originally requiring *special* bail, if the defendant stand out to an *exigent*,^(g) he can come in and appear to the *exigent*, without putting in special bail, it was ruled by the court, that there ought to be special bail. "It would be very unreasonable, they said, that the defendant should gain an advantage, by standing out till process of outlawry: He certainly ought not to be in a better condition then, than if he had appeared at first:" And accordingly the direction given was, that the *filacer* should not issue a *supersedeas*, till the defendant had put in special bail.^(h) So, in the Common Pleas, it is a rule, that "where the defendant shall abscond to avoid being arrested, and cannot be arrested, although the plaintiff shall *bona fide* have used his best endeavors for that purpose, a *supersedeas* shall not be issued, to stay the proceedings to an outlawry, unless the defendant shall have first put in special bail; and that the writ of *supersedeas* thereupon issued, in case special bail shall not afterwards be perfected according to the course of the court, where special bail is required upon arrests, shall be void, and of no effect to stay the plaintiff's proceeding to the outlawry: but the same may be gone on with, from the time of such default, as if no appearance had been entered or special bail filed, and shall not be deemed irregular or erroneous, by means of such interruption of the proceedings, by putting in, and not afterwards perfecting special bail as aforesaid."⁽ⁱ⁾

*If the defendant be neither arrested nor appear, but make [*135] default, at five successive county courts or hustings, he is *outlawed* if a man, or if a woman she is *waived*, by the judgment of the coroners, or of the recorder in London:^(a) and the judgment of outlawry being returned by the sheriff upon the *exigent*, the *filacer*, who acts as clerk

(a) Cas. P. R. C. P. 28.

(b) Append. Chap. VII. § 16, and for the sheriff's return thereto, see *id.* § 17.

(c) Trye, *in pref.*

(d) *Id.* 67, 8 Gilb. C. P. 19. Fort. 39. Barnes, 326.

(ee) Barnes, 319.

(f) *Id.* 323, and see R. M. 17 Car. II. R. E. 24 Car. II. reg. 1. R. T. 2. Jac. II. C. P.

(g) The question, as stated by Sir James Burrow, was whether the defendant, standing out to an outlawry, can come in and appear to the outlawry, without putting in special bail: but upon inquiry, it appears to have been, as stated above, upon the *exigent*, before outlawry.

(h) 3 Bur. 1920.

(i) R. E. 21 Geo. III. C. P. And see further, as to bail on process of outlawry, Petersd. Part I. Chap. XVIII.

(a) Co. Lit. 288, b. Gilb. C. P. 15, 16, and see Append. Chap. VII. § 10.

of the *outlawries* in the King's Bench, (b) will make out a writ of *capias utlagatum*, which is either *general* or *special*, (c) and may be issued into any county, without a *testatum*; (d) nor is there any occasion, upon an outlawry after judgment, to revive the judgment by *seire facias*, after a year and a day. (e) But, in the Common Pleas, a writ of *capias utlagatum* cannot be sued out and tested after the death of the defendant. (f) And where the judgment of outlawry was entered after the plaintiff's death, the court held, that a *capias utlagatum* could not regularly be issued, without reviving the judgment. (g)

By the *general* writ of *capias utlagatum*, the sheriff is commanded, "that he do not omit, by reason of any liberty of his county, but that he take the defendant, if he be found in his bailiwick, and him safely keep, so that he may have his body in court, on a *general* return day, *wheresoever*, &c. in the King's Bench, or, in the Common Pleas, before the king's justices at *Westminster*, to do and receive what the court shall consider of him." (h) The defendant being taken by the sheriff on this writ, either gives bail to appear and reverse the outlawry; or remains in custody, until he actually reverse it, or obtain a charter of pardon, or be relieved under an insolvent act. (i)

At common law, the defendant could not have been bailed, when taken by the sheriff on a *capias utlagatum*; (k) and this case is particularly excepted out of the statutes 23 Hen. VI. c. 9, and 13 Car. II. stat. 2, c. 2, § 4, by the latter of which statutes it is expressly declared, that "no sheriff, &c. shall discharge any person or persons, taken upon any writ of *capias utlagatum*, out of custody, without a lawful *supersedeas* first had and received for the same." (l) But now, by statute 4 & 5 W. & M. c. 18, § 4, 5, "if any person, outlawed in the court of King's Bench, other than for treason and felony, shall be taken and arrested, upon any *capias utlagatum* out of the said court, the sheriff making the arrest may, *in all cases where special bail is not required by the said court*, take an attorney's engagement under his hand, to appear for the defendant, and reverse the outlawry; and may thereupon discharge the defendant from such arrest: and, *in those cases where special bail is required by the said court*, the said [*136] sheriff shall and may take security of the defendant by bond, with one or more sufficient surety or sureties, in the penalty of double the sum for which special bail is required, and no more, for his appearance by attorney in court, at the return of the writ, and to do and perform such things as shall be required by the same court; and after such bond taken, may discharge the defendant, from the said arrest: Or, in case the defendant shall not be able to give security as aforesaid, *before the return of the writ*, he shall and may be discharged, whenever he shall find sufficient security to the sheriff, for his appearance by attorney in the said court, at some return in the ensuing term, to reverse the outlawry, and to do and perform such other thing and things as shall be required by the said court." (a) This statute has been construed not to extend to *criminal*

(b) Trye, *in pref.*

(d) 1 Vent 33. Gilb. C. P. 17.

(f) Cas. Pr. C. P. 36.

(h) Trye, 115, and see Append. Chap. VII. § 18, 19.

(k) Trye, 73. 3 Bur. 1484. 4 Bur. 2540.

(l) And see R. H. 2 Car. I. § 5. M. 1654, § 9. H. 15 & 16 Car. II. M. 17 Car. II. T. 2 Jac. II. C. P.

(a) See R. H. 2 Car. I. § 3, C. P.

(c) *Id.* 65, 6. 6 Gilb. C. P. 16.

(e) Cro. Eliz. 706. 5 Mod. 203. Gilb. C. P. 71.

(g) Barnes, 325, and see *id.* 323.

(i) 4 Bur. 2119, 2127.

cases; at least to misdemeanors, after conviction: (b) And even in *civil* cases, the defendant cannot be bailed, where he was not bailable upon the process to outlawry; (c) for it was the design of the statute to put him in the same condition as if he had not been outlawed: and therefore he is not bailable, when taken upon an outlawry *after* judgment. Neither, upon this statute, will the court on motion restore goods taken upon a special *capias utlagatum*; (d) but they will of course be restored, upon the reversal of the outlawry. (e) A *bankrupt* having been arrested after outlawry, and a levy made on his goods by the sheriff, under a special writ of *capias utlagatum*, the court of King's Bench would not relieve him on motion, in a summary way, from such arrest and levy, except upon the terms of appearing to the action, and putting in and perfecting special bail; although the plaintiff had also proved her debt under the commission, and received a dividend, after which she commenced her action for the balance. (f) And it seems, that bankruptcy and certificate are no grounds for discharging a *prisoner* in custody on a *capias utlagatum*. (g)

When there is no affidavit of a bailable cause of action, the sheriff is authorized, by the statute, to discharge the defendant, on an attorney's undertaking to appear and reverse the outlawry: But where an affidavit has been made, he ought not to be discharged, without giving the security required by the statute; which is not a *common* bail bond, but a bond, with one or more sufficient surety or sureties, for appearance by attorney at the return of the writ, *and to do and perform such things as shall be required by the court*; (h) that is, to put in and perfect bail to a new action, plead within a limited time, put the plaintiff in the same condition, and such like matters. (i) And it is not necessary that the affidavit should be made *before* the outlawry, (k) nor the sum sworn to indorsed on the *capias utlagatum*; (l) but it is sufficient, if there be an affidavit before the *defendant is discharged: the court having determined, that [*137] process of outlawry is not within the statutes for preventing frivolous and vexatious arrests. (aa)

By the *special* writ of *capias utlagatum*, the sheriff is commanded, not only to take the defendant, as by the *general* writ, but also "to inquire, by the oath of honest and lawful men of his county, what goods and chattels, lands and tenements, he hath, or had on the day of his outlawry, or at any time afterwards; and by their oath to extend and appraise the same, according to their true value; and to take them into the king's hands, and safely keep them, so that he may answer to the king for the true value and issues of the same; making known what he shall do thereupon to the court, on the return-day." (bb) Upon this writ, the sheriff is to impanel a jury, who are to make inquiry of the *goods* and *chattels* of the defendant, including his *debts* (c) or *choses* in action, and also of his *leasehold* and *freehold* lands and tenements; to *appraise* the goods, and to *extend* or value the lands, &c. But they have nothing to do with his

(b) 4 Bur. 2539.

(c) *Id.* 2540.

(d) 2 Wils. 127. *Per Cur.* M. 20 Geo. III. K. B.

(e) Carth. 459. 1 Ld. Raym. 349, S. C.

(f) 14 East, 536.

(g) 3 Taunt. 141.

(h) 3 Bur. 1483.

(i) 4 Bur. 2540.

(k) 2 Str. 1178, 9. 1 Wils. 3 S. C. Fort, 39, S. P.

(l) 3 Bur. 1482.

(aa) *Fownes v. Allen*, M. 10, Geo. II. cited in 3 Bur. 1483. Barnes, 322.

(bb) Trye, 116, 16. *Off. Brev.* 35. *Thes. Brev.* 59, &c. Lil. Ent. 552, and see Append. Chap. VII. § 20.

(c) 4 Co. 95. Lane, 23. Lutw. 329, 1513. Gilb. C. P. 200, but see 2 Rol. Abr. 806, l. 52. Sav. 40.

copyholds, (d) or *trust property*. (e) Witnesses may be *subpœnaed* to attend the execution of the inquiry; and when made, the sheriff is to take possession of the goods and chattels of the defendant, and of the *leasehold tenements* in his own occupation: (f) But he must not oust, or disturb the possession of his tenants; (g) and can only take the *issues* or profits of his *freehold tenements*. (h) The inquisition should set forth, with *convenient certainty*, the appraised value of the *goods*; the particulars of the *debts*; of what *lands*, &c., the defendant is seized or possessed, the different *parcels*, in whose *tenure*, and of what annual *value*, beyond reprises. (i) But the inquisition, being merely an office of *instruction* or *information*, does not require so much *certainty* as an office of *intituling*. (k) And if the lands, &c., be *undervalued*, there may be a *melius inquirendum*. (l)

When the *special writ* of *capias utlagatum* is returned, it should be delivered, with the inquisition annexed, to the *filacer*, as clerk of the *exigents* and *outlawries* (m) in the King's Bench, or to the clerk of the *outlawries* in the Common Pleas, and afterwards filed in the office of the *custos brevium*; (n) whence a transcript is sent into the Exchequer. (o) Out of this latter court there issues a *venditioni exponas*, to sell the *goods*, (p) a *scire facias*, to recover the debts, (q) and a *levari facias*, to levy [*138] the *issues* *and profits; under which latter writ, the sheriff may take not only the rent and moveables of the party outlawed, but also the cattle of a *stranger*, *levant* and *couchant* on the lands extended. (a) In aid of these writs, a *bill* may be exhibited in the Exchequer, against the outlaw, to compel a discovery of his real and personal estate, &c., either by the plaintiff, to enable him to take out execution, or by the attorney general, on behalf of the crown. (b) And it is said to be the course of that court, upon an outlawry, to prefer an *information*, in the nature of a *trover* and conversion, against him that hath the goods of the party outlawed. (cc)

The money raised by the sheriff, under these writs, belongs to the crown; but the plaintiff may have it paid to him, in satisfaction of his debt and costs, by applying to the court of Exchequer, or lords of the treasury: and he may also, upon *petition* (dd) to the lords of the treasury, obtain a *lease* or *grant*, under the Exchequer seal, of the king's right to levy the profits. (ee) If the money raised by the sheriff do not exceed the sum of *fifty* pounds, the court of Exchequer, on *motion*, will order it to be paid to the plaintiff. But if it exceed that sum, the plaintiff must *petition* for it to the lords of the treasury; stating the amount of his debt, a short abstract of the proceedings, with the expenses he has been put to, and praying, in respect thereof, that the attorney-general may be authorized to consent, on behalf

(d) Parker, 190.

(e) Cro. Jac. 513. Sty. Rep. 41. Bunb. 92, but see the statute of frauds, 29 Car. II. c. 3, § 10, though it rather seems that *trust property* is not extendible by this statute, on a *capias utlagatum*. Lee's Prac. Dic. 2 Ed. 315, n. and see Hardr. 466, 7, 488.

(f) 9 Hen. VI. 20, 21.

(g) *Id.* 21 Hen. VII. 7.

(h) *Id.* Plowd. 441. Hardr. 106, 176. Bunb. 103, 105.

(i) Append. Chap. VII. § 21, 22.

(k) 2 Salk. 469. Bunb. 103.

(l) Hardr. 106, but see 2 Salk 469.

(m) Trye, in *pref.*

(n) *Id. ibid.* & p. 88, 9. 3 Durnf. & East, 578, 9.

(o) Gilb. C. P. 16.

(p) Append. Chap. VII. § 23, and for the return thereto, see *id.* § 24.

(q) Gilb. C. P. 16, 1 Lutw. 330.

(a) 1 Ld. Raym. 305, and the cases there cited, in the last edition.

(b) Hardr. 22.

(cc) 1 Mod. 90.

(dd) Append. Chap. VII. § 25.

(ee) 9 Hen. VI. 20. 2 Rol. Abr. 818. Hardr. 106, 422. T. Raym. 17. Gilb. C. P. 17.

of the crown, that the money remaining in the sheriff's hands may be paid over to the petitioner.(f) This petition is referred, by the lords of the treasury, to their solicitor;(g) who should be furnished with a *certificate* of the proceedings from the clerk in court,(h) and an *affidavit*,(i) sworn before a baron, of the amount of the debt and costs; whereupon he will make his *report*,(k) which should be filed with the clerk of the treasury. A *warrant* is then issued, under the king's sign manual, for the attorney-general to give his consent to an order, pursuant to the prayer of the petition:(l) upon which a *motion* is made in the court of Exchequer; and, the attorney-general consenting, an *order* is framed accordingly.(m) This order must be engrossed, and put under seal, with a *subpoena*(n) annexed to perform it; and the sheriff being served therewith, must pay over the money, or will be liable to an attachment.(o)

Having thus shown the consequences of an outlawry, I shall proceed to consider the mode of *reversing* it, where the party outlawed comes in *gratis*, or in consequence of an arrest upon the *capias utlagatum*. There are two ways of reversing an outlawry; 1st, by *writ of error*;(p) returnable **coram nobis*,(a) or *vobis*;(b) 2dly, by *motion*, founded [*139] on a plea, averment,(c) or suggestion, of some matter apparent, as in respect of a *supersedeas*, omission of process, variance, or other matter apparent on the record: and yet, in these cases, some have holden, that in another term, the defendant is driven to his writ of error. But for any matter of fact, as death, imprisonment, service of the king, &c., he is driven to his writ of error, unless it be in the case of felony, and there in *favorem vitæ* he may plead it. And there is an old rule of court, in the Common Pleas, that a writ of error shall not be allowed, nor any record removed, or writ of *de non molestando* or *supersedeas* granted, before some manifest error be shown to the court, in term time, or in vacation to some of the justices, and by them allowed.(d) It seems, however, to be discretionary in the courts to relieve by motion, or put the parties to a writ of error; and of late years they have gone further than heretofore upon motion, the more effectually to expedite justice, save expense, and preserve the credit and character of the defendant.

It was not formerly usual for the courts to reverse an outlawry upon motion, for error in fact; the defendant being put to his writ of error for reversing it.(ff) But now, where it appears by affidavit, that he was imprisoned,(gg) or beyond sea,(hh) at the time of the *exigent* awarded, the courts, for avoiding circuity, will reverse the outlawry upon motion. So, it was reversed by the court of Common Pleas, although it was sworn, that the defendant went beyond sea, in order to avoid the process.(ii) And where, on error to reverse an outlawry, the error assigned was, that before

(f) Append. Chap. VII. § 26, 7.

(g) *Id.* § 28.(h) *Id.* § 29.(i) *Id.* § 30.(k) *Id.* § 31.(l) *Id.* § 32.(m) *Id.* § 33.(n) *Id.* § 34.

(o) Imp. K. B. 10 Ed. 537. 2 Crompt. 3 Ed. 42.

(p) Co. Lit. 259, b. Trye, 73. Fort. 38. 2 Ken. 304. Append. Chap. LXIV. § 4, 5, 6. And for the forms of assignments of error, and other proceedings, on a writ of error, *coram nobis*, see *id.* § 60, &c., 122.

(a) Trye, 74. Append. Chap. LXIV. § 4.

(b) Append. Chap. XLIV. § 5, 6.

(c) Trye, 69, 118. *Thes. Brev.* 60, and see Append. Chap. VII. § 35.

(d) R. T. 24 Eliz. § 4, C. P.

(e) Barnes, 324, 5.

(ff) Carth. 459. 1 Ld. Raym. 349, S. C. 2 Str. 1178. 1 Wils. 3, S. C. Barnes, 319, 20; 325. 12 East, 622.

(gg) 3 Taunt. 141.

(hh) 4 Taunt. 691. 1 Maule & Sel. 409, and see Barnes, 325.

(ii) 4 Taunt. 691, but see 2 Car. & P. 125, 129, (a), 132.

and at the time of awarding and issuing the *exigi facias*, the plaintiff in error was in parts beyond the seas, and the defendant pleaded, that before the awarding and issuing of the *exigi facias*, the plaintiff in error, of his fraud and covin, and in order to defeat the defendant in error of the means of recovering his just debt, and for the purpose of avoiding the outlawry when the same should be pronounced, voluntarily left the realm of *England*, and went into parts beyond the seas, and, of such his fraud and covin, did voluntarily stay and remain in parts beyond the seas, until after the awarding of the *exigi facias*, and pronouncing of the outlawry, whereupon issue was joined, and found for the defendant in error; the court of King's Bench held, that this plea was not an answer to the assignment of error, and that judgment of reversal of the outlawry should be entered for the plaintiff in error, *non obstante veredicto*.^(k) But, in a late case,^(l)

the court refused to set aside an outlawry upon motion for [*140] irregularity, against one of several defendants, who was a foreigner, and resided abroad, *before he had appeared. On a writ of error to reverse an outlawry, issue being joined on an assignment that the outlaw was beyond sea, at the time of suing out the writ of *exigent*, and thence until the time of pronouncing the outlawry, and the plaintiff in error having proved the previous proceedings, and that the outlaw was abroad at the time of suing out the *exigent*, the court of Common Pleas held this to be sufficient, without proving the time when the judgment of outlawry was pronounced, or that the defendant was then abroad.^(a) But where the defendant was described in an original writ, as T. B. of C. in the county of N., and, upon a writ of error brought to reverse the outlawry, the error assigned was, that T. B. was not, before or at the time of issuing the original writ, of or conversant in C. aforesaid, and that there was not any town, hamlet or place, of the name of C. in that county; to which the plaintiff pleaded, that he prosecuted his writ, with intent to declare upon a bond made by the defendant, by which he was described as T. B. of C. in the county of N.; the court held, that this was an estoppel, and affirmed the judgment of outlawry.^(b)

At common law, the party outlawed must have appeared *in person*, in order to reverse an outlawry; it not being deemed sufficient for him to appear by *attorney*.^(c) But now, by statute 4 & 5 W. & M. c. 18, § 3, for the more speedy and easy reversing of outlawries in the court of King's Bench, "no person outlawed therein, for any cause matter or thing whatsoever, treason and felony only excepted, shall be compelled to come or appear in person in the said court, to reverse such outlawry; but shall or may appear by *attorney*, and reverse the same without bail, in all cases except where *special* bail shall be ordered by the said court." An attorney therefore, making an affidavit to support a motion to set aside an outlawry, against

(k) 5 Barn. & Cres. 314. 8 Dowl. & Ry. 208, S. C. 1 Moore & P. 135, (b).

(l) 2 Moore, 567. 8 Taunt. 516, S. C.

(a) 5 Taunt. 309. 1 Marsh. 58, S. C., and see 2 Car. & P. 125. Ry. & Mo. 329, S. C.

(b) 5 Barn. & Ald. 682. 1 Dowl. & Ry. 328, S. C.

(c) Cro. Jac. 462. Trye, 71, 2. 2 Salk. 496. In the case of *French v. Moore*, M. 45 Geo. III. K. B., it was determined, that the defendant must appear, before he can move to reverse an outlawry: And this case was recognized by the court, in that of *Summervell v. Watkins*, 14 East, 536, and see 2 Moore, 567, *accord*. But in the case of *Graham v. Henry*, 1 Barn. & Ald. 132, the court held, that the defendant need not appear, before he moves to reverse an outlawry: for until it be reversed, no writ exists, to which he can appear.

a defendant who has not appeared, must show that he is authorized to act for the defendant.(*dd*)

Before the allowance of a writ of error, or reversing an outlawry, by plea or otherwise, *for want of proclamations*, the statute of *Elizabeth*,(*ee*) requires, "that the defendant in the original action shall put in bail, not only to appear and answer the plaintiff in a new action, to be commenced for the cause mentioned in the former,(*ff*) but also to satisfy the condemnation, *if the plaintiff shall begin his suit before the [*141] end of *two terms* next after allowing the writ of error, or otherwise avoiding the said outlawry."(*a*) On reversing the outlawry, for any other error in law besides the want of proclamations, it was long unsettled, whether the defenant should be obliged to put in *special* bail. In the earlier cases upon this subject, it was determined that he should:(*b*) But there are cases to the contrary, in the time of *Holt*, Ch. J.:(*c*) and in one of them(*d*) it is said, that if the party outlawed come in *gratis*, upon the return of the *exigent*, &c. he may be admitted by motion to reverse the outlawry, for any other cause than want of proclamations, without putting in bail; but if he come in by *cepi corpus*, he shall not be admitted to reverse it without appearing in person, as in such case he was obliged to do at common law, or putting in bail with the sheriff for his appearance upon the return of *cepi corpus*, and for doing what the court shall order. In two subsequent cases(*e*) however, special bail was put in, upon reversing the outlawry, for errors in law, though it does not appear but that the party came in *gratis*. At length, in the case of *Serecold v. Hampson*,(*f*) the court, upon considering the words of the 4 & 5 W. & M. c. 18 § 3, which empowers the outlaw to appear by attorney, and says, "the outlawry shall be reversed without bail, in all cases except where special bail shall be ordered by the court," declared they were of opinion, they had a *discretionary* power to require it or not; and that the want of an affidavit before the outlawry was no objection,(*g*) because that is only requisite to warrant an arrest: and though the 31 *Eliz. c. 3, § 3*, be the only act that expressly requires bail, it is not to be thence inferred, that in other cases it ought not be insisted on; for that act makes a new error, and the bail upon it is absolutely to pay the condemnation money. And accordingly, it is now settled, that on reversing an outlawry, for any other error in law besides the want of proclamations, bail is *common* or *special*, in like manner as upon the arrest.

Where *special* bail is required, it need not be put in before the allowance of the writ of error; but it is well enough, if put in at any time before the reversal.(*h*) And in a late case it was determined, that upon

(*dd*) 3 Dowl. & Ryl. 55, and see 3 Barn. & Cres. 736. 5 Dowl. & Ryl. 625, S. C., *accord*.

(*ee*) 31 *Eliz. c. 3, § 3*. 2 Salk. 496.

(*ff*) The reason seems to be, that the process is determined by the outlawry; and consequently the plaintiff cannot declare upon it, but must bring a new action. Cro. *Eliz.* 707, but see March, 9, § *vide post*, Chap. XVII.

(*a*) R. M. 12 Geo. I. C. P. *accord*. And see 3 Barn. & Cres. 529. 5 Dowl. & Ryl. 302, S. C., but see 2 Barn. & Cres. 353. 3 Dowl. & Ryl. 575, S. C.

(*b*) Lit. Rep. 301. Carth. 459. 1 Ld. Raym. 349, S. C. Gilb. C. P. 19.

(*c*) 12 Mod. 545. 1 Ld. Raym. 605, S. C. 2 Salk. 496.

(*d*) 2 Salk. 496.

(*e*) *Wall & Watton*, E. 12 Geo. I. cited in 1 Wils. 4. *Martin & Duckett*, 2 Str. 951. 2 Barnard, K. B. 298, S. C.

(*f*) 2 Str. 1178, 9. 1 Wils. 3, S. C., and for a fuller note of this case, see 12 East, 624, *in notis*.

(*g*) *Ante*, 136, 7.

(*h*) 1 Ld. Raym. 605. 2 Str. 951. 2 Barnard, K. B. 298, S. C.

a writ of error prosecuted by the defendant *in person*, to reverse an outlawry, in a civil action, for a common law error, the recognizance of bail is to be taken in the common alternative form, to pay the condemnation money *or* render the principal, and not absolutely to pay the condemnation money,⁽ⁱ⁾ as in the case of reversing an outlawry upon the [*142] statute 31 Eliz. *c. 3, for want of proclamations.^(a) And though in that case it was said, that if a party ask of the court to interfere by motion, where he has no right to their interference, but only upon error brought, they may impose upon him what terms they think just, yet in a subsequent case, the court of King's Bench, upon motion, reversed the outlawry of the defendant in a civil suit, on account of his being beyond sea at the time of the *exigent* awarded, upon his putting in bail in the alternative, and paying all costs, including any which might have been incurred in the court of Exchequer,^(b) So, in the Common Pleas, where the defendant is of right entitled to reverse the outlawry on error brought, the court in general will relieve him on motion, without imposing any other terms than payment of costs, and putting in special bail, when necessary, or rendering the defendant:^(c) And the recognizance of bail in that court, which is in the alternative, to pay the condemnation money *or* render the defendant, as in the King's Bench, may be taken in the original cause.^(c) Where an outlawry was reversed, on account of the *third* proclamation not having been made one month at least before the *quinto exactus*, the Court of King's Bench, supposing the want of due proclamation to be only an irregularity, directed special bail to be put in to the action, in the common form.^(d) But where the *third proclamation* was made at the door of the church of the parish of which the defendant was described to be in the writ, and in the bond upon which the action was brought, but where he did not reside at the time when the proclamation was made; the court reversed the outlawry, as for want of proclamations, and ordered bail to be taken to pay the condemnation money.^(e) In a joint action against two defendants, one of them, being in *Ireland* was sued to outlawry; and judgment being had against the other, the court, on motion to reverse the outlawry, made the rule absolute, on putting in bail, and consenting to give judgment, which they said was necessary in a joint action, on account of the original.^(f)

In the Common Pleas, when a defendant is outlawed on a common original in trespass *quare clausum fregit*, he has a right to reverse it at his own expense, on entering a *common* appearance, and payment of costs:^(g) But *special* bail is required, on reversing an outlawry, where the sum in the original amounts to *twenty* pounds or upwards.^(h) And in that court, no outlawry shall be reversed, after the death of the plaintiff in the [*143] action, *without the defendant's appearance, and putting in special bail, if required, to the executor or administrator of the plaintiff;

(i) 12 East, 622. 4 Taunt. 691, *accord*.

(a) *Ante*, 140, 141.

(b) 1 Maule & Sel. 409. 1 Barn. & Ald. 131, *accord*, but see 12 Mod. 545, per Holt, Ch. J. 2 Salk. 496. 1 Ld. Raym. 349. Carth. 459. *Phillips v. Warburton*, M. 26 Geo. III. *Berwick v. Parkin*, E. 31 Geo. III. K. B. Imp. K. B. 10 Ed. 546. 8 East, 527, and see R. M. 1654, § 13, R. H. 2 *Cur. I.* § 2, C. P. Cas. Pr. C. P. 29. Barnes, 326.

(c) 4 Taunt. 691.

(d) 2 Barn. & Cres. 353. 3 Dowl. & Ryl. 575, S. C.

(e) 3 Barn. & Cres. 529. 5 Dowl. & Ryl. 302, S. C.

(f) *Per. Cur. H.* 22 Geo. III. K. B.

(g) Barnes, 324.

(h) R. H. 2 *Cur. I.* § 2. R. M. 17 *Cur. II.* C. P. stat. 7 & 8 Geo. IV. c. 71, but see R. T. 2 *Jac. II.* C. P., by which special bail was formerly required where the sum amounted to *ten* pounds or upwards.

or to husband and wife, where the wife whilst a feme sole, sued the defendant to an outlawry before marriage: provided the plaintiff's attorney do, within *fourteen* days after notice given to him of the defendant's intention to reverse the outlawry, deliver to the prothonotary the name of the plaintiff's executor or administrator.(a) In general, an outlawry can only be reversed upon payment of *costs*: But if the process has been abused, and made subservient to purposes of oppression, as where a man has been outlawed who was already in prison at the plaintiff's suit,(b) or being at large did not abscond, but appeared publicly, and might have been arrested or served with process,(c) the court, on motion, will order the plaintiff to reverse the outlawry at his own expense. So, where the plaintiff had proceeded to outlaw a female, and obtained judgment of waiver, the court set it aside on motion, with costs; it appearing that she was in prison, during the time the several processes were sued out, and that the plaintiff was aware of that fact, and knew where to find her.(d)

In the Common Pleas, the reversal is entered on the same roll where the *exigent* is awarded.(e) And, on reversing the outlawry, the defendant must pay to plaintiff or his attorney, or leave in court for him, the full and just costs of suit to the *exigent*: And where the plaintiff, by virtue of such outlawry, hath taken an inquisition, and extended the goods, &c., of the outlaw into the king's hands, and returned the same into the Exchequer, such further just and reasonable costs shall be taxed by the prothonotary, and likewise paid to the plaintiff or his attorney, or left in court, as the plaintiff hath been at in taking and prosecuting the said inquisition, before any certificate of such reversal shall be made by the clerk of the outlawries.(f) Also, when an outlawry hath been transcribed into the Exchequer, and process made out thereupon, and afterwards such outlawry is reversed, before any judgment shall be entered for removing the king's hands, and the party outlawed restored to his possession, the prosecutor of the outlawry shall be paid such costs as shall be taxed by the remembrancer or his deputy, for the proceedings in that court.(g) But, with this exception, no defendant who shall appear and reverse an outlawry, shall upon such reversal pay for costs to the plaintiff, any sum of money exceeding the usual costs of the *exigent* in the Common Pleas, together with the fine to the king upon the original writ, if any was paid; and all further costs shall be respited, until the time of signing judgment for the plaintiff.(h)

*When the outlawry is reversed, or the defendant has obtained a charter of pardon, he may be discharged, if in custody, by writ [*144] of *supersedeas*;(aa) and his property,(bb) if taken into the king's hands, shall be restored to him by writ of *amoveas manus*, or otherwise, according to the course of the Exchequer.(cc) And when a sheriff's officer, being in possession of the tenant's effects under an outlawry, made a

(a) R. T. 2 *Jac.* II. C. P., and see Barnes, 323, 325.

(b) 2 Vent. 46. 2 Salk. 495. 3 Barnes, 321.

(c) T. Jon. 211. Comb. 19. 12 Mod. 413. 2 Wils. 127, but see Cas. Pr. C. P. 61, 78, 151. Barnes, 320, S. C. *Id.* 321, 2, 3.

(d) 9 Moore, 589.

(e) R. II. 2 *Car.* I. § 4, C. P.

(f) R. T. 2 *Jac.* II., and see R. M. 17 *Car.* II. C. P.

(g) R. T. 1 W. & M. *reg.* 1, C. P. Barnes, 324.

(h) R. T. 33 *Car.* II. C. P.

(aa) 13 *Car.* II. stat. 2, c. 2, § 4. Trye, 122, and see Append. Chap. VII. § 36, 7.

(bb) As to chattels *real*, see Cro. Eliz. 278. 2 Vern. 312. Bunb. 105, and as to chattels *personal*, see 5 Mod. 61.

(cc) Trye, 90.

distress for rent, and sold the goods so distrained, and afterwards the outlawry was reversed; it was ruled, that the officer was liable to pay the produce of the goods to the landlord, in an action for money had and received. *(dd)* When the defendant has obtained a charter of pardon, he must sue out a *scire facias*, to give notice thereof to the plaintiff, in order that he may further prosecute his action, if he thinks proper. *(e)*

Every outlawry determines upon the *death* of the party outlawed: *(f)* and if he was outlawed in a *civil* suit, the representatives of the outlaw shall have restitution of the land seized, or of the personal effects, if they remain in the sheriff's hands undisposed of: but in *criminal* cases, outlawry works an entire forfeiture of the outlaw's estate, both real and personal. In order to reverse an outlawry on *death*, there must be a certificate from the minister of the parish where the party died or was buried, and likewise an affidavit of his death, by some person who was acquainted with him, and was present at the death or burial; in which affidavit the party should be described as in the outlawry. But though outlawry determines upon the death of the outlaw, yet, before the king's hands can be amoved from the lands or goods seized, such death must be pleaded, and judgment entered up thereon in the Exchequer, upon the plea being confessed by the attorney general. And in like manner, if the outlawry be reversed, (which must be done in the court where the action was originally brought,) for any other reason, a certificate of such reversal from the clerk of the outlawries must be pleaded and confessed, and judgment entered up thereon in the Exchequer, before the king's hands can be amoved. These proceedings are in nature of a suggestion upon the roll, in the court of Exchequer; and the judgment of the barons is, "that his majesty's hands be *amoved* from the possession of the premises, &c." *(g)* The plea in this case may be put in by any person; for though the judgment be, that he shall be restored to the possession of the premises, yet it gives no title to the lands: but in order to discharge the sheriff, the judgment roll must be carried to the pipe office, that a *quietus* may be made thereupon. If, after such judgment, any difficulty attends the getting possession, a writ of *amoveas manus* must be sued out of the Exchequer, directed to the sheriff, who will thereupon deliver possession. *(h)*

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*CHAPTER VIII.

Of the BILL of MIDDLESEX and LATITAT, and SUBSEQUENT PROCESS thereon, in the KING'S BENCH; of the CAPIAS QUARE CLAUSUM FREGIT, &c.; in the COMMON PLEAS; and of PROCESS in the EXCHEQUER of PLEAS.

A BILL of *Middlesex*, or *Latitat*, is the ordinary mode of commencing actions in the court of King's Bench, against unprivileged persons: And a *latitat*, being a kind of *original* in that court, *(a)* may be issued in the first

(dd) 7 Durnf. & East, 259.

(e) Trye, 134, 154, and for the form of this writ, and of the return thereto, see Append. Chap. VII. § 39, 40, 41.

(g) Append. Chap. VII. § 38.

(a) Carth. 233. 2 Ld. Raym. 883. Cowp. 456.

(f) Cas. Pr. C. P. 36. *Ante*, 135.

(h) 2 Sel. Pr. 2 Ed. 305, &c.

instance, without previously suing out a bill of *Middlesex*.(b) But this mode of commencing actions is not applicable to *peers* of the realm, *corporations*, or *hundredors* on the statute 7 & 8 Geo. IV. c. 31, who, not being subject to a *capias*, must be sued by original writ; nor to *members* of the house of commons, who for the same reason must be sued by *original* writ, or by *bill* for the real cause of action, stating them to have privilege of parliament. And there is no need of any process for commencing actions against *attorneys* or officers, who are supposed to be already present in court: nor against *prisoners* in the actual custody of the marshal. A writ of *latitat*, issued against a peer, was superseded on motion, grounded on an office copy of the *præcipe*, in which the defendant was styled *Baron*:(c) but the motion for this purpose must be made as soon as may be, and before interlocutory judgment.(d)

The bill of *Middlesex*, or *latitat*, is in general considered merely as process to bring the defendant into court. It might therefore formerly have been sued out, though the defendant could not have been arrested upon it, before the cause of action;(e) and the plaintiff is allowed to give in evidence a cause of action arising after it is sued out, and before the exhibiting of the bill.(f) But in a late case, where the defendant was arrested and held to bail on a bill of *Middlesex*, for a debt not due at the time of the arrest, the court ordered the bail bond to be delivered up to *be cancelled, and set aside the bill of *Middlesex*, for irregularity.(a) It has been frequently ruled however, that for certain purposes, a bill of *Middlesex* or *latitat*, out of the King's Bench, may be taken to be in nature of an original writ in the Common Pleas,(bb) and a *latitat*, even without a bill of *Middlesex*, if properly issued and continued on the roll, has been holden to be a good commencement of the suit, to avoid a plea of the statute of limitations,(cc) or a *tender* made after suing it out.(dd) It was indeed said by Holt, Ch. J. that there is a difference between a civil action, and an action given by a statute; for in the first case, the suing out a *latitat* within the time, and continuing it afterwards, will be sufficient; but in the other case, if the party proceed by *bill*, he ought to file his bill within time, that it may appear to be upon the record itself.(ee) But, upon a writ of error, all the judges in the Exchequer chamber held, that a *latitat* is a kind of original in the King's Bench:(ff) And accordingly, in two subsequent cases,(gg) it was holden to be a good commencement of the suit in a penal action. Hence it appears, that a *latitat* may be considered, either as the commencement of the action, or only as process to bring the defendant into court, at the *elec*

(b) Sty. Rep. 156, 178. 1 Sid. 53, 60. Carth. 233. 2 Ld. Raym. 880. 1 Str. 550. 2 Str. 736. 2 Ld. Raym. 1441, S. C. Willes, 258. 2 Bur. 961. 1 Blac. Rep. 215, S. C. 3 Bur. 1241. 1 Blac. Rep. 312, S. C. 2 Blac. Rep. 925. Forrest, 110. 9 East, 337, 344.

(c) 3 East, 127, and see 3 Maule & Sel. 88.

(d) Lady *Napier's* case, T. 21 Geo. III. K. B. *Ante*, 118.

(e) Cro. Eliz. 271. Cro. Jac. 561. 1 Vent. 28. 8 Mod. 343. 1 Wils. 142. 2 Bur. 967. Doug. 62. 4 East, 75.

(f) Cowp. 454. 7 Durnf. & East, 4. 4 East, 75, and see 2 Wms. Saund. 5 Ed. 1. (1.)

(a) 2 Chit. Rep. 11.

(bb) Sty. Rep. 156. Carth. 233. 2 Ld. Raym. 883. 1 Wils. 147. Cowp. 456.

(cc) *Ante*, 27. 2 Wms. Saund. 5 Ed. 1. (1.)

(dd) Cro. Car. 264. 1 Wils. 141, but see 3 Bos. & Pul. 330.

(ee) Carth. 233.

(ff) 2 Ld. Raym. 883. Cowp. 456.

(gg) *Bridges v. Knapton*, and *Hardiman v. Whitaker*, cited in 2 Bur. 950, 3 Bur. 1243. Cowp. 454. 2 East, 574.

tion of the plaintiff.(h) Though if it be stated as the commencement of the action, to avoid a *tender*, the defendant may deny that the plaintiff had any cause of action at the time of suing it out,(i) or if it be replied to a plea of the statute of limitations, the defendant, in order to maintain his plea, may aver the real time of suing it out, in opposition to the *teste*.(k)

Anciently, it seems, the process in *trespass* in the King's Bench was founded on a *plaint* or *queritur*,(l) entered on the records of the court: and the first process thereon was a precept in nature of an *attachment*;(m) upon which the sheriff returned, either that he had attached the defendant,(n) or that he had nothing by which he could be attached.(o) On the latter return, if the defendant did not appear, there issued into *Middlesex*, or other county

where the court sat, a precept in nature of a *capias*, commanding [*147] the sheriff of that county to take the defendant, if he should be found in his bailiwick, and safely keep him, so that he might have his body before the king, at a certain time and place therein mentioned, to answer the plaintiff, in a plea of *trespass*,(a) &c. This precept being now used as the first process in *trespass*, when the defendant is in *Middlesex*, is therefore called a *bill of Middlesex*: and it is the proper process, when the defendant resides in that county; it being holden that a *latitat*, directed to the sheriff of *Middlesex*, is irregular.(b) If the defendant cannot be arrested upon, or served with a copy of this process, the plaintiff may sue out an *alias*,(c) and after that (if necessary,) a *pluries* bill of *Middlesex*; commanding the sheriff, as *before* or as *oftentimes* he has been commanded, to take the defendant, &c.(d) But a term must not intervene between the return of an *alias*, and the issuing of a *pluries* bill of *Middlesex*. 1 Man. & Ryl. 317.

But if the defendant be not in *Middlesex*, the plaintiff must sue out a writ of *latitat*,(e) or *testatum* bill of *Middlesex*, directed to the sheriff or sheriffs of the county where he is supposed to be, reciting the former process and its return, and suggesting that it is sufficiently *testified*, the defendant lurks and secretes himself in their county.(f) A writ of *latitat* is considered as a continuance of a bill of *Middlesex*. 7 Barn. & Cres. 526, 1 Man. & Ryl. 232, 237, S. C. Ante, 27. This writ may be issued in the first instance;(g) and if it prove ineffectual, the plaintiff may sue out an *alias*, and after that (if necessary,) a *pluries latitat*, or, more properly speaking, an *alias* or *pluries capias*,(hh) (for these writs do not contain any *testatum*, or suggestion of a *latitat*;) and the *pluries* may be repeated from time to time, till the defendant be arrested, or served with a copy of it:

(h) Bul. Nl. Pri. 151. 1 Wils. 146. *Pugh v. Martin*, H. 24 Geo. III. K. B., and see 8 Durnf. & East, 628. 2 Wms. Saund. 5 Ed. 1. (1.) (i) 1 Wils. 141.

(k) 2 Bur. 950. 3 Barn. & Cres. 328. 5 Barn. & Cres. 149. 7 Dowl. & Ryl. 729, S. C. 7 Barn. & Cres. 406, and see 4 Esp. Rep. 100, 161, as to *evidence* of the commencement of the action, &c.

(l) Append. Chap. VIII. § 1. In Trye's *jus. fil.* published in 1684, it is said, that there were several files of these *plaints*, then remaining in the former upper treasury of the King's Bench; and the profits arising from them were formerly so considerable, that they were always excepted by the chief justice, out of the grant of the office of *custos brevium*. *Id.* p. 98, 100. See also Rich. Pr. K. B. 24. 2 H. Blac. 271, 2.

(m) Trye, 99. Stat. 8 Eliz. c. 2. Brown's *Vade Mecum*, 526, and see Append. Chap. VIII. § 2. (n) Append. Chap. VIII. § 3. (o) *Id.* § 4.

(a) Append. Chap. VIII. § 6, 21.

(b) 1 Maule & Sel. 442.

(c) But an *alias* writ, being founded on the sheriff's return of *non est inventus*, cannot be sued out, when the service of the first is complete. *Holloway v. Whalley*, T. 41 Geo. III. K. B.

(d) Append. Chap. VIII. § 9, 24.

(e) Trye, 99.

(f) Append. Chap. VIII. § 11, 28.

(g) Ante, 145.

(hh) Append. Chap. VIII. § 19, 31.

though, according to some books, (ii) there must be a new *latitat*, after four terms from the time of suing out the first. Or, when it is doubtful in what county the defendant is to be found, the plaintiff may issue several writs against him into different counties; and the master will be justified in allowing the expenses of such writs. (k) In any of these writs, there may be a clause of *non omittas*, commanding the sheriff, that he do not omit, on account of any liberty in his county, but that he enter the same, &c. (l) And, by the long established and recognized practice of the court, a *non omittas* writ may be issued in the first instance, without suing out a previous writ, and waiting for the sheriff's return of *mandari ballivo, qui nullum dedit responsum*. (m) In actions not bailable, if the plaintiff sue *qui tam*, (n) or as *executor* or *administrator*, or *assignee* of a bankrupt, &c., the process need not state the special character in which he sues; nor, in an action against an executor or administrator, &c., the character in which he is sued. (o)

*A bill of *Middlesex*, and notice thereto, describing the defend- [*148] ant as Mr. A., without stating his christian name, is irregular. (a) And, in the King's Bench, where the party arrested was described in the process, and affidavit to hold to bail, by the *initials* of his christian name only, the court ordered the bail bond to be delivered up to be cancelled, and the defendant discharged upon entering a common appearance. (b) And, in that court, where the christian name of the defendant is omitted in a bailable *latitat*, the court, on motion, will set it aside, for irregularity; but where it is omitted in serviceable process, they will leave the party to his plea in abatement. (c) So, in the Common Pleas, if a defendant be arrested by the *initials* of his christian name only, and sign a bail bond in a similar manner, the court will discharge him, on entering a common appearance, on his undertaking to bring no action. (d) So, where the christian name of the defendant was wholly omitted in a *latitat*, the proceedings were deemed irregular, and set aside on motion: (e) and there is no distinction in this respect, between bailable and serviceable process. (e) But where, by a writ of *capias ad respondendum*, the sheriff was directed to take Messrs. C. and D., without mentioning their christian names, and they afterwards signed a bail bond in their christian and surnames, the court held it to be a waiver of the irregularity in the writ. (f) Also, it is a rule, that every subsequent writ should correspond with that which is gone before, in the names of the parties: Therefore, where an action was brought against *Bates* and another, for an act done by them as justices of the peace, and the *latitat* against *Bates* was by the name of *William*, and the *alias* by the name of *John*, the court thought the proceedings irregular, and set them aside, as far as they respected *Bates*. (g) But a misnomer may be cured, by altering the writ, and getting it resealed, before the

(ii) Hans. Introd. 1. Prac. Epit. K. B. 2, *Tamen quare*.

(k) 1 Chit Rep. 544.

(l) Append. Chap. VIII. § 26, 33.

(m) 9 East, 330.

(n) 2 Str. 1232. 2 Blac. Rep. 722. 3 Wils. 141, S. C.

(o) 6 Moore, 66. 3 Brod. & Bing. 4 S. C.

(a) ——— v. *Snow*, E. 57 Geo. III. K. B. 1 Chit Rep. 398. (a). and see 4 Moore, 317. 1 Brod. & Bing. 529, S. C.

(b) 4 Barn. & Ald. 536, and see 2 Dowl. & Ry. 73, 237.

(c) 6 Barn. & Cres. 165.

(d) 6 Moore, 264, and see 3 Bing. 296. 10 Moore, 322, S. C. accord. 1 Moore and P. 24, but see 2 Bos. & Pul. 466, *contra*.

(e) 1 Chit. Rep. 397.

(f) 4 Moore, 317. 1 Brod. & Bing. 529, S. C. but see 6 Moore, 264. 3 Bing. 296.

(g) 3 Durnf. & East, 660.

return: *(h)* And where process is sued out against four defendants, one of whom is misnamed, it may be served upon the three whose names are right, and if the name of the other be afterwards altered, and the writ resealed, it is good against all. *(i)*

The plaintiff was formerly allowed to join *four* defendants, for separate causes of action, in one writ; and to declare against them severally. *(k)* And this is still allowed, in the Common Pleas, where the process is not bailable. *(l)* But in the King's Bench, by a late rule of court, *(m)* "in all actions by *bill*, the mesne process shall contain the name of the [*149] defendant, *or (if more than one,) of all the defendants in that action; and shall not contain the name or names of the defendant or defendants in any other action." Where the process is bailable, a plaintiff cannot, in either court, join several defendants in one writ, for distinct causes of action: *(a)* And if the plaintiff hold two defendants to bail on a joint writ, and declare against them severally, the court will set aside the declaration and subsequent proceedings for irregularity. *(b)* Bailable process however may, it seems, be taken out against some defendants, and serviceable process against others. *(c)* And, in the Common Pleas, where an action is brought against more than *four* defendants, and two writs are sued out, it does not seem to be necessary to name all the defendants in each writ. *(e)*

The bill of *Middlesex*, and other process into that county are issued out of the bill of Middlesex office, and signed by the clerk, but not sealed. The *latitat*, and other process thereon, are issued and signed by the signer of the writs in the King's Bench office, and afterwards sealed at the seal office. The clerk, according to ancient orders, was upon the signing of every writ of *alias* and *pluries capias*, and of every *non omittas*, to subscribe under the same, the term when the *latitat* was sued forth; and no such writ could be signed in term time, before a note was delivered in, subscribed with the term when the *latitat* was sued forth, for the entering of the same; and in vacation time, the clerks were to enter every such writ, before it was signed. *(d)* At the time of issuing the bill of Middlesex, or *latitat*, &c., the plaintiff's attorney should deliver to the officer a *præcipe*, *(e)* or note of instructions: And it is usual to make the affidavit of the cause of action at the same time, before the officer or his deputy.

In point of form, the bill of *Middlesex* and *latitat*, &c., are *common* or *special*. Before the making of the statute 13 Car. II. stat. 2, c. 2, a defendant might have been arrested and holden to bail for any sum of money, upon a *common* bill of Middlesex or *latitat*, &c., not expressing the particular cause of action. It consequently happened, that he was frequently arrested, and holden to bail or imprisoned, for a large sum of money, when perhaps

(h) 1 Chit. Rep. 321.

(i) *Per. Cur. M.* 55 Geo. III. K. B. 1 Chit. Rep. 398, *(a)*, and see 6 Barn. & Ald. 111. 2 Dowl. & Ry. 211, S. C.

(k) Com. Rep. 74. 4 Durnf. & East, 696, and see *Yardley v. Burgess*, T. 32 Geo. III. K. B. 4 Durnf. & East, 697. 1 Maule & Sel. 55.

(l) 1 Bos. & Pul. 19, 49.

(m) R. E. 8 Geo. IV. K. B. 6 Barn. & Cres. 639.

(a) *Holland v. Johnson*, 4 Durnf. & East, 695. *Holland v. Richards*, T. 32 Geo. III. K. B. 4 Durnf. & East, 697. 1 Bos. & Pul. 19, 49.

(b) 4 East, 589. 1 Maule & Sel. 55. 1 Bos. & Pul. 49. 2 New Rep. C. P. 82. 1 Marsh. 274, and see 5 Durnf. & East, 722.

(c) 1 Bing. 48, 68. 7 Moore, 301, 362, S. C.

(d) R. T. 1656, *reg.* 1, K. B.

(e) 1 Chit. Rep. 186. Append. Chap. VIII. § 5, 8, 10, 18, 20, 23, 25, 27, 30, 32, 34.

there was no real plaintiff, or little or no cause of action.(f) To remedy this mischief, it was enacted, that "no person arrested by any sheriff, &c., by force or colour of any bailable writ, bill or process, issuing out of the King's Bench wherein the certainty and true cause of action is not expressed particularly, shall be compelled to give security for his appearance in any penalty or sum of money, exceeding the sum of *forty pounds*(g) This statute, says Mr. Justice *Blackstone*,(h) (without any such intention in the makers, (had like to have ousted the King's Bench of all its jurisdiction over civil injuries without force; for as the *bill of [*150] Middlesex was framed only for actions of *trespass*, a defendant could not be arrested and holden to bail thereupon, for breaches of civil contracts. But notwithstanding this statute, the defendant might still be arrested, and holden to bail upon a common bill of Middlesex, or *latitat*, &c. for any sum not exceeding *forty pounds*:(a) And where it was for a larger sum, a method was devised, to preserve the jurisdiction of the court, and at the same time to authorize an arrest, by inserting in the process an *ae etiam*, or special clause beginning with these words, shortly describing the true cause of action, in addition to the general complaint of *trespass*.(b) And a rule of court was made upon this statute, that no attorney should make any precept or writ, with a clause of *ae etiam*, &c. against any heir, executor or administrator; nor in any case where, by the course of the court, special bail was not required.(c)

In *trespass* therefore, and other cases, where the defendant either cannot, or is not meant to be arrested, and held to special bail, the process in general is in the *common* form, requiring the defendant to answer the plaintiff, in a plea of *trespass*. This description of the plea, however, though it was heretofore material,(d) is now considered as mere matter of form: Therefore, where a motion was made to stay the proceedings on a bill of Middlesex, which was in *debt* only, and not in *trespass*, with an *ae etiam* in *debt*, the court ordered the bill to be amended, by inserting the plea of *trespass*.(e) In a subsequent case,(f) where the bill of Middlesex was to answer the plaintiff in a plea of *debt*, instead of *trespass*, and also to a bill to be exhibited in a plea of *trespass* upon the *case*, the court refused to grant a rule for setting aside, on the authority of a case, which was read from the master's note book, exactly in point.(gg) And a bill of Middlesex, requiring the defendant to appear before *us*, is good.(hh)

When the cause of action is of a bailable nature, and it is intended to arrest the defendant, and hold him to special bail, for a larger sum than 40*l*. there should be a clause of *ae etiam* in the process: and in such case, an omission in the *ae etiam* part of the writ, of the sum for which the defendant is arrested,(i) or that it was due on promises,(k) is irregular, and he cannot be holden to special bail thereon. There are also some cases, in which the cause of action must be expressed in the process, though the defendant

(f) See the preamble to the statute.

(g) Stat. 13 *Car. II.* stat. 2, c. 2, § 2, and see 2 *East*, 305, 6.

(h) 3 *Blac. Com.* 287.

(a) 1 *H. Blac.* 310.

(b) *Trye*, 102, 3, and see N. H. 2 *Geo. II.* § II. K. B. 2 *Wils.* 392. 2 *East*, 307. 2 *Wms. Saund.* 5 Ed. 52. (1.) Append. Chap. VIII. § 36, &c.

(c) R. M. 15 *Car. II. reg.* 2, K. B.

(d) 2 *Str.* 1072.

(e) 1 *Blac. Rep.* 462.

(f) 2 *Durnf. & East*, 513.

(gg) M. 20 *Geo. III.* K. B. The same application was also refused in II. 24 *Geo. III.* K. B. 2 *Durnf. & East*, 513, (a), and see 2 *Wms. Saund.* 5 Ed. 52. (1.) 2 *Chit. Rep.* 166.

(hh) *Per. Cur.* II. 43 *Geo. III.* K. B.

(i) 2 *East*, 305.

(k) 1 *Chit. Rep.* 171.

be not arrested, and held to special bail: Thus, in an action on the *lottery* act, the amount of the penalties sued for must be specified in the first process; even though the defendant be not holden to bail thereon.^(l) And

where a writ is sued out upon a recognizance of bail, it is necessary [*151] *by rule of court,^(a) that after the words "*in a plea of trespass*," there should be inserted the following clause, "*and also to a bill of the said plaintiff, against the said defendant, in a plea of debt upon recognizance, according to the custom of our court before us, to be exhibited*:" otherwise the defendant or his attorney is not bound to accept of a declaration in *debt*, upon such recognizance. An *ac etiam* writ is holden to be a good continuance of common process, so as to avoid a plea of the statute of limitations.^(b)

The bill of Middlesex, being merely a *precept*,^(c) has no direction or *teste*. But the writ of *latitat*, and other subsequent process, should be directed to the sheriff or sheriffs of the county, where the defendant is supposed to reside;^(d) or, if one of the sheriffs is a party, to the other;^(e) or if both sheriffs are parties to the *coroner*,^(f) and if he also be a party, to *clisors* named by the master in the King's Bench,^(g) or prothonotaries in the Common Pleas.^(h) And a *latitat* cannot be directed to the sheriff of Middlesex; for if this were allowed, a bill of Middlesex might never be issued.⁽ⁱ⁾ But where the copy of a *latitat* was directed to the sheriff, and not, as it ought to have been, to the sheriffs of *London*, it was not deemed irregular.^(k)

It was formerly holden, that a writ of *latitat*, &c. did not run into *Wales*,^(l) or the *counties palatine*:^(m) but a different practice now prevails;⁽ⁿ⁾ which practice is recognized as to *Wales*, by the statutes 13 Geo. III. c. 51, § 1, 2,^(o) and 5 Geo. IV. c. 106, § 21.; and, without respect to the *counties palatine*, the true meaning of the expression *breve domini regis non currit*, &c. is said to be, that the court cannot write directly to the sheriff, as they do in other cases.^(p) In a county palatine therefore, the process should be directed to the proper officer; as in *Durham*, to the *Bishop*, or his chancellor; in *Cheshire*, to the *Chamberlain*, or his deputy; and in *Lancashire*, to the *Chancellor* or his deputy:^(q) And an *alias capias*, directed to the sheriffs of the city of *Chester* instead of the chamberlain of the county palatine, directing him to issue his mandate to the sheriffs, is irregular, and may be set aside at the instance of the defendant.^(r) In these cases, the mandatory part of the writ is different from the common

(l) 4 Durnf. & East, 349, 577. 6 Durnf. & East, 617. 2 H. Blac. 601.

(a) R. E. 15 Geo. II. *reg.* 1, K. B. This rule applies to the form of the *latitat*, and other subsequent process. In a bill of Middlesex, the form is, "*in a plea, &c., according to the custom of the court of the lord the king, before the king himself, to be exhibited*."

(b) 4 Barn. & Cres. 625. 7 Dowl. & Ry. 25, S. C.

(c) Trye, 97. 2 Sid. 129. 2 Str. 1069. 9 East, 340.

(d) Append. Chap. VIII. § 12, 13.

(e) 5 Maule & Sel. 144.

(f) Append. Chap. VIII. § 14. 1 Blac. Rep. 506. — v. *Philips*, E. 42 Geo. III. K. B. S. P.

(g) 3 East, 141.

(h) 2 Blac. Rep. 911, 1218, but see 10 Moore, 266.

(i) 1 Maule & Sel. 442.

(k) *Per. Cur.* E. 21 Geo. III. K. B.

(l) 1 Wils. 193.

(m) T. Raym. 206. 1 Lev. 256, 291. 2 Wms. Saund. 5 Ed. 193, S. C. See also Hetl. 18. Cro. Jac. 484. 2 Bulst. 54, 156.

(n) Doug. 213.

(o) *Id. in notis.*

(p) 2 Str. 1089. Andr. 191, S. C. See also R. T. 21 *Car.* I. K. B. 6 Durnf. & East. 71. 1 Moore, 514. Harg. Tracts, 417, &c.

(q) Append. Chap. VIII. § 15.

(r) 3 Moore, 237. 1 Brod. & Bing. 12, S. C. 1 Chit. Rep. 374.

form;(s) and if the officer, to whom it is directed, refuse to receive it, he is liable *to an attachment.(aa) In the *Cinque ports*, the [*152] process is directed to the *Constable* of *Dover* castle, his deputy or lieutenant;(bb) and in *Berwick* upon *Tweed*, to the mayor and bailiffs of *Berwick*;(c) In the isle of *Ely*, the process out of the courts at *Westminster* goes in the first instance to the sheriff of *Cambridgeshire*, who thereupon issues his mandate to the bailiff of the franchise.(d) And, in like manner, where the defendant resides in the borough of *Southwark*, the process is directed to the sheriff of the county of *Surrey*, who issues his mandate thereupon to the bailiff of the borough, and not to the bailiff in the first instance.(e)

The *latitat*, and other subsequent process, should be *tested* in the name of the chief justice, or *senior* judge of the court, if there be no chief justice; and this process,(f) as well as the *capias* in the Common Pleas,(g) may be tested before the cause of action. If it be sued out in *term* time, it is usually tested on the first day of that term; though it may be tested of the preceding one:(h) If sued out in *vacation*, it should be tested on the last day of the preceding term;(i) for if tested in vacation, it is altogether void:(k) And in all continued writs, the *alias* must be tested the day the former was returnable.(l) A bill of Middlesex may be stated in pleading to have been sued out in vacation,(m) so as it be not alleged that the court was then holden at *Westminster*:(n) and it may be stated to have been sued out of the court of *Westminster*, on a day between the *esso* day, and the *quarto die post*; for though the courts do not actually sit on the *esso* day, yet in law it is considered as the first day of the term.(o) And this, and every other process by bill, must be made returnable on a *particular* return day, or *day certain*, in full term;(p) as on *Monday* or some other day of the week, *next after* the preceding general return; and it may be made returnable on a general return, in full term, by specifying the day of the week on which it falls, as on *Monday* in fifteen days of Saint Hilary, &c.(q) But it must not be returnable on a *dies non juridicus*; as on a *Sunday*, the feast of the *Purification* in Hilary term,(r) *Ascension day* in Easter term,(s) or *Midsummer day* (if it happen) in Trinity term, unless it be on the *Friday* next after Trinity Sunday, in which case it is *dies juridicus* *by the 32 Hen. VIII. c. 21.(a) And [153] *Monday* next after the *Morrow* of the Holy Trinity is not a good

(s) Append. Chap. VIII. § 35.

(aa) 2 Str. 1089, and see 1 Moore, 514.

(bb) Append. Chap. VIII. § 16.

(c) *Id.* § 17.

(d) 3 East, 128.

(e) 14 East, 289. and see 1 Chit. Rep. 374. (b).

(f) 2 Bur. 967.

(g) 1 Bos. & Pul. 343. 2 Bos. & Pul. 235.

(h) 5 Taunt. 664.

(i) 3 Keb. 214. T. Jon. 149. 1 Vent. 363. 2 Bur. 962.

(k) 2 Bur. 954, 967. 5 Bur. 2588. 2 Blac. Rep. 683 S. C.

(l) 2 Salk. 699.

(m) 15 East, 378.

(n) 2 Ld. Raym. 1557. and see 3 Durnf. & East, 184. 15 East, 378. but see 2 Brod. & Bing. 659.

(o) 3 Durnf. & East, 183.

(p) 1 Str. 399.

(q) Append. Chap. V. § 26.

(r) 4 Barn. & Ald. 288. and see 8 Dowl. & Ryl. 450.

(s) 1 Chit. Rep. 400. In this case, a bill of *Middlesex* returnable "on *Thursday* next after Easter day," which was the day of the *Ascension*, was holden to be irregular; and that the objection could not be waived by the defendant: but as he had promised to take no advantage, the court set aside the proceedings without costs, and on the terms of no action being brought.

(a) 2 Inst. 264, 5. Cro. Jac. 16. 2 Bulst. 212. 7 Mod. 17. 6 Mod. 252. 1 Blac. Rep. 529. and see R. T. 35 Geo. III. K. B.

return for the first Monday in Trinity term; but the return for that day should be *Monday* next after *eight days* of the Holy Trinity.(b) It should also be observed, that as there are more than *seven* days between the morrow of All Souls, and the morrow of St. Martin, in Michaelmas term, the day before the morrow of Saint Martin, being the 11th of November, is not the day of the week *next* after the morrow of All Souls; and therefore, on this day, the bill of Middlesex, or other process, should be made returnable on *Monday* (or other day of the week, being) *the feast of Saint Martin*. There is no necessity for any particular number of days between the *teste* and return of a *latitat*, or other process by *bill*: even one was formerly deemed sufficient;(c) and it may be now sued out on the very return day.(d)

The ordinary mode of commencing actions, in the court of Common Pleas, is by writ of *capias quare clausum fregit*; which is founded on a supposed original, and answers to the bill of *Middlesex* or *latitat* in the King's Bench.(e) The writ is holden to be a good commencement of the suit, so as to avoid a plea of the statute of limitations;(f) and in point of form, it is *common* or *special*. Where the cause of action is not bailable, it is in the common form, commanding the sheriff to take the defendant, &c. to answer the plaintiff, of a *plea wherefore, with force and arms, the close of the plaintiff, at, &c. he broke; and other wrongs to him did, to the great damage of the plaintiff, and against the peace, &c.*(g) And the defendant may be arrested, and holden to special bail, upon a common writ of *capias quare clausum fregit* in the Common Pleas, for any sum not exceeding 40*l.*(h) But in general, where the cause of action is of a bailable nature, an *ac etiam* is inserted in the process, or special clause beginning with these words, as in the bill of *Middlesex* or *latitat* in the King's Bench, shortly describing the real cause of action.(i) It is not necessary however, in this court, that a clause of *ac etiam* should be inserted on the *præcipe*, or instructions for the writ:(k) nor that the filacer's name should be added to a common *capias*.(l) The writ of *capias quare clausum fregit* should be *tested* in term time, and returnable before the king's justices at *Westminster*, on a general return day: And as it is founded on a supposed original, there should regularly be *fifteen* days between the *teste* [*154] and return. *If there were not so many, the court would formerly have set aside the proceedings for irregularity, with costs:(a) but afterwards, they permitted this defect to be amended:(b) and now, the amendment being a matter of course, it seems the court will not set aside the process for irregularity on this ground.(cc)

If the defendant, in a bailable action, cannot be taken on the first writ,

(b) 5 East, 291. 1 Smith R. 425, S. C. and see 1 Chit. Rep. 323. (a).

(c) 2 Str. 917. 2 Barnardist. K. B. 60, S. C.

(d) 4 Durnf. & East, 610. but see 2 Ld. Raym. 772. 2 Salk. 421. 7 Mod. 12 S. C.

(e) *Ante*, 91, 104.

(f) 2 Ld. Raym. 880. Willes, 258. 2 Blac. Rep. 925. 3 Wils. 465, S. C.

(g) Append. Chap. VIII. § 52.

(h) 1 H. Blac. 301. *Ante*, 150.

(i) Append. Chap. VIII. § 54. And for the forms of *ac etiams*, in C. P. see *id.* § 62, 3, &c.

(k) 2 Taunt. 161, but see Barnes, 117, *contra*.

(l) Cas. Pr. C. P. 106. 1 H. Blac. 120. and see 2 Chit. Rep. 239, 356.

(a) Barnes, 409, 420, 427. 2 Wils. 117, S. C. 1 H. Blac. 222.

(b) 3 Wils. 454. 2 Blac. Rep. 918, S. C.

(cc) 1 H. Blac. 291. 1 Bos. & Pul. 342

before it is returnable, the plaintiff may have one or more writs of *capias* by *continuance*, in order to arrest him in the same county; and need not sue out an *alias* or *pluries capias*.^(dl) And if a *capias* by *continuance* be *tested* on the same day as the original *capias*, a new original *capias* may be sued out to warrant it, though such new original bear *teste* before the cause of action accrued.^(e) It was formerly necessary, where the defendant resided in a different county from that in which the plaintiff meant to lay the venue, to sue out a *capias* into the latter county, and then a *testatum* into the other;^(f) for the plaintiff lost his bail, if he declared in any other county than that in which the *capias* issued, as is still the case by *original* in the King's Bench:^(g) but a rule having been made in the Common Pleas,^(h) that "where the defendant is arrested by virtue of a *capias ad respondendum* in any county, and bail is put in thereupon, the plaintiff may declare in a different county, without its being deemed a waiver of the bail," it is now usual to sue out a *capias* at once, into the county in which the defendant resides; and where he cannot be found in that county, the plaintiff's attorney may sue out a *capias*, or *testatum*,⁽ⁱ⁾ into another. Where the first *capias* issued on an affidavit of debt sworn before and filed with the filacer, if a second *capias* issue, there must be a new affidavit of debt, sworn before and filed with the filacer of the second county;^(k) the statute^(l) requiring, that the affidavit should be sworn before the officer who issues the process, or his deputy: but where a *testatum capias* issues, a new affidavit is unnecessary:^(m) And an original *capias* cannot regularly issue into a county palatine;⁽ⁿ⁾ but the defendant may be arrested therein on a *testatum capias*. In any of the foregoing writs, if the defendant reside within a liberty, there may be clause of *non omittas*,^(o) empowering him to enter it. These writs are issued, on a proper *præcipe*^(p) or note of instructions, and signed by the filacer; after which they are sealed; and, in bailable cases, it is usual at the same time to make an affidavit of the cause of action, before the filacer or his deputy.

*A writ cannot be altered, after it is issued, without re-sealing [*155] it;^(a) but a mistake therein may be cured, by altering the writ, and getting it re-sealed, before its return:^(b) And, in the King's Bench, the return day may be altered, and postponed from time to time, on re-sealing the writ; provided a term do not intervene between the *teste* and day on which it is ultimately made returnable.^(c)

In the Exchequer of Pleas, the first process used for bringing the defend-

^(dl) Imp. C. P. 7 Ed. 92. The *capias* by *continuance* is in the same form as the first *capias*; for which see Append. Chap. VIII. § 52, 54.

^(e) 1 Bos. & Pul. 342.

^(f) For the form of a *testatum capias*, in C. P. see Append. Chap. VIII. § 58, and for the like writ, into a county palatine, see *id.* § 62.

^(g) 3 Lev. 235. R. E. 2 Geo. II. (a). K. B.

^(h) R. H. 22 Geo. III. C. P. 1 Moore, 515.

⁽ⁱ⁾ 2 Bos. & Pul. 516.

^(k) 2 Moore, 192. 8 Taunt. 242, S. C. 1 Maule & Sel. 230. 3 Bing. 39. 10 Moore, 318, S. C. *accord.* but see 2 Taunt. 161, *semb. contra.*

^(l) 12 Geo. I. c. 29, § 2.

^(m) 2 Taunt. 164, 166, and see 7 Barn. & Cres. 526. 1 Man. & Ryl. 232, S. C. Post, 179, 80.

⁽ⁿ⁾ 1 Moore, 514.

^(o) Append. Chap. VIII. § 60.

^(p) *Id.* § 51, 53, 56, 57, 59, 61.

^(a) 1 Chit. Rep. 319.

^(b) *Id.* 321, 398. (a). *Ante*, 148.

^(c) 1 Barn. & Cres. 111. 2 Dowl. & Ryl. 211, S. C.

ant into court, in ordinary cases, is a *venire facias*, *subpcena*, or *quo minus capias, ad respondendum*. The *venire facias*, we have seen, (d) is in nature of an original writ; and was the process used at common law, against persons having privilege of parliament. This process is issued, on a proper *præcipe*, (e) and directed to the sheriff; commanding him to cause the defendant to come before the barons of the Exchequer at *Westminster*, on a day in term, to answer the plaintiff of a plea of trespass on the case, (or as the nature of the action may be,) whereby he is the less able to satisfy his majesty, the debts which he owes him at his Exchequer, &c. (f) On this writ, the practice, before the statute 51 Geo. III. c. 124, § 2, was for the sheriff, to whom it was delivered, to make out a warrant or *summons* (g) to his officer, who thereupon summoned the defendant, by delivering to him a copy of the summons, or leaving it for him, in his absence, at his dwelling house, or place of abode; and, upon the sheriff's return of the names of the summoners, (h) if the defendant did not appear, a *distringas* (i) issued, on a proper *præcipe*, (k) against his lands and chattels, upon which the sheriff returned issues to the amount of 40s.; (l) and after that, if necessary, an *alias* or *pluries distringas*: (m) And it was a rule, that when issues were returned upon any writ of *distringas*, the plaintiff might immediately after the return thereof, apply by motion for increasing issues, upon further process to be issued between the parties; which issues were increased from time to time, at the discretion of the court. (n) But the process by *venire facias* and *distringas*, in the Exchequer, is now regulated by the statute 7 & 8 Geo. IV. c. 71, § 5. (o) And though, when the defendant is abroad, the plaintiff is not allowed to issue a *distringas*, as a preliminary step to entering an appearance for him according to the statute, so that he may proceed thereon to final judgment, as if the defend-

ant himself had appeared; (p) yet in other cases, he may still [*156] proceed by *distringas*, on *service of the *venire facias*, for the purpose of compelling an appearance, as he might have done before the act. (a) The present mode of proceeding on that statute, is by serving the defendant personally, if possible, with a copy of the *venire*; or, if he cannot be met with, by leaving such copy at his dwelling house, or usual place of abode, (b) with some adult member of his family there, or the person with whom he lodges: and service of the *venire* on the wife of the defendant, at his dwelling house, has been deemed good service. (c) So, where a copy of the writ was left with a servant of the defendant's brother, who was also his partner, and a co-defendant in the action, at whose house the servant acknowledged he had resided, this was considered as good service, although the party at the time was out of the kingdom: (d)

(d) *Ante*, 92.

(e) *Append. Chap. VIII. § 76.*

(f) *Id.* § 77.

(g) *Id.* § 80.

(h) *Id.* § 81, 2.

(i) *Id.* § 84.

(k) *Id.* § 83.

(l) *Id.* § 88.

(m) *Id.* § 85. And for the form of a sheriff's warrant on a writ of *distringas*, &c. see *id.* § 87.

(n) R. T. 26 & 27 Geo. II. § 6, in *Scac. Man. Ex. Append.* 212. 5 Price. 639, n. and see *Forrest*, 29. 5 Price, 522, 3, in *notis.* *Id.* 639, as to the manner in which the court exercise their discretion in increasing issues on writs of *distringas*.

(o) *Ante*, 114, and see 5 Taunt. 71. (a).

(p) 3 Price, 263. And see *id.* 266, n. 5 Price, 522, 639, *ante*, 114, (f), by which it seems, that the ancient practice of issuing writs of *distringas* in the Exchequer, on default of appearance on the *venire facias*, still continues.

(a) 3 Price, 263. but see 2 Price, 12. 5 Taunt. 703. 1 Marsh. 292, S. C.

(b) 3 Price, 266.

(c) 2 Price, 4.

(d) 3 Price, 176. and see *Bunb.* 107. *Forrest*, 29. 3 Price, 266, 7.

but delivering a copy of the writ at the counting house of the defendant, is not sufficient, *(ee)* unless it be given to a partner, or some accredited person there. *(ff)* To ground a motion for a *distringas*, on the above statute, an affidavit must be made in this court, similar to that in the King's Bench and Common Pleas; *(g)* and the subsequent proceedings are the same as in those courts.

The *subpœna ad respondendum* is a process directed to the defendant; commanding him to appear before the barons of the Exchequer at *Westminster*, immediately after service thereof in term, or, if sued out in vacation, on a day in the next term, to answer the king under the penalty of 100*l.*, concerning certain articles then and there, on his majesty's behalf, to be objected against him. *(h)* This process, we have seen, *(i)* is analogous to the *subpœna* in Chancery, or on the equity side of the Exchequer: and may be issued out of the office of Pleas; and it is not necessary that such process should be signed by the chief secondary, or a sworn clerk in the office of the king's remembrancer. *(k)* A copy of the writ, or *label*, *(l)* specifying the day of appearance, is made out thereon, and served on the defendant. But it is not the practice, as in *Chancery*, to serve a *subpœna*, by leaving the body of the writ with the defendant, where there is but one: It is sufficient, if a copy or label be left, and the original produced, and shown to him. *(m)* If the defendant do not appear within *four* days after the return of it, an *affidavit* *(n)* is made of the service; upon which there issues an *attachment*, *(o)* and afterwards, if necessary, a *distringas*, on the statute 7 & 8 Geo. IV. c. 71, § 5. Previously to that statute there issued, on the defendant's non-appearance to the attachment, an *alias* or **pluries attachment*, with a clause of *proclamation*; *(a)* [*157] and, on the return of *non est inventus*, *(b)* if he still made default, a *commission of rebellion*, *(c)* for taking him into custody by a serjeant at arms: but now, as the statute 7 & 8 Geo. IV. c. 71, § 5, extends to process by *subpœna* and attachment, the mode of proceeding to compel an appearance, is regulated by that statute. *(d)* And, by a late rule of court, *(ee)* "*præcipes* for all *subpœnas* and *attachments* that are issued in the office of pleas, with the names of the parties therein, the returns of such writs, the dates when they are issued, and the names of the attorneys or side clerks issuing the same, shall be given to the officer who signs such writs as require the name of the clerk of the pleas to be set thereto, on issuing such *subpœnas* and attachments, *(f)* and on the issuing of all attachments for want of appearance, the affidavits of service *(gg)* of the *subpœnas* upon which such attachments are issued, shall be filed on a file to be kept for that purpose in the said office."

(ee) 2 Price, 9.

(ff) 3 Price, 266.

(g) *Ante*, 115; and see Man. Ex. Append. p. 15.

(h) Append. Chap. VIII. § 94.

(i) *Ante*, 92.

(k) 9 Price, 385; but see R. II. 19 Jac. I. R. M. 36 Car. II. Excheq. *contra*; which rules were considered in the above case as obsolete.

(l) Append. Chap. VIII. § 96.

(m) 6 Price, 34. And as to the service of a *subpœna*, on the Equity side of the court of Exchequer, see 1 Youn. & J. 570.

(n) Append. Chap. VIII. § 97, 8.

(o) *Id.* § 100, &c.

(a) Append. Chap. VIII. § 104.

(b) *Id.* § 105.

(c) *Id.* § 107. And for the form of the returns thereto, see *id.* § 108, 9.

(d) *Ante*, 113, &c.

(ee) R. E. 45 Geo. III. in *Scac.* Man. Ex. Append. 225. 8 Price, 506.

(f) Append. Chap. VIII. § 93, 99, 103, 106.

(gg) *Id.* § 97, 8.

The *quo minus capias*, which answers to the bill of *Middlesex* or *latitat* in the King's Bench, and *capias quare, clausum fregit* in the Common Pleas, ^(hh) is a process directed to the sheriff; commanding him to take the defendant, and safely keep him, so that he may have his body before the barons of the Exchequer at *Westminster*, on a day in term, to answer the plaintiff of a plea of trespass, whereby he is the *less able*, &c. ⁽ⁱⁱ⁾ This process, as well as the *venire facias* and *distringas*, is issued, on a proper *præcipe*, ^(k) and always contains a clause of *non omittas*; ^(l) and it must be tested in term-time, in the name of the chief baron or *senior* baron of the court, if there be no chief baron. If sued out in term-time, it is usually tested as in the other courts, on the first day of that term; or, if sued out in vacation, on the last day of the preceding one: and it may be made returnable on any day in term, not being a *Sunday*, or other *dies non juridicus*, as the feast of the *Purification*, &c. If, as is commonly the case, the writ be made returnable on a general return, it is described accordingly, as in process by original writ; or, if on any other day, it is usual to state the day of the month, as "on the ——— day of ——— instant, (or next coming:)" and it may be made returnable, by the day of the month, on any day except a *dies non juridicus*. ^(m) Writs of *venire facias*, *distringas*, and *quo minus*, &c. are signed with the name of the clerk of the pleas; but *subpœnas*, and process of contempt thereon, are not signable, but issued under the seal of the court, and subscribed, "By the Barons." ⁽ⁿ⁾

In suing out process, in the Exchequer of Pleas, the attorneys and side clerks, by whom the business of the court is transacted, ^(o) act [*158] either as **principals*, immediately employed by the parties, or as *agents* to attorneys so employed, and admitted in either of the other courts at *Westminster*, who as such are *solicitors* on the plea side of this court. When an attorney of the Exchequer acts as principal, his name only is written, opposite to that of the clerk of the pleas, at the foot of a signable process, as attorney for the plaintiff; but when he is only an agent, the name of the solicitor for whom he acts is first written thus, "E. F. Solicitor," and then his own name, and afterwards that of the clerk of the pleas. When a clerk in court acts as principal, his name is written thus, "G. H. Clerk in Court," and then the initial of the name of the attorney in whose division he is: but when he is only an agent, the name of the solicitor is first written, and then his own name, without stating him to be a clerk in court; afterwards, the initial of the attorney's name; and lastly, the name of the clerk of the pleas. If the process be not signable, the attorneys name or initial is indorsed thereon, instead of being written at the foot of it. ^(a)

(hh) *Ante*, 82.

(k) *Id.* § 76, 83, 110.

(l) *Id.* § 77, 84, 111.

(n) *Append. Chap. VIII. § 94, 102, 104, 107.*

(a) *Append. Chap. VIII. § 95, 101*; and see 2 Chit. Rep. 84. For writs and process in general, in the court of Exchequer of Pleas, see *Man. Ex. Pr. Chap. III.*; for the *venire facias ad respondendum*, and subsequent process of *distringas*, *Id. Chap. IV.* *Append. Chap. VIII. § 77, &c. 84, &c.*; for the *subpœna ad respondendum*, and subsequent process, *Man. Ex. Pr. Chap. VI.* *Append. Chap. VIII. § 94, &c.*; and for the *quo minus*, &c. *Man. Ex. Pr. Chap. VIII. IX. X.* *Append. Chap. VIII. § 111, &c.*

(ii) *Append. Chap. VIII. § 111.*

(m) 1 M'Clel. & Y. 483, 495, 6.

(o) *Ante*, 58.

It will here be proper to take notice of some things that are required by act of parliament, to be set down, subscribed to, or indorsed upon the process, in the different courts. And first, by the statutes 5 & 6 W. & M. c. 21, § 4, and 9 & 10 W. III. c. 25, § 42, made for preventing abuses committed by arresting persons, without any writ or legal process to justify the same. and by that means evading the stamp duties thereon; the officer, who shall sign any writ or process, to arrest any person or persons before judgment, shall, at the signing thereof, set down upon such writ or process, the day and year of his signing the same.”(b) And by a subsequent statute,(c) made for the like purposes, “every warrant, issuing upon any such writ or writs, shall have the same day and year plainly and distinctly set down thereon, as shall be so set down on the writ itself.” The indorsement of the *date*, however, is said to be no part of the writ: and therefore, if the *teste* be right, the courts will not set aside the proceedings, for a mistake of the indorsement.(d) But where, in an action against an attorney for negligence, in not proceeding to judgment and execution in due time, the bill of Middlesex against the original defendant (having no *teste*,) was stated, under a *videlicet*, to have issued *on the 24th of January 1785, returnable on *Monday* [*159] next after fifteen days of St. Hilary in the same year, which was really the fact, but by a mistake of the indorsement, it appeared in evidence to have issued on the 24th of January 1784, the plaintiff was nonsuited; and on a motion for a new trial, the court were of opinion, that the time of proceeding against the original defendant depending on the return of the writ, the return became material, and therefore the variance was fatal.(a)

By the statute 12 Geo. I. c. 29, § 2, the sum specified in the affidavit of the cause of action, is required to be indorsed on the back of the writ or process for holding the defendant to special bail. This part of the statute, however, is merely *directory* to the sheriff; and does not avoid the process, when the sum sworn to is not indorsed upon it.(bb) And where the demand is made up of several *items*, it is sufficient to indorse the total of them on the writ.(cc)

A further regulation was made by the statute 2 Geo. II. c. 23, § 22, which enacts, that “every writ and process, for arresting the body, and every writ of execution, or some label annexed to such writ or process, and every warrant that shall be made out thereon, shall, before the service or execution thereof, be subscribed or indorsed with the name of the attorney, clerk in court, or solicitor, written in a common legible hand, by whom such writ, &c. respectively shall be sued forth;(dd) and where such attorney, &c. shall not be the person *immediately* retained or employed by the plaintiff, then also with the name of the attorney, &c. so *immediately* retained or employed, to be subscribed or indorsed and written in like manner. And that every *copy* of any writ or process, that shall be served upon any defendant, shall, before the service thereof, be in like manner subscribed or indorsed,

(b) Append. Chap. VII. § 2. Chap. VIII. § 7, 22, 29, 55, 95, 101.

(c) 6 Geo. I. c. 21, § 54.

(d) 1 Wils. 91. And the indorsement by the officer, on the back of a writ of summons of four knights, to make election of the grand assize, on a writ of right, that “the four knights were duly sworn,” which was not true, was holden to be no part of the return, so as to make the sheriff answerable for the contents of such indorsement, in an action for a false return. 3 Moore, 249. 1 Brod. & Bing. 17, S. C.

(a) 1 Durnf. & East, 656.

(bb) 1 Bur. 330. Barnes, 414. 1 H. Blac. 76. 4 Bing. 63; but see 2 New Rep. C. P. 202. *semb. contra*.

(cc) 4 Bing. 63.

(dd) Append. Chap. VIII. § 22, 29, 55.

with the name of the attorney or solicitor who shall be *immediately* retained or employed by the plaintiff." And, by a late rule of the court of King's Bench,^(e) "the attorney concerned for the plaintiff in the cause, or his agent, shall, upon all bailable mesne process, and every writ of attachment, indorse the place of abode and addition of the party against whom the writ issued, or such other description of him, as such attorney or agent may be able to give."

But, by the statute 12 Geo. II. c. 13, § 4, "the not subscribing or indorsing the name of the attorney, &c. on any warrant that shall be made out upon any writ, &c. shall not vitiate the same; but such writ, &c. and all proceedings thereon, shall be as valid and effectual, notwithstanding such omission, as if the preceding act had not been made; provided the writ, whereon such warrant is made out, be regularly subscribed or indorsed, according [*160] to the act."^(f) Since the making of this statute, *though the omission of the attorney's name upon the *warrant*, which is the act of the sheriff, will not vitiate the proceedings,^(a) yet if it be not subscribed to or indorsed on the writ, or *copy*^(b) they may be set aside for irregularity.

Lastly, by the statute 7 & 8 Geo. IV. c. 71, § 8, reciting that arrests of the person had in many instances been made under writs sued out by persons not being attorneys or solicitors, and whose places of residence were unknown, which practice had been found to be productive of oppression and vexation; it is enacted, that "no sheriff, under-sheriff, or other officer, having the execution of process, shall grant any warrant for the arrest of, or shall arrest the person of any defendant, upon any writ or process issued by any plaintiff in his own person, unless the same writ shall, at or before the time of granting such warrant, or of making such arrest, be delivered to such sheriff, under-sheriff, or other officer having the execution of process, by some attorney of one of the courts of record at *Westminster*, or of the courts of Great Sessions in *Wales*, or of the courts of the counties palatine of *Lancaster* or *Durham*, or of the court out of which the said writ shall have issued, or by the clerk of such attorney, or an agent authorized by such attorney in writing; and unless the said writ shall be indorsed by such attorney or his clerk, or such agent as aforesaid, in the presence of such sheriff, under-sheriff, or other officer having the execution of process, with the name and place of abode of such attorney." And, by § 9, "all warrants granted, and all arrests of the person made, contrary to the provisions of that act, shall be altogether illegal and void. Provided always, that nothing therein contained, shall extend to any writ or process sued out by any attorney, solicitor, clerk of court, or other officer of any court, having authority to sue out process in his own name."

If there be no process,^(c) or if it be defective in point of form,^(d) or in its direction,^(e) teste,^(ff) or return,^(g) or the attorney's name be not indorsed

(e) R. H. 2 & 3 Geo. IV. K. B. 5 Barn. & Ald. 560. 2 Chit. Rep. 377. 1 Dowl. & Ry. 471.

(f) See R. T. 1 Geo. II. (b). K. B. 1 Chit. Rep. 611, (a).

(a) Pr. Reg. 441, 2. Barnes, 414, S. C.

(b) Barnes, 415. *Wright & another v. Wiles*, M. 21 Geo. III. K. B. *Per Cur.* T. 29 Geo. III. K. B., but see Pr. Reg. 440, 41. Cas. Pr. C. P. 102. Barnes, 407, S. C.

(c) 2 Chit. Rep. 237.

(d) 3 Durnf. & East, 660.

(e) 2 Ken. 287. 1 Blac. Rep. 506. Barnes, 422.

(ff) 2 Bur. 954, 967. 5 Bur. 2588. 2 Blac. Rep. 683, S. C. Barnes, 407, 8, 9, 420.

(g) 1 Str. 399.

upon it, *(h)* the defendant may move the court to set aside the proceedings for irregularity. And a writ, having a wrong return, will not be aided, by a correct day being mentioned in the notice to appear. *(i)* But he cannot take advantage of any error or defect in the process, after he has appeared to it, *(k)* or taken the declaration out of the office, *(l)* or obtained time to put in bail to the action; *(m)* for it is the universal practice of the courts, that the *application to set aside proceedings for irregularity [*161] should be made as early as possible, or, as it is commonly said, in the first instance; *(a)* and where there has been an irregularity, if the party overlook it, and take subsequent steps in the cause, he cannot afterwards revert back and object to it. *(b)* In the Common Pleas, the court will not quash a writ, on the ground of its having been served in a wrong county. *(c)* And it is said, that a mistake in the process is cured by the plaintiff's entering an appearance, which has always been looked upon as effectual for that purpose, as if the defendant had entered the appearance; *(d)* but the plaintiff cannot, by entering an appearance, cure the want of service of a copy of the process, *(e)* or a defect in the notice subscribed thereto. *(f)* It is also said, that no advantage can be taken of the irregularity of process, without having it returned, and before the court. *(g)* And where the irregularity complained of is not in the process, but in the notice to appear thereto, *(hh)* or in the service of it, *(ii)* the rule should be to set aside such service, and not the process itself. *(kk)* [A]

The courts will in general *amend* the process, where there is any thing to amend by: *(ll)* [B] and it has been amended in the name of the defend-

(h) *Wright and another v. Willes*, M. 21 Geo. III. K. B. *Per Cur.* T. 29 Geo. III. K. B. Barnes, 415.

(i) 2 Chit. Rep. 356. and see 4 Barn. & Ald. 288.

(k) 1 Str. 155. Barnes, 163, 167, 415. 1 Bos. & Pul. 250, 344.

(l) *Cas. temp. Hardw.* 242. 2 Str. 1072, 3. *Wright & another v. Willes*, M. 21 Geo. III. K. B. Barnes, 416. 1 H. Blac. 222, 3 C. P.

(m) 6 Barn. & Cres. 76. 9 Dowl. & Ryl. 124, S. C.

(a) 3 Durnf. & East, 7. 1 East, 334, 5. 8 Dowl. & Ryl. 450. 9 Price, 637.

(b) 1 East, 77, and see 3 Durnf. & East, 10. 5 Durnf. & East, 254, 464. 1 East, 330. 2 Smith, R. 391. 1 Chit. Rep. 333. 2 Chit. Rep. 236. 8 Dowl. & Ryl. 450, K. B. 1 H. Blac. 251. 1 Bos. & Pul. 250, 344. 1 Taunt. 59. 2 Taunt. 244. 4 Taunt. 545. 6 Taunt. 6. 1 Marsh. 403, S. C. 6 Taunt. 185. 1 Moore, 299, C. P. 9 Price, 637, Excheq.

(c) 1 Marsh. 9.

(d) *Prac. Reg.* 347, 8. *Sed quare?* as from later decisions it seems, that in the Common Pleas, the defendant is not bound to apply to the court, for an irregularity in process, until the plaintiff has taken some step, by which he shows that he means to proceed upon it. 6 Taunt. 5. 1 Marsh. 403, S. C., and see 5 Taunt. 664. 6 Taunt. 191, 2. 1 Marsh. 551, S. C. 2 Chit. Rep. 236. 7 Moore, 461. 1 Bing. 122, S. C.

(e) Barnes, 406.

(f) *Prac. Reg.* 347. 2 Price, 9.

(g) 3 Wils. 58, but see 5 Taunt. 854, where it was said by Mr. *Sergeant Best*, *arguendo* that the practice was uniform, to make these motions before the writ was returned.

(hh) 9 East, 528. 5 Taunt. 652, *(a)*. 1 Chit. Rep. 384.

(ii) 5 Taunt. 644. 1 Bing. 65.

(kk) 1 Chit. Rep. 616, *(a)*.

(ll) 1 Durnf. & East, 782.

[A] Where the delay or irregularity in the cause has proceeded from the gross negligence or ignorance of the solicitor, the court will, in its discretion, relieve the client against the consequences of the delay or irregularity. *Pratt v. Adams*, 7 Paige, C. R. 615. The costs of an irregularity arising from the gross ignorance or negligence of the solicitor, will be charged upon the solicitor personally. (*Walworth*, Ch.) *Kane v. Van Franken*, 5 Paige, C. R. 62.

[B] In this country amendments have been much regulated by statutes, and great liberality has been allowed. Thus in Pennsylvania, the pleadings may be amended at any stage of the proceedings before or on the trial; and mistakes in the names of the parties may be corrected even after judgment by confession. *Purd. Dig.* p. 38, *Brightly's Ed.* 1853. In

ant, where he was a prisoner in custody under it. (mm) But the court of King's Bench would not grant a rule for amending the writ, under which

(mm) *Per Cur.* M. 48 Geo. III. K. B., and see 7 Durnf. & East, 698.

Ohio, like liberality is allowed. See *Curwen's Laws*, p. 1183, 1184. And in New York. See *Blatchford's Gen. Stat.* p. 240. *Massachusetts Rev. Stat.* ch. 100, § 22, p. 608.

The power to grant amendments is a discretionary power in the court, and in general, will not be interfered with on writ of error. *Caldwell v. McKee*, 8 Missouri, 334. *Lansing v. Birge*, 2 Seam. 375. *Green v. Robinson*, 3 How. Miss. 105. *Quiett v. Boon*, 5 Iredell, 9. *Perley v. Brown*, 12 N. Hamp. 493. *Dyott v. Com.*, 5 Whart. 67. *Archer v. Stamps*, 4 Sm. & Marsh. 352. *Newall v. Hussey*, 6 Shep. 249. *Glascock v. Glascock*, 8 Missouri, 577. They are almost universally allowed, where they do not surprise, hinder, or delay the opposite party. They may be allowed even after a mis-trial. *Hester v. Haygood*, 3 Hill, S. C. 195. *Cayce v. Ragsdale*, 2 Benn. Miss. Rep. 32.

Every court of record has power over its own records and proceedings, as long as they remain incomplete, and until final judgment is rendered; and until that time it is the established practice in such courts to regard all actions, whether on the docket of the existing or a former term, as within the jurisdiction and control of the court. *Woodecock v. Parker*, 35 Maine, (5 Red.) 138. *Killein v. Sistrunch*, 7 Geo. 281. *Barefield v. Bryan*, 8 Geo. 463. *Bagley v. Wood*, 12 Ired. 90. Until the expiration of the term, the court has authority to amend, reverse, or annul its judgments, as well upon material as immaterial points, upon the merits as well as upon matters of form; so that it is not error to allow a judgment to be amended, after a motion to set it aside has been over ruled and notice of appeal entered. *Wood v. Wheeler*, 7 Texas, 13. And these amendments may be made of their own motion or on the suggestion of any party interested, and without notice to any one, and they are the exclusive judges of the necessity and propriety of amending. *Balch v. Shaw*, 7 Cush. 282.

Where there is no statute on the subject, amendment is a matter of mere discretion; and the exercise of that discretion cannot be impeached or controlled by bill of exceptions or error. *Wyman v. Dorr*, 3 Greenl. 183. *Clapp v. Baleh*, 1b. 219. *Mandeville v. Wilson*, 5 Cranch, 15. *Walden v. Craig*, 9 Wheat, 576. *Chirae v. Reinicker*, 11 Wheat, 302. *Bailey v. Musgrave*, 2 S. & R. 29. *Benner v. Fry*, 1 Bin. 369. *Stephens v. Watts*, 2 Wash. 203. *Marine Insurance Co. v. Hodgson*, 6 Cranch, 206. *United States v. Buford*, 3 Pet. 12. *Merriam v. Langdon*, 10 Conn. 460. *Brown v. McCune*, 5 Sandf. 224. *Phinele v. Vaughan*, 12 Barb. 215. *Green v. Cole*, 13 Ired. 421. *Bean v. Moore*, 2 Chand. Mis. Rep. 44. *Austin v. Jordan*, 5 Texas, 130. *King v. The Bank*, 4 Eng. 185. *Wilson v. Johnson*, 1 Green's Iowa Rep. 167. *Saunders v. Smith*, 3 Kelly, 121. *Graves v. Fulton*, 7 How. Miss. 592. And the amendments may be made at any stage of the proceedings, provided the opposite party be not put in a worse situation. *Beard v. Young*, 2 Overt, 54. *Cooper v. Jones*, 4 Sandf. S. C. 699. *Cartwright v. Chabert*, 3 Texas, 261.

Mere clerical errors may always be amended, even in criminal cases. *Shorff v. Commonwealth*, 2 Binn. 514. *Keans v. Rankin*, 2 Bibb. 88. *Anon.* 1 Gallis, 22. *State v. Seaborn*, 4 Dev. 319. *Vandyke v. Dare*, 1 Bailey, 65. *State v. Williams*, 2 McCord, 301. *Young v. State*, 6 Ham. 435. *Toomer v. Parkey*, 1 Rep. Const. Ct. 323. *Jackson v. Anderson*, 4 Wend. 474.

It may be stated, as a general rule, that any mere clerical error is amendable. *Smith v. The Bank*, 5 Ala. 26. *Mitchell v. Sparkes*, 1 Seam, 122. *Galloway v. McGethens*, 5 Ired. 12. *Dearing v. Smith*, 4 Ala. 432. *Jordan v. The Bank*, 5 Ib. 284. *Hawley v. Bates*, 19 Wend. 632. *Tatem v. Potts*, 5 Blackf. 534. *Woods v. Green*, Wright, 503. *Seale v. Swan*, 9 Porter, 163. *Smith v. Strade*, 1b. 446. *Furness v. Ellis*, 2 Brock, 14. *Cherry v. Woodard*, 1 Ired. 438. *Otez v. Rodgers*, 4 *Ibid.* 534. *McCall v. Trevor*, 4 Blackf. 496. *Johnson v. Nash*, 5 Washb. Verm. 40. *Sheppard v. McClay*, 12 Ala. 561. *Silner v. Butterfield*, 2 Carter Ind. Rep. 24. *Austin v. Jordan*, 5 Texas, 130. Thus where the inferior court of Georgia had passed an order requiring the clerk to issue a fi. fa. against the treasurer of a county, but the clerk failed to record such order, it was held, that it was competent for the inferior court, after the fi. fa. has been issued, to place the order on the minutes, *nunc pro tunc*. *Foster v. The Justices*, &c., 9 Geo. 185. So where a seal was omitted from a citation, the clerk of the court was allowed to amend it, by affixing a seal. *Cartwright v. Chabert*, 3 Texas, 261. It rests in the discretion of the court. *Clark v. Hellen*, 1 Ired. 421. *Purell v. McFarland*, 1 Ired. 34. A writ of error may be amended by affixing a seal to it. *Lowe v. Morris*, 13 Geo. 147. *The People v. Steuben Co.*, 5 Wend. 103. But see where leave was refused, *Hall v. Jones*, 9 Pick, 446. *Bailey v. Smith*, 3 Fairf. 196. *Stayton v. Newcomb*, 1 Eng. 451. And in Maine it has been held, that an original writ without a seal cannot be amended. *Bailey v. Smith*, 3 Fairf. 196. *Tibbetts v. Shaw*, 19 Maine, 204. *Wetherill v. Randall*, 30 Id. 168.

An error in the test of a writ may be amended. *Nash v. Brophy*, 13 Metc. 218; *Baker v. Smith*, 4 Yeates, 185; *Shoemaker v. Knorr*, 1 Dall. 197; *Ross v. Luther*, 4 Cow. 158; *De-*

the defendant had been arrested by a wrong name, after actions of false imprisonment had been brought for such arrest.⁽ⁿ⁾ So, an amendment cannot be made of mesne process, by adding the name of another person as plaintiff.^(o) A writ returnable on a *dies non* is altogether void, and cannot be amended by the court.^(p) And the courts, we have seen,^(q) will not in general allow a writ to be amended, to the prejudice of the bail.^[A]

Before or immediately after the end of every term, the sheriff is required, by an old rule,^(r) to deliver and return into court, all writs of *latitat*, *and writs thereupon issuing out of the King's Bench. [*162] And where a writ is sued out to avoid the statute of limitations, it should regularly be *entered* on a roll, and docketed, with the sheriff's return thereto, and *continuances* to the time of declaring.^(aa) The writ should be entered on a roll of that term wherein it was returnable; and, in the King's Bench, it is entered in *hæc verba*: after which the roll proceeds with an entry of the plaintiff's appearance, the sheriff's return of *non est inventus*, and continuances of the process from term to term, by *vicecomes non misit breve*, to the term of the declaration. In the Common

(n) Anon. M. 41 Geo. III. K. B.

(o) 1 Chit. Rep. 369.

(p) 4 Barn. & Ald. 288, but see 6 Moore, 113. 3 Brod. & Bing. 25, S. C.

(q) *Ante*, 130.

(r) R. E. 6 Jac. I. K. B.

(aa) 2 Wms. Saund. 5 Ed. 1, (1). 8 Moore, 189. Append. Chap. VIII. § 48, 9, 50, 75, 112, and see Append. Chap. VI. § 28. Chap. XIV. § 7.

mass v. Camp, 5 How. Miss. 516; *Converse v. The Bank*, 3 Shep. 431; *Ripley v. Warren*, 2 Pick. 592; or, in the *ad damnum*, *Cragen v. Warfield*, 13 Metcf. 218; *Foulkes v. Webber*, 8 Humph. 530; *Converse v. The Bank*, 3 Shep. 431; *McLellan v. Criften*, 6 Greenl. 307; *Clark v. Herring*, 5 Binn. 33; *Danielson v. Andrews*, 1 Pick. 156; *Gregg v. Gier*, 4 McLean, 203; *Geren v. Wright*, 8 Sm. & Marsh. 360; *Clayton v. Liserman*, 7 Ired. 92. But where it involves the question of jurisdiction it cannot; *Hart v. Moloney*, 2 New Hamp. 322. In the date of the writ it may; *Anderson v. The Bank*, 5 Geo. 821; *Jackson v. Bowling*, 5 Eng. 578; *McLarren v. Thurman*, 3 Ib. 313; *Harness v. McCormick*, 5 Pike, 663; or in the names of the parties, *Wileox v. Hawkins*, 1 Hawks. 84; *Wilson v. King*, 6 Verg. 493; *Burnham v. Savings Bank*, 5 New Hamp. 573; *Sherman v. The Conn. Bridge*, 11 Mass. 338; *Bullard v. The Nan. Bank*, 5 Id. 99; *Bank v. Lucey*, 1 Monr. 7; *Anderson v. Brock*, 3 Greenl. 243; *Kineaid v. Howe*, 10 Mass. 203; *McClure v. Burton*, 1 Car. Law Reps. 472; *Aequitta v. Cromwell*, 1 Calf. 191; *Heath v. Lent*, Id. 410; *Maxwell v. Haven*, 8 Geo. 61; *Cauthorn v. Knight*, 11 Ala. 579; *Coburn v. Ware*, 12 Shep. Maine Rep. 330; *Woodson v. Law*, 7 Geo. 105; *Porter v. Goodman*, 1 Cow. 413; *Cox v. The Macon Railroad*, 12 Geo. 270; *Winsor v. Lombard*, 18 Pick. 57; *Thayer v. Hollis*, 3 Metcf. 369; or in a wrong addition or place, *Gooch v. Bryant*, 1 Shep. 386; *Kimball v. Wilkins*, 2 Cush. 555; or in the signature of the clerk or his deputy, *Whitney v. Beebe*, 7 Eng. 421; *Farmers' Loan v. Carrell*, 2 Comst. 556; *Pepoon v. Jenkins*, Coleman's Cases, 55; or the clerk's omission to enter defendant's appearance, *Worrell v. McHenry*, 1 Mann. Mich. Rep. 227; or irregularities in jury process, *Livingston v. Rodgers*, 1 Caines, 587; *Beach v. The Bank*, 7 Cow. 509; *Whittier v. Varney*, 10 New Hamp. 291; or in the record, *The State v. King*, 5 Ired. 203; *Colby v. Moody*, 1 App. Maine Rep. 111; *in re Limerick Petitioners*, 6 Shep. 183; *Simpson v. Bank*, 2 Speers. 41; *Sweeney v. Delany*, 1 Barr Penn. 320; or in the amount of the judgment, *Walker v. Walker*, 3 Harring. 502; *Dearing v. Smith*, 4 Ala. 432; *Hunt v. Grant*, 19 Wend. 96; or in the name of the county in which the alleged taking in replevin is laid, *Judson v. Adams*, 8 Cush. 556; or in the name of the court, *Anthony v. Humphries*, 6 Eng. 663; or of the state, *Harris v. Jenks*, 2 Seam. 475; or mistake in the date, *Parkman v. Crisby*, 16 Pick. 297. But before any amendment can be allowed there must be something to amend by. *Ellis v. Ewbanks*, 3 Seam. 190; *Bird v. Hood*, 6 Black. 260; *Beck v. Williams*, 5 Ib. 374; *Jackson v. Fletcher*, 1 Morris, 230; *Beall v. Fox*, 4 Geo. 403; *Nimmon v. Worthington*, 1 Carter, Ind. Rep. 376; *Siekles v. Overton*, 3 Barr, 325; *Ellison v. The State*, 8 Ala. 273; *Ellis v. Brown*, 1 Pike, 82; *Lake v. Morse*, 11 Ill. 587; *Wright v. Hale*, 2 Cush. 486; *Smets v. Wetherbee*, R. M. Charl. 537; *Dean v. Swift*, 11 Verm. 331. See *post*, p. 696; Vol. II. p. 922, for a fuller discussion of the law of amendments and statutes of jeofails.

[A] See 1 Broom's Pract., p. 652, *et seq.*

Pleas, the roll merely contains a recital of the writ, with an entry of the plaintiff's appearance, and sheriff's return, &c. And when the proceedings are thus entered, the roll is docketed^(b) with the clerk of the judgments in the King's Bench, or prothonotaries in the Common Pleas, and afterwards filed in the treasury of the court. In replying to a plea of the statute of limitations, except by *original*,^(c) the plaintiff should show that the cause was regularly continued, by *vicecomes non misit breve*, from the return of the writ to the time of declaring.^(d) And where three *latitats* were sued out at different times, for the same cause of action, and the defendant appeared upon the second, and signed a *non pros* for not declaring, the court ordered the continuances subsequently entered upon the first, to be struck out; being of opinion, that the first *latitat* was made an end of by the second; and if it were not so, the practice of the court is clear and well known, that the continuances must be by *alias* and *pluries*, and not by original writs of *latitat*.^(e) But the continuances need not appear in pleading, to have been by *alias* and *pluries* writs:^(f) And in general, the continuances are mere matter of form, and may be entered at any time.^(g) It has even been holden, that they may be made by the attorneys in their chambers.^(h) And, in order to save the statute of limitations, it is sufficient that the writ be sued out, and the return indorsed upon it, in time; it not being necessary that the writ should be delivered out of the sheriff's office as returned.⁽ⁱ⁾

In *penal* and other actions, which are limited by statute to be commenced within a certain time, it is necessary for the plaintiff to produce the writ at the trial, or an examined copy of it, if filed, in order to show that the action was commenced in due time, unless it appear to have been so commenced, on the face of the record of *nisi prius*. And, in the Common

Pleas, the production of a *capias ad respondendum*, sued out in [*163] time, *is deemed sufficient for that purpose.^(a) But if the writ was not sued out till after the time prescribed, though by relation it would be within the time, the plaintiff will be nonsuited.^(bb) If there be only *one* writ, the plaintiff may give it in evidence, without showing it to be returned.^(cc) And if the declaration appear, on the face of the record, to have been delivered or filed within the time allowed by the rules of the court for declaring, it is sufficiently connected with the writ;^(dd) if not other evidence is necessary to connect them. And, in the Common Pleas, if the issue be made up of a term subsequent to that allowed by the rules of the court for declaring, the plaintiff must show that the declaration was delivered or filed

(b) Append. Chap. VIII. § 49, 113.

(c) Sty. Rep. 373, 401. 1 Wils. 167, 8.

(d) 1 Show. 366. 2 Salk. 420, S. C. 1 Lutw. 260. 1 Ld. Raym. 435, S. C., and see 3 Durnf. & East, 662. 3 Bos. & Pul. 334, 5.

(e) *Benson v. King*, H. 25 Geo. III. K. B.

(f) 4 Barn. & Cres. 625. 7 Dowl. & Ryl. 25, S. C.

(g) *Bates, qui tam v. Jenkinson*, E. 24 Geo. III. K. B. 6 Durnf. & East, 257, 618, S. C., cited. 7 Durnf. & East, 618, and see 6 Moore, 525. 3 Brod. & Bing. 212, S. C. 1 Bing. 324. 5 Barn. & Cres. 341. 8 Dowl. & Ryl. 270, S. C. *Ante*, 27, (i).

(h) 1 Sid. 53, 60, and see 2 Salk. 590. 2 Wms. Saund. 5 Ed. 1, (1).

(i) 5 Barn. & Ald. 489, and see 6 Moore, 525. 3 Brod. & Bing. 212, S. C. 1 Bing. 324. 5 Barn. & Cres. 341. *Ante*, 27, (i).

(a) 3 Wils. 455.

(bb) Bul. Ni. Pri. 195.

(cc) 7 Durnf. & East, 6. 2 Bos. & Pul. 157, and see 4 Taunt. 555. 6 Taunt. 142, 3. 1 Marsh. 498, 9, S. C.

(dd) 4 Taunt. 555, and see 6 Taunt. 144. 1 Marsh. 499, 500, S. C.

within that time.(e) Where there are *two* writs, the court will presume that the plaintiff proceeded on the last, unless he can connect them, by showing the first to be returned:(f) for until that be done, the court is not in possession of the cause, so as to award an *alias* or *pluries* for bringing the defendant into court.(g) But where the debt was paid after a *pluries* writ issued, the defendant was not allowed to object at the trial, that the *latitat* was not returned; for at any rate, if the *pluries* writ had been the commencement of the action, it was only an irregularity, which though a ground for applying to the court to set aside the proceedings, yet having been once waived, could not afterwards be objected to.(h) Where one writ was produced at the trial, and three declarations against the principal and his bail, to show that certain actions had been brought against them, and three *allocaturs* of the costs taxed in the same actions were also put in and proved; this was deemed sufficient evidence of three actions having been brought, and of the costs having been taxed therein.(i)

To prove the issuing of a writ, in an action against an attorney for practising without a certificate, it is not sufficient to prove the *præcipe* by the filacer's book, and to give notice to the party to produce it; but it should also be shown that, after the return, the treasury was searched, and no such writ found, and that it was in the party's hands, who had notice to produce it.(k)

*CHAPTER IX.

[*164]

Of the PROCEEDINGS on MESNE PROCESS, against the PERSON of the DEFENDANT; and of the SERVICE of a COPY of PROCESS, NOT BAILABLE; and the NOTICE to appear thereto.

THERE are two ways of proceeding upon mesne process against the person of the defendant, whether the action be commenced by *original* writ, bill of *Middlesex* or *latitat*, *capias quare clausum fregit*, &c. or *attachment of privilege*; first, by *service* of a copy of the process; and 2dly by *arrest*.

Before the making of the statute 12 Geo. I. c. 29, a defendant might have been arrested, upon process against the person, in civil actions, for any sum of money however trifling, or to any amount however considerable, without any affidavit of its being due. To remedy which, it was enacted by the above statute, (*amended* by the 5 Geo. II. c. 27, made *perpetual* by the 21 Geo. II. c. 3, and extended to *inferior* courts by the 19 Geo. III. c. 70, § 2,) that "in all cases, where the cause of action shall not amount to the sum of *ten* pounds or upwards, and, the plaintiff or plaintiffs shall proceed by way of process against the person, he she or they shall not arrest, or cause to be arrested, the body of the defendant or defendants; but shall serve him her or them personally, within the jurisdiction of the court,

(e) 6 Taunt. 141. 1 Marsh. 497, S. C.

(f) *Bates, qui tam*, v. *Jenkinson*, E. 24 Geo. III. K. B., per *Buller*, J. 6 Durnf. & East, 617. 2 Bos. & Pul. 157. 14 East, 491, and see 6 Taunt. 142, 3. 1 Marsh. 498, 9, S. C.

(g) 7 Mod. 3. 1 Lutw. 260. 1 Ld. Raym. 435, S. C. 2 Ld. Raym. 883. Willes, 255.

(h) 7 East, 536.

(i) 11 Price, 235, 250, 270, 71.

(k) 4 Esp. Rep. 160.

with a copy of the process; upon which shall be written an *English* notice to such defendant, of the intent and meaning of such service; for which no fee or reward shall be demanded or taken: provided nevertheless, that in particular franchises and jurisdictions, the proper officer there shall execute such process. And that in all cases, where the plaintiff's cause of action shall amount to the sum of *ten* pounds or upwards, an *affidavit* shall be made and filed of such cause of action; which affidavit may be made before any judge or commissioner of the court out of which such process shall issue, authorized to take affidavits in such court, or else before the officer who shall issue such process, or his deputy; which oath such officer or his deputy are empowered to administer; and for such affidavit one shilling shall be paid, and no more; and the sum or sums specified in such affidavit, shall be indorsed on the back of such writ or process: (a) for which sum or sums, so indorsed, the sheriff or other officer, to whom such writ or process shall be directed, shall take bail, and for no more." This

[*165] part *of the statute, we have seen, (aa) is merely *directory* to the sheriff; and does not avoid the process, where the sum sworn to is not indorsed upon it. But the statute is express, that the affidavit must be filed, before the writ issues. (b) And "if any writ or process shall issue for the sum of *ten* pounds or upwards, and no affidavit and indorsement shall be made as aforesaid, the plaintiff or plaintiffs shall not proceed to arrest the body of the defendant or defendants, but shall proceed in like manner as is directed by the statute 12 Geo. I. c. 29, in cases where the cause of action does not amount to the sum of *ten* pounds or upwards." [A]

And, by a late act of parliament, (c) "no person shall be held to special bail, upon any process issuing out of any court where the cause of action shall not have originally amounted to the sum of *twenty* pounds or upwards, over and above and exclusive of any costs, charges or expenses that may have been incurred, recovered or become chargeable, in or about the suing for or recovering the same, or any part thereof: And that in all cases where the cause of action shall not amount to *twenty* pounds or upwards, exclusive of such costs, charges and expenses as aforesaid, and the plaintiff or plaintiffs shall proceed by the way of process against the person, he she or they shall not arrest, or cause to be arrested, the body of the defendant or defendants; but shall serve him her or them personally, within the jurisdiction of the court, with a copy of the process and proceedings thereupon, in such manner as by the said act of the *twelfth* year of the reign of his late majesty king *George* the first is provided, in cases where the cause of action shall not amount to *ten* pounds or upwards, in any superior court, or to *forty* shillings or upwards in any inferior court." But the statute 51 Geo. III. c. 124, § 1, did not avoid the plaintiff's proceedings and judgment, by reason of his having arrested the defendant for a sum exceeding *fifteen* pounds, when he recovered less than that sum. (d) And where the defendant pleaded, the plaintiff had sued out a writ against him by a wrong name, under

(a) Append. Chap. VII. § 2. Chap. VIII. § 22, 29, 55.

(aa) *Ante*, 159.

(b) 2 Ken. 374.

(c) 7 & 8 Geo. IV. c. 71, § 1, and see stat. 51 Geo. III. c. 124, § 1, continued by 57 Geo. III. c. 101, but which had expired before the passing of the 7 & 8 Geo. IV. c. 71.

(d) 7 Taunt. 435. 1 Moore, 131, S. C.

[A] This act was said by President *Shippen* in *Taylor v. Rivers*, 1 Dall. 159, never to have been in force in Pennsylvania, but see note p. 180.

which he was arrested, and allowed to go at large by the sheriff, and that the writ was afterwards altered, by inserting the real name of the defendant, under which he was again arrested, without any fresh affidavit of debt, as required by the statute, the plea was holden to be bad, on special demurrer: as it did not go the merits of the action, and, if true, the defendant should either have pleaded in abatement, or moved to set aside the proceedings for irregularity.(e) It is curious to remark the changes which the law of arrest has undergone at different periods. Anciently, as no *capias* lay, an arrest was not allowed, except in action of trespass *vi et armis*: afterwards, an arrest was introduced, with the *capias*, in other actions: and now, by the operation of the before-mentioned statutes, an arrest cannot be had, in the only action wherein it was formerly allowed.

*These statutes, however, except so far as they prohibit the hold- [*166] ing to bail for causes of action under *twenty* pounds, are not directly restrictive of any authority antecedently exercised by the courts, in respect to the holding to bail: but of the act of the plaintiff only.(a) And as the practice of the courts, anterior to the statutes, appears to have been, to receive affidavits sworn out of *England*, and verified here, for the purpose of making orders thereupon, to hold defendants to special bail:(b) so this practice, not being inconsistent with the letter of the statute 12 Geo. I. c. 29, has prevailed ever since: and accordingly it is now settled, that the defendant may be arrested, under an order of the court or a judge, upon an affidavit made out of *England*, and verified here, as well where the affidavit is made abroad, out of his majesty's dominions, before some magistrate or person of competent authority there, as where it is made before a judge or other person authorized to take affidavits in *Ireland* and *Scotland*.(c) And on similar grounds, though the plaintiff is prohibited by the statutes from arresting the defendant upon his own affidavit only, in an action for general damages, as in *assumpsit* or *covenant* to indemnify, &c. or in an action for a *tort* or *trespass*, yet the court or a judge is not restrained thereby, but may make a special order upon such affidavit, for holding the defendant to special bail.(d) In *trespass* for the mesne profits, after a recovery in *ejectment*, the action is bailable or not, at the discretion of the court or a judge: and when an order for bail is made, the recognizance is usually taken in *two* years value of the premises; but this is also discretionary.(ee)

There are three cases provided for by these statutes; first, where the cause of action does not amount to *twenty* pounds; secondly, where it amounts to *twenty* pounds or upwards, and no *affidavit* is made thereof: thirdly, where it amounts to twenty pounds or upwards, and there is an *affidavit* made and filed of the cause of action.(f) In the two first cases, the process against the person is *not bailable*;(g) and the defendant cannot be arrested thereon, but must be personally served with a *copy* of it; on which there must be

(e) 5 Moore, 168.

(a) 8 East, 370.

(b) 8 Mod. 322. Barnes, 466, but see 2 Str. 1209. 2 Bur. 655.

(c) 8 East, 364. And see the statute 55 Geo. III. c. 157, for empowering the courts of law and equity in *Ireland*, to grant commissions for taking affidavits in all parts of *Great Britain*: *Bovara v. Besesti*, M. 24 Geo. III. K. B. *Brown v. Phepoe*, H. 24 Geo. III. K. B. *Voght v. Elgin*, H. 38 Geo. III. K. B. 1 Chit. Rep. 463. 4 Barn. & Cres. 886. 7 Dowl. & Ryl. 478, S. C.

(d) *Post*, 172.

(ee) Barnes, 85. 1 Sel. Pr. 2 Ed. 36. Ad. Eject. 2 Ed. 329.

(f) *Prac. Reg.* 350.

(g) This is frequently called *common* or *serviceable* process; though the term *common* seems more properly confined to the bill of Middlesex or *latitat*, &c., without the clause of *ac etiam*.

written an English *notice*, of the intent and meaning of such service; (*h*) which in effect reduces it to a mere *summons*. (*i*) This notice (which is only necessary on the *copy* of the process served, and need not [*167] be on the writ itself,) (*k*) is required by the statutes, where the cause of action amounts to *twenty* pounds or upwards, and no affidavit *is made thereof, as well as where it does not amount to *twenty* pounds. (*a*) And it must be directed to the defendant: (*b*) for if his name be not prefixed thereto, the process is irregular, and may be quashed on motion. The notice should, it seems, be directed to the defendant by his *christian*, as well as *surname*; (*c*) and require the defendant to appear at the return of the process: (*d*) and where the process is returnable on a general return day, as in the Common Pleas, (*e*) or King's Bench by *original*, (*f*) or on a *quo minus* in the Exchequer, (*g*) it should require him to appear on the return day, though it happen on a *Sunday*, (*hh*) and not on the *quarto die post* of the return of the process. In the King's Bench, a notice requiring the defendant to appear on *Friday*, instead of *Saturday*, the *sixth* of *November*, is irregular. (*ii*) And so, in the Common Pleas, where a writ was tested on the *twelfth* of *February*, returnable in *fifteen* days of *Easter*, being the *fifth* of *April*, and in the notice to appear, the return day was stated to be the *fifth* of *February*, instead of the *fifth* of *April*, the court held this to be irregular, and set aside the proceedings. (*kk*) But it is not necessary that the *year* should be stated in the notice, in words at length: it being sufficient to set out in figures. (*l*) If there be no notice to appear, (*m*) when necessary, or the notice be not properly directed, (*n*) &c. the defendant may move the court to set aside the proceedings. But any trifling informality in the notice as setting down the day of the *month* on which the defendant is to appear, without saying *instant*, *next*, or specifying the *year*, or mentioning an impossible year, will not invalidate it. (*o*)

The copy of process, to be served on the defendant, [A] must be a copy of such process as he might have been arrested upon, before the statute 12 Geo. I. c. 29; and therefore, where the proceedings are by *original* he should be served with a copy of the *capias*, and not of the *original* writ

(*h*) Append. Chap. IX. § 1, 2, 3.

(*i*) Cowp. 455.

(*k*) 9 East, 528, 9.

(*a*) 7 Durnf. & East, 337. Barnes, 404. Pr. Reg. 349. Cas. Pr. C. P. 100, 143. 1 Sel. Pr. 2 Ed. 74, 5, but see 1 Wils. 22, *contra*.

(*b*) Kelynge, 131. 1 Wils. 104. *Doe v. Johnson and another*, H. 24 Geo. III. K. B. Barnes, 409. 1 H. Blac. 100. 2 Bos. & Pul. 38, and see 1 Chit. Rep. 500. *Id.* 501, *in notis*; but see 2 Chit. Rep. 355, 6.

(*c*) ——— *v. Snow*, E. 57 Geo. III. K. B. 1 Chit. Rep. 398, and see 1 Chit. Rep. 500. *Id.* 501, *in notis*; but see 2 Chit. Rep. 355, 6.

(*d*) ——— *v. Hanson*, T. 42 Geo. III. K. B. Barnes, 293, 4. 2 Bos. & Pul. 340. 2 Price, 9.

(*e*) Barnes, 293. Cas. Pr. C. P. 92, S. C. 2 Bos. & Pul. 340, but see 1 H. Blac. 630, *scmb. contra*.

(*f*) 3 Bur. 1600.

(*g*) 1 Younge & J. 9.

(*hh*) Cas. Pr. C. P. 92, 97, 8. Pr. Reg. 346, 7. Barnes, 293, 4, S. C. *Notice*, H. 7 Geo. II C. P. 3 Bur. 1600.

(*ii*) 1 Chit. Rep. 615.

(*kk*) 2 Moore, 214. 8 Taunt. 253, S. C.

(*l*) 4 Maule & Sel. 335, *per Bayley*, J. K. B. 1 Marsh. 550, (*a*), 577. 6 Taunt. 333, C. P. 1 Chit. Rep. 385, *in notis*; 2 Chit. Rep. 356, but see *id.* 238. 1 Maule & Sel. 119. 5 Taunt. 651. 1 Marsh. 272, S. C. 6 Taunt. 6. 1 Marsh. 403, S. C., *contra*.

(*m*) Cas. Pr. C. P. 100. 2 Str. 1072. 9 East, 528.

(*n*) Kelynge, 131. 1 Wils. 104. Barnes, 409. 1 H. Blac. 100. 2 Bos. & Pul. 38. 2 Price, 9. 1 Chit. Rep. 500.

(*o*) 2 Str. 1233. Barnes, 425. *Per Cur.* E. 21 Geo. III. K. B. 1 Taunt. 424. 2 Barn. &

of *summons* or *attachment* :(*p*) and a complete copy of the whole process must *be served.(*aa*) But where the defendant is [*168] in a county palatine, he should be served with a copy of the process issuing out of the superior court, and not of the *mandate*, from the officer to whom it is directed.(*b*) And, in the Exchequer, a variance in the body of the copy of process, from the writ itself, is fatal, and subversive of the process, and subsequent proceedings.(*c*) The copy of the process may be served by the sheriff or his officers, (except in particular franchises, having the return of writs,) or by any one else,(*d*) provided he be able to examine the copy with the original, so as to swear (if necessary,) to the service. In particular franchises and jurisdictions, the proper officer there should execute the process.(*e*) The court will not allow the copy of a writ to be amended, so as to make the service good.(*f*)[*A*]

Formerly, a copy of the process must have been served on the defendant *before* the return day ;(*g*) but now it is holden, that service at any time, even after the rising of the court, *on* the return day, is sufficient.(*h*)[*B*] And it may be served at any hour, however late, at night ; process not being within the rule of court as to service of notices, &c., before *ten o'clock*.(*i*) In the Exchequer, we have seen,(*k*) service of a writ on *Candlemas* day, is deemed good service. In the King's Bench, a bill of *Middlesex* must not be served in *London*, or elsewhere out of the county of *Middlesex* ;(*l*) nor whilst the defendant is attending his cause at the sittings :(*m*) And a *latitat* cannot regularly be served in any other county than that to the sheriff of which it is directed.(*n*) So, in the Common Pleas, a *capias* directed into one county, cannot be regularly served in another, although it happen that the same officer is filacer for both counties :(*o*) And a *capias* directed into *Kent*, cannot be well served in the *Cinque ports*,(*o*) or city of *Canterbury*.(*pp*) But where there is any dispute as to the boundaries of the county, the courts will not determine it on motion :(*q*) And, in order to set aside the service of a writ in a wrong county, there must be a positive affidavit, in the King's Bench, showing that there could be no dispute as to the boundaries.(*r*) On serving the copy, it is not necessary, though usual, to show *the ori- [*169]

(*p*) Barnes, 406, 410.

(*aa*) Pr. Reg. 354. Barnes, 405, S. C.

(*bb*) 2 Barnard, K. B. 318, 327, 337, 398. Pr. Reg. 344. Barnes, 406.

(*c*) 1 Price, 245, but see 7 Moore, 359. 1 Bing. 65, S. C.

(*d*) Pr. Reg. 345. Cas. Pr. C. P. 34, S. C.

(*e*) Stat. 5 Geo. II. c. 27, § 3, but see Cas. Pr. C. P. 96. Pr. Reg. 345. Barnes, 404, S. C.

(*f*) *Sutherland v. Tubbs*, M. 55 Geo. III. K. B. 1 Chit. Rep. 320, (*a*).

(*g*) Barnes, 415, 424.

(*h*) 2 Bur. 812. 1 Durnf. & East, 192. Pr. Reg. 352. 2 Wils. 372. 1 H. Blac. 222. 3 Taunt. 404. 8 Taunt. 127. 1 Moore, 573, S. C. 1 Dowl. & Ryl. 172.

(*i*) 2 Chit. Rep. 357. 1 Dowl. & Ryl. 172, K. B. 7 Moore, 358. 1 Bing. 66, S. C. C. P.

(*k*) *Ante*, 56.

(*l*) Doug. 384. 1 Durnf. & East, 187. 1 Esp. Rep. 42. (*m*) 2 Str. 1094.

(*n*) 4 Maule & Sel. 412. 1 Chit. Rep. 15, (*c*), 333, (*a*), but see Doug. 384. 1 Durnf. & East, 187. 6 Durnf. & East, 74. 8 Durnf. & East, 235, *semb. contra*.

(*o*) 7 Taunt. 233. 2 Marsh. 550, and see 2 New Rep. C. P. 167. 1 Marsh. 9. 1 Moore, 299. 1 Chit. Rep. 15, (*c*). (*pp*) 11 Price, 122.

(*q*) 1 Wils. 77. Doug. 384. 1 Durnf. & East, 187. 4 Maule & Sel. 412, and see 11 Price, 122.

(*r*) 1 Chit. Rep. 14, and see *id.* 333. 3 Barn. & Cres. 158. 4 Dowl. & Ryl. 739, S. C.

[*A*] See 1 Troub. & Hal. Pract. 230, 3d Ed.

[*B*] See *Heberton v. Stockton*, 2 Miles, 164. *Cusher v. Wisnor*, 2 Browne, 245. *Boyd v. Ser- rill*, 4 Penn. Law Jour. 114.

ginal process, *(aa)* unless demanded: *(bb)* But if a defendant, at the time he is served with a copy of process, in the King's Bench, demand to see the original, and is refused, the service is irregular. *(cc)* And where the defendant was served with a copy of a *capias*, and, a quarter of an hour afterwards, demanded to see the original, which was refused by the officer, the court of Common Pleas set aside the service and subsequent proceedings. *(dd)* If the defendant refuse to accept a copy of process, it may be left in his house; *(ee)* or, if he lock himself in, it may be put through the crevice of his door; *(ff)* or, in the Common Pleas, it seems that if he keep out of the way, to avoid being served, it may be sent him in a letter by the post: *(g)* But sending process by the post, in a letter which the defendant refuses to receive, is not good service; although the refusal may have been wilful, and accompanied with a long avoidance of service. *(h)* And where the defendant, on being served with a copy of process by the name of *John*, observed his name was *Nicholas*, upon which the person who served it was about to alter the name, when the defendant said, "never mind; I am the person, and will take care of it;" the court notwithstanding held, that the service was irregular, and set it aside, but without costs. *(i)* If a latitat has been served by mistake on a wrong person, the right person may afterwards be served with an *alias capias* issued thereon. *(k)*

In a *joint* action against two or more defendants, each of them must be served with a copy of the process. *(l)* But, in an action against husband and wife, it is deemed sufficient to serve the husband only. *(m)* Whenever the defendant would take advantage of a mistake in the copy of process, or notice to appear thereto, he must produce the copy served, and swear that he was served with no other. *(n)* And where there is no irregularity in the notice to appear to, or service of process, the rule, we have seen, *(o)* should be to set aside such service, and not the process itself.

If, upon the service, the defendant speak contemptuous words of the court, or its process, he is liable to an *attachment*. And where the words are spoken of the court, the attachment issues in the first instance; *(p)* for it would be to no purpose to grant a rule to show cause, which would probably expose the court to further insult. *(q)* But the court will not grant an attachment, for violent or contemptuous behaviour, *after* service of the process. *(r)* It has been doubted, whether, when contemptuous words are sworn to by one person only, the rule should be absolute, or only [*170] to show *cause; *(a)* the rule in *Chancery* requiring two affidavits, to deprive the party of the benefit of showing cause; and in the King's Bench, the rule is only to show cause, when the words are spoken of its process. *(b)*

(aa) 2 Str. 877. Barnes, 302, 422.

(bb) Cas. temp. Hardw. 138.

(cc) 2 Barn. & Cres. 761. 4 Dowl. & Ry. 317, S. C.

(dd) 5 Moore, 162.

(ee) Barnes, 278. *Bates, qui tam, v. Muddison*, M. 23 Geo. III. K. B., and see 7 Dowl. & Ry. 233.

(ff) Cas. Pr. C. P. 103. Pr. Reg. 354. Barnes, 405, S. C., and see Barnes, 42.

(g) 5 Taunt. 186. 1 Marsh, 8, S. C.

(h) 3 Bing. 443.

(i) 1 Chit. Rep. 319.

(k) 2 Barn. & Cres. 95. 3 Dowl. & Ry. 254, S. C.

(l) Pr. Reg. 351.

(m) Barnes, 406, 412. Pr. Reg. 351, S. C.

(n) Barnes, 298, and see 1 Ken. 374.

(o) Ante, 161.

(p) 6 Mod. 43. 1 Salk. 84. 1 Str. 185. Say. Rep. 47, R. T. 17 Geo. III. K. B.

(q) 1 Salk. 84.

(r) 1 Brod. & Bing. 24. 4 Moore, 147.

(a) 2 Str. 1068.

(b) Say. Rep. 114. In the case of *Adamson v. Gibson*, H. 27 Geo. III. K. B., an attachment Ald. 642. 1 Chit. Rep. 384, S. C. *Id.* 615, *(a)*.

*CHAPTER X.

Of the ARREST, upon BAILABLE PROCESS.

In treating of the law of arrest, it is proposed to consider, first, for what cause of action it is allowed; 2dly, the affidavit to hold to bail; 3dly, what persons may, or may not be arrested; and lastly, by whom; and under what authority, when, where, and in what manner the arrest may be made.

When the cause of action amounts to *twenty* pounds or upwards, and an affidavit thereof is made and filed according to the statutes, the process is *bailable*; and the defendant may in general be arrested, and holden to special bail. But where the plaintiff, having a debt due to him under an arrestable sum, procured a promissory note to be indorsed to him by another creditor, for the purpose of holding the defendant to special bail, the court, considering this as a practice to evade the statute, discharged the defendant out of custody, on filing common bail.(a) And, by the statute 7 & 8 Geo. IV. c. 71,(b) “no sheriff or other officer, within the principality of *Wales*, or the counties palatine of *Chester*, *Lancaster* or *Durham*, shall, upon any mesne process issuing out of his majesty’s courts of record at *Westminster*, arrest or hold any person to special bail, unless such process shall be duly marked and indorsed for bail, in a sum not less than *fifty* pounds.”

With respect to the cause of action, it is a rule, that where there is a certain debt to the amount of *twenty* pounds, or damages to that amount which may be reduced to a certainty, as in *assumpsit* or *covenant* for the payment of money,(c) the defendant may be arrested, as a matter of course, on an affidavit shortly stating the cause of action. And he might formerly have been arrested in like manner, in an action of *trover*(d) or *detinue*; for these were considered as being more properly actions of property, than of tort. But where the defendant, being a custom-house officer, was arrested in an action of *trover*, brought against him for seizing goods, and it appeared by affidavit that there was a reasonable foundation for the seizure, that the goods were deposited in the king’s warehouse, and that the defendant had used due diligence in proceeding towards a condemnation in the Exchequer, the court ordered common bail to be accepted.(aa) And by a late rule,(bb) in all the courts, “no person can be held to special bail, in an action of *trover*

was moved for against the defendant’s wife and daughter, for treating the process of the court with contempt, by throwing it into the street, &c., and the court said, that on a return by the sheriff, the rule for an attachment was absolute in the first instance; but on affidavits, the party must have an opportunity of answering.

(a) 1 Ken. 371.

(b) § 7, and see stat. 11, 12 W. III. c. 9, § 2. 2 Str. 1102.

(c) Barnes, 79, 80, 108. But one who became surety for the defendant, before his discharge under an insolvent debtor’s act, and was afterwards obliged to give a new security by bond and warrant of attorney, &c., for the old debt, cannot hold the defendant to bail thereon by affidavit, as for so much money paid for his use. 3 East, 169.

(d) 6 Mod. 14. Barnes, 80. 2 Str. 1192. 1 Wils. 23, S. C. 1 Wils. 335. Say. Rep. 53, S. C., and see Cowp. 529. Append. Chap. X. § 82, &c.

(aa) 2 Blac. Rep. 1018. 1 Wils. 335. Say. Rep. 53, S. C., *semb. contra*.

(bb) R. H. 48 Geo. III. K. B. C. P., and Excheq. 9 East, 325. 1 Taunt. 203. Man. Ex. Append. 225. 8 Price, 507. Append. Chap. X. § 85.

or *detinue*, without an order made for that purpose by the Lord Chief Justice, or one of the judges."

On the other hand, where the damages are altogether *uncertain*,^(cc) as in *assumpsit* or *covenant* to indemnify, &c., or in actions for a *tort* or *trespass*,^(d) there can be no arrest, without a *special order* of the court or a judge,^(e) on a full affidavit of the circumstances;^(f) for it would be unreasonable that the defendant should be arrested, for what damages the plaintiff fancies he has sustained, and is pleased to swear to. And it is not usual to grant a special order, except where there has been an outrageous battery or mayhem,^(g) or the defendant is about to quit the kingdom. An affidavit stating that "the defendant was indebted to the plaintiff in 3000*l.* and upwards, being the value of certain bars of silver, delivered by the plaintiff or on his account to the defendant, to be by him carried and delivered, and by the defendant undertaken to be carried and delivered, to E. B. at *Gottenburgh* in *Sweden*, for the use and on account of the plaintiff, but which bars of silver, or any part thereof, the defendant had not carried or delivered to the said E. B. at G. aforesaid, or to any other person, or at any other place, for the use of the plaintiff," was deemed sufficient to hold the defendant to special bail, on a judge's order; although it was objected, that it did not state any debt owing from the defendant to the plaintiff, and that there was no averment that the plaintiff had any property in the silver, or was damnified by the non-delivery of it.^(h)

There are also some cases, where the defendant cannot be arrested, though the action be brought for a sum *certain*; and others, where he cannot be arrested for the whole of the *legal* debt, but only for so much as is *equitably* due. Thus, in an action of *debt* on a *penal* statute,⁽ⁱ⁾ the defendant cannot be arrested, though it be for a sum certain; as it is a maxim, that every man shall be presumed innocent of an offence, till he be found guilty: But where an action is brought on a *remedial* statute, as for money won at play,^(k) or on a statute which [*173] expressly authorises an arrest, as for exporting wool,^(l) double value for holding over,^(m) having *unsealed wrought silks,^(a) or insuring lottery tickets,^(b) &c., the defendant may be arrested. So, in an action of *debt* upon a *recognizance* of bail, the defendant cannot be arrested:^(c) for besides that the sufficiency of the bail must have been proved, or admitted, previous to their being allowed, there are many things to be inquired into, which may show them not liable;^(e) and it is commonly said, that if the defendant were arrested in such an action, there would be bail *in infinitum*. And for similar reasons, an arrest is

(cc) Barnes, 79, 80, 108, 9.

(d) *Id.* 61. Pr. Reg. 63, S. C. Barnes, 76. Pr. Reg. 66. Cas. Pr. C. P. 149, S. C.

(e) Append. Chap. X. § 87.

(f) *Id.* § 86, 88.

(g) R. M. 1654, § 9, K. B. R. M. 1654, § 12, C. P.

(h) 2 East, 453, but see 2 Bos. & Pul. 282. 1 Chit. Rep, 168, (a).

(i) Yelv. 53. Gilb. C. P. 37. Barnes, 80.

(k) 9 Ann, c. 14. 2 Str. 1079. 7 Durnf. & East, 259, but see 2 Wils. 67. The statute is *remedial*, where the action is brought by the party injured: but *penal*, where brought by a common informer. *Per Nares*, J. 2 Blac. Rep. 1227. And for the *form* of an affidavit to hold to bail on this statute, see Append. Chap. X. § 80.

(l) 10, 11 W. III. c. 10, § 20. Com. Rep. 75.

(m) 4 Geo. II. c. 28, § 1. 5 Durnf. & East, 364.

(a) 26 Geo. II. c. 21, § 8. 3 Bur. 1569.

(b) 27 Geo. III. c. 1, § 2. Append. Chap. X. § 81.

(c) *Per Buller*, J. M. 28 Geo. III. K. B.

not permitted in an action of *debt* upon a *bail*(*dd*) or *replevin*(*ee*) bond; whether the action be brought in the name of the sheriff,(*ff*) or his assignee. But, after judgment has been obtained against the bail in such action, the defendant may be arrested in an action on the judgment.(*gg*) A defendant cannot be arrested, on an affidavit stating him to be indebted to the plaintiff for goods *bargained and sold*,(*h*) or, for goods *sold*,(*i*) without saying that they were *delivered*: for there is no reason why the plaintiff should have the security of the defendant's body under arrest, and also retain the security of the goods in his own hands.(*k*) And the court of Common Pleas will not permit a defendant to be arrested, in an action founded on the prothonotary's *allocatur*, for costs;(l) nor on a policy of assurance, for a total or partial loss, without an adjustment, or express promise to pay the amount.(*m*) But a defendant may be arrested on a *guaranty*, or undertaking to be answerable to a certain amount, for goods sold to a third person, in the event of his failing to pay for them.(*n*)

A party cannot be arrested and held to bail for a *penalty*, but only for the sum secured by it.(*o*) And hence it is, that in an action of *debt* upon bond, conditioned for the *payment of money*, though the penalty is, strictly speaking, the legal debt, yet as it is now considered, upon the statute for the amendment of the law,(*p*) to be merely a security for principal, in interest and costs, the defendant cannot be arrested for more than the sum really due by the condition. And, in like manner, where the bond is conditioned for the *performance of covenants*,(*q*) or *save harmless*,(*r*) &c. the defendant ought not to be arrested for the penalty, but only for the amount of the damages really sustained by the breach of the condition. But, upon a bond in a penalty, conditioned for paying a less sum by instalments and interest, though a part only of the instalments are due, the obligee may arrest for the aggregate amount of all the instalments, and the interest *accrued due before the action brought.(*a*) An arrest [*174] may also be made for the penalty of a bond conditioned for the performance of a *promise of marriage*,(*b*) &c. where the penalty is the real debt, or rather in nature of stated damages. And where an agreement was made in writing, to deliver a certain quantity of goods, within a certain time, at the price of 300*l.* or in default thereof, that the defendant would forfeit and pay to the plaintiff 100*l.*; in an action brought for the penalty, the judges of the Common Pleas were of opinion, that the defendant might be held to bail.(*c*)

Where there have been *mutual* dealings between the parties, the *balance* is considered as the debt at law, as well as in equity: And therefore, upon an unliquidated account, if the plaintiff were to swear to the sum due to him on the debtor side only, it would be looked upon as a mere evasion;

(*dd*) R. M. 8 Ann, (*c*), K. B.

(*ee*) 1 Salk. 99.

(*ff*) 6 Durnf. & East, 336. 8 Durnf. & East, 450.

(*gg*) *Butt v. Moore & another, bail of Reade*, M. 28 Geo. III. K. B. 8 Durnf. & East, 85.

(*h*) 12 East, 398.

(*i*) 8 Moore, 366. 1 Bing. 357, S. C.

(*k*) *Per Bayley, J.* 12 East, 399.

(*l*) 4 Taunt. 705.

(*m*) 5 Taunt. 291. 1 Marsh. 19, S. C. *Id.* 21, (*o*), and see 1 Maule & Sel. 494.

(*n*) 9 Price. 155.

(*o*) 6 Durnf. & East, 217. 2 East, 409. And for the difference between *penalties* and *liquidated* damages, see 2 Bos. & Pnl. 346. Holt, Ni. Pri. 45, n. 2 Price, 200. 8 Moore, 214. 1 Bing. 302, S. C. 6 Barn. & Cres. 216.

(*p*) 4, 5 Ann, c. 16, § 13.

(*q*) 1 Sid. 63. 1 Salk. 100. Barnes, 109. Say. Rep. 109. Doug. 449. 5 Taunt. 247.

(*r*) Barnes, 109.

(*a*) 7 Taunt. 251.

(*b*) 1 Wils. 59. 3 Bur. 1351, 1373. Doug. 449.

(*c*) Barnes, 86, but see *id.* 108.

and if not sufficient to support an indictment for perjury, would it seems entitle the defendant to a special action on the case, for a malicious arrest: (d) And, at any rate, if the balance did not constitute an arrestable debt, the defendant would be entitled to the costs, under the statute 43 Geo. III. c. 46, § 3, as having been arrested and held to bail, without any probable cause. (e)

The defendant having been once arrested, cannot in general be arrested again, for the same cause of action. (f) *Nemo debet bis vexari, pro eadem causâ*. Thus, where the defendant was arrested on a writ taken out pending a prior action, wherein he had been previously arrested for the same cause, the court discharged him on common bail. (g) So the defendant was discharged where he had been arrested a second time, pending a writ of error, and before judgment was given thereon, or the action discontinued. (h) And where the plaintiff, not liking the bail in the former action obtained a side-bar rule for leave to discontinue on payment of costs, and afterwards proceeded to charge the defendant in custody with a declaration in a new action, the court conceiving this to be a trick, discharged the side-bar rule; so that the bail to the former action still continued liable. (i) But where it appeared that the bail in the prior action were forsworn, the court refused to assist the defendant, though he was arrested before the former action was discontinued; saying, the plaintiff was right in laying hold of him as he did; for had he discontinued, the defendant would probably have run away. (k) And it has been determined [*175] that the plaintiff, after suing out *common* process, may sue out a *bailable* writ for the same cause, *and arrest the defendant, before he discontinues the first action; for this is not a case within the rule of not permitting the defendant to be twice arrested for the same cause. (a) By rule of *Mich. 15 Car. II.* (b) it is ordered that "if a defendant be lawfully delivered from arrest upon any process, he shall not be arrested again at the same time, by virtue of another process, at the suit of the same plaintiff." But, notwithstanding this rule, the court of King's Bench held, that the plaintiff might lodge a detainer against the defendant, in custody upon *mesne* process, after his bail had justified, the defendant not having completed his discharge, but being still within the prison; and that he was not entitled to be discharged, upon an affidavit that the sum for which the detainer was lodged, was due at the time of the first arrest. (c)

The rule for preventing vexatious arrests, was formerly so rigidly adhered to, that where the plaintiff was *nonprossed* for want of a declaration, he could not afterwards have arrested the defendant, in a second action for the same cause. (dd) And this is still the practice in the Common Pleas. (ee) But,

(d) *Dr. Thurlington's case*, 4 Bur. 1996. And for the facts of this case, see 1 Ken. 424. See also 5 Barn. & Ald. 513. 1 Dowl. & Ryl. 67, S. C. 2 Barn. & Cres. 693. 4 Dowl. & Ryl. 187, S. C. 3 Barn. & Cres. 139. 4 Dowl. & Ryl. 653, S. C., but see 2 Campb. 594, *semb. contra*.

(e) 5 Barn. & Ald. 513. 1 Dowl. & Ryl. 67, S. C. And see further, as to the cause of action, for which a defendant may or may not be arrested and holden to bail. Petersd. Part I. Chap. II.

(f) R. M. 15 Car. II. *reg.* 2, K. B.

(g) 2 Str. 1209, and see 13 Price, 8. McClel. 2, S. C.

(h) 7 Taunt. 192.

(i) 4 Bur. 2502.

(k) 2 Str. 1216.

(a) 6 Durnf. & East, 616, and see Wightw. 72. *Davison v. Cleworth*, H. 58 Geo. III. K. B. 1 Chit. Rep. 275, *in notis*. 13 Price, 8. McClel. 2, S. C.

(b) $\frac{1}{2}$ 2, K. B.

(c) 3 Maule & Sel. 144.

(dd) 1 Ld. Raym. 679. Com. Rep. 94, S. C.

(ee) 3 Moore, 607. 1 Brod. & Bing. 289, S. C. 4 Moore, 294. 1 Brod. & Bing. 514, S. C.

in the King's Bench, it has been determined, that after a *nonpros*, the defendant shall find bail in the second action ;(*ff*) for the plaintiff, it is said, suffers enough by paying costs in the first action, and therefore ought not to be in a worse condition than before. For a similar reason, where the plaintiff, having misconceived his action, moves to *discontinue* upon payment of costs, he may, after the costs are taxed and paid, (*gg*) take out a new writ for the same cause, and have the defendant arrested *de novo*. (*hh*) But where the plaintiff held the defendant to bail, before the cause of action accrued, and afterwards discontinued and paid costs, and then arrested him *de novo* for the same cause, after it accrued ; the court of Kings's Bench discharged the defendant on common bail. (*i*) If the plaintiff be *nonsuited*, in an action of *debt* on bond, for not sufficiently proving the execution of it, on *non est factum* ; (*k*) or on the ground of a variance in a former action, in which the defendant was arrested ; (*l*) he may be arrested again, in a second action for the same cause : But this is not allowed after a nonsuit on the merits. (*m*) So, where an action was brought against one of two partners for a joint debt, and the defendant having been arrested therein, pleaded the partnership in *abatement*, it was holden, that the plaintiff might, after entering a *cassetur billa*, bring a new action against both partners, and arrest the defendant again for the same debt. (*n*) And where the plaintiff becomes *bankrupt*, before *interlocutory judgment, [*176] the defendant may be arrested and held to bail by the assignees, in a second action for the same cause. (*a*) But where the defendant has been arrested in an action brought in the name of a bankrupt, by the authority of his assignees, he cannot be afterwards arrested, at the suit of the assignees, for the same cause of action, unless the first action has been discontinued, and the costs taxed and paid. (*b*)

Wherever the second action appears to be vexatious, (*c*) or the defendant is arrested or detained in custody therein, and after being *superseded* or *supersedeable* in a former action, by the *laches* of the plaintiff, (*d*) the court will discharge the defendant on common bail ; even though he be arrested on a note given subsequent to the *supersedeas*, (*e*) or in a different form of action, so as it be substantially for the same cause. (*f*) And where a defendant was arrested in the mayor's court of *Hereford*, by the practice of which court, a plaintiff is not bound to declare, without a rule for that purpose and the defendant, without conforming to the practice, superseded the action for want of a declaration, and was again arrested in *London* for the same cause of action, the court, without entering into the irregularity of the defendant's proceedings, discharged him on filing common bail. (*g*) But where there are no laches in the plaintiff, and *à fortiori* where the defendant is in fault, the court will not assist the latter : Thus, where A. having been arrested at the suit of B. gave him a draft for part of the demand, and agreed to settle the remainder in a few days ;

(*ff*) 1 Str. 439.

(*gg*) 2 Str. 1209. 3 Maule & Sel. 153. 5 Barn. & Ald. 905. 1 Dowl. & Ry. 556, S. C. 7 Moore, 312.

(*hh*) 2 Wils. 381. Barnes, 399.

(*i*) 5 Maule & Sel. 93.

(*k*) Barnes, 73.

(*l*) 1 Chit. Rep. 273.

(*m*) *Per Cur.* E. 19 Geo. III. K. B.

(*n*) *Salisbury v. Whiteall*, H. 43 Geo. III. K. B. 1 Marsh. 395, 6.

(*g*) *Barnes, assignee of Saunders, v. Maton*, M. 23 Geo. III. K. B. 15 East, 631.

(*b*) 1 Chit. Rep. 276.

(*c*) 2 Blac. Rep. 809.

(*d*) 2 Str. 782, 943, 1039. 2 Wils. 93. Cowp. 72. *Cookson v. Foster*, T. 23 Geo. III. K. B., but see Barnes, 62.

(*e*) 2 Str. 1218. 8 East, 334.

(*f*) 3 East, 309.

(*g*) 3 Dowl. & Ry. 189.

after which, the draft being dishonoured, B. sued out a new writ against A., and arrested him again on the same affidavit; this was holden to be regular.^(h) And if the defendant be discharged out of custody, on account of some act for which the plaintiff is not answerable, such as an alteration in the warrant to arrest by the sheriff's officer, without the plaintiff's knowledge, in such case the defendant may, after the first action is discontinued, be again held to bail for the same cause.⁽ⁱⁱ⁾ So, where the first action is compromised, and a second brought for the same cause, the court will not set aside a bail bond taken on an arrest, unless the proceedings appear to be vexatious.^(kk) The defendant having given a bond, conditioned for the payment of a sum of money, if the sentence of a Vice-Admiralty court should be affirmed on appeal, and the appeal having been dismissed for want of prosecution, the defendant was arrested and holden to bail; after which, the appeal being restored upon petition, the action was suspended, and the bail discharged; but being again dismissed, a new action on the bond was commenced; and the court of Common Pleas held, that the defendant might be again arrested and holden to bail.^(l)

So, where the defendant has been arrested abroad, he may be [*177] again arrested here, for the same cause of action; at *least where it does not appear that the plaintiff may have the same redress and benefit by the proceedings abroad, as in this country.^(a) It is no ground for discharging the defendant out of custody, that a previous application had been made to the court of Chancery, for a writ of *ne exeat regno*, for the same sum.^(b) So, where A. proceeded by foreign attachment against B. who surrendered, and pleaded to the jurisdiction of the court, upon which A. discontinued the foreign attachment, and arrested B. by process out of the King's Bench, the court of Common Pleas held, that the foreign attachment was not such a proceeding as to entitle B. to be discharged out of custody in the present suit, on entering a common appearance.^(c) And where the defendant being in custody within a *local* jurisdiction, the plaintiff lodged a detainer against him, but discontinued the action from fear of a plea to the jurisdiction, and then arrested the defendant in the King's Bench, without having paid the costs of the first suit; the court held, that the defendant was not entitled to be discharged on filing common bail, the second suit not being vexatious.^(d) Where a defendant was twice arrested, and put in bail to two writs in different counties, for the same cause of action, the court of King's Bench refused to make a rule absolute for setting aside one of the two writs; the proper course being, that an *exoneretur* should be entered on one of the bail-pieces.^(e)

Upon the same principle of not permitting the defendant to be twice arrested for the same cause, it is holden,^(f) that in an action of *debt* upon judgment, whether after verdict or by default, the defendant cannot be arrested, if he was previously arrested in the original action; even though

(h) 6 Durnf. & East, 52, and see *Penfold v. Maxwell*, M. 57 Geo. III. K. B. 1 Chit. Rep. 275.

(ii) 6 Durnf. & East, 218.

(kk) 1 Chit. Rep. 161.

(l) 1 New. Rep. C. P. 13.

(a) 7 Durnf. & East, 470. 2 East, 453.

(b) 8 Taunt. 24.

(c) 5 Taunt. 851. 1 Marsh. 395, S. C., and see the case of *Bromley v. Peck*, 5 Taunt. 852, *in notis*.

(d) 3 Dowl. & Ryl. 33.

(e) 1 Chit. Rep. 392. And see further, as to the cases in which the defendant may or may not be twice arrested for the same cause, *id.* 273, (a), 276, (a). Petersd. Part I. Chap. IV.

(f) 2 Str. 1218. Say. Rep. 43. Pr. Reg. 54. Cas. Pr. C. P. 32, S. C. Barnes, 116.

the bail in that action have since become *insolvent*,^(g) or the plaintiff has *released* them, by declaring in a different county,^(h) or the defendant has *surrendered* in their discharge, and obtained a *supersedeas*.⁽ⁱ⁾ And if a defendant being arrested upon process of the King's Bench, give a warrant of attorney to confess judgment, and be afterwards holden to bail in the Common Pleas, in an action upon that judgment, the latter court will discharge him upon a common appearance.^(k) But if the defendant were not arrested in the original action, he may be arrested in an action of *debt* on the judgment.^(l) And, in the Common Pleas, the defendant may be arrested in such action, notwithstanding a writ of error has been brought, and bail *put in thereon.^(a) Where a cause, in which [*178] the defendant has been arrested, is referred to arbitration, and the arbitrator awards to the plaintiff a sum exceeding *twenty* pounds, the defendant may be arrested again, in the action upon the award.^(b)

It was formerly holden, that where the judgment was merely for *costs*, upon a nonsuit,^(c) or the debt was originally under *ten* pounds, but raised to a larger sum by the addition of costs;^(d) or the action was for *general* damages, which were reduced by the judgment to a sum *certain* above *ten* pounds,^(e) the defendant could not be arrested in the King's bench, either upon the judgment itself, or upon a subsequent promise, in consideration of forbearance,^(f) to pay the debt and costs. But it was afterwards determined in both courts,^(gg) that a defendant might be arrested and held to special bail, in an action on a judgment for *ten* pounds, for damages and costs; though the original debt alone were under that amount. This determination seems to have occasioned the passing of the statute 43 Geo. III. c. 46, § I. by which it is enacted, that "no person shall be arrested or held to special bail, upon any process issuing out of any court in *England* or *Ireland*, for a cause of action not originally amounting to the sum for which such person is by the laws now in being liable to be arrested and held to bail, over and above and exclusive of any costs, charges and expenses that may have been incurred, recovered or become chargeable, in or about the suing for or recovering the same, or any part thereof." And by the statute 7 & 8 Geo. IV. c. 71,^(hh) "no person shall be held to special bail, upon any process issuing out of any court, where the cause of action shall not have originally amounted to the sum of *twenty* pounds or upwards, over and above and exclusive of such costs, charges and expenses as aforesaid." This statute, however, does not extend to *Scotland* or *Ireland*.⁽ⁱⁱ⁾

(g) Say. Rep. 160.

(h) 2 Wils. 93. Barnes, 116, S. C., but see 2 H. Blac. 278.

(i) 2 Str. 1039. Cowp. 72, R. H. 8 Geo. II. reg. 2 C. P. Cas. Pr. C. P. 34. Pr. Reg. 56. Barnes, 390. 1 Bos. & Pul. 361.

(k) 2 Bos. & Pul. 416, but see Barnes, 94.

(l) 8 Durnf. & East, 85. Pr. Reg. 55, 6. Cas. Pr. C. P. 32, S. C. Barnes, 116. 1 New Rep. C. P. 133.

(a) Barnes, 71. Pr. Reg. 57. Com. Rep. 556, S. C. 2 Blac. Rep. 768.

(b) 2 Durnf. & East, 756.

(c) 5 Bur. 2660. 2 Blac. Rep. 1274, C. P. *contra*.

(d) 2 Str. 975, 1077. 3 Bur. 1389. 4 Bur. 2117. *Butcher v. Holland*, II. 25 Geo. III. K. B.

(e) 2 Str. 1243. 1 Wils. 120.

(f) Cowp. 129.

(gg) 4 Durnf. & East, 570, K. B. Barnes, 432, 3. Pr. Reg. 60. Cas. Pr. C. P. 89, S. C. C. P., but see Barnes, 433. Pr. Reg. 61, S. C., *scmb. contra*.

(hh) § 1, and see stat. 51 Geo. III. c. 124, § 1, continued by 57 Geo. III. c. 101. (ii) § 10.

The *affidavit* required by the statutes, of the cause of action, may be made by the plaintiff, his wife, or a third person: *(k)* and it may be made by one or several persons. [A] The affirmation of a *Quaker* is sufficient to hold the defendant to special bail. *(l)* And, in the Common Pleas, an affidavit made by a third person, need not state any connection between the deponent and the plaintiff. *(m)* [B] But the affidavit, or affirmation, must be made by some person who is legally competent to be a witness; and therefore it is bad, if made by a person convicted of felony, or other infamous crime. *(aa)* An affidavit however, that the plaintiff is a transported felon, cannot be read in answer to an affidavit to hold to bail, made by a third person: *(b)* And a plaintiff convicted of a conspiracy, is not incompetent to make an affidavit to hold to bail. *(c)* The true place of abode and addition of every person making the affidavit must be inserted therein. *(d)* In the King's Bench however, the deponent may be described as "of the city of *London*, merchant: *(e)*" And, in the Common Pleas, the addition of "*manufacturer*" to the deponent's name, has been deemed sufficient. *(f)* But the court of King's Bench will not try the real place of the plaintiff's abode upon affidavits: *(g)* And there is no occasion to insert in the affidavit, the addition and description of the defendant. *(h)* In an affidavit to hold to bail, the plaintiff's clerk may state his place of abode to be the office where he is employed the greater part of the day, though at night he sleep at another place: *(i)* and it is sufficient to describe him as clerk to his employer, whose address is stated. *(kk)* So a foreigner, whose general residence is abroad, and who only landed here for a temporary purpose, may properly describe his place of abode to be his own country, and not at the place where the affidavit was sworn: *(ll)* And where a deponent had been a few days before discharged out of prison, but by permission had still continued to lodge there at night, having no other place of residence, his describing himself *bonâ fide*, in an affidavit to hold bail, as *late* of such a prison, has been deemed sufficient: *(mm)* But a deponent who has left one place of residence, and

(k) 1 Wils. 339. Say. Rep. 59, S. C. 1 Bos. & Pul. 1. 1 Chit. Rep. 58, 161. 9 Price, 322.

(l) Cowp. 382, and see Willes, 292, n. Append. Chap. X. § 5.

(m) 1 Bos. & Pul. 1. 4 Taunt. 231. 1 Chit. Rep. 58, 161.

(aa) 5 Mod. 74. 2 Salk. 461. Barnes, 79. Pr. Reg. 49, S. C. 2 Str. 1148. 2 Wils. 225. and see Peake's Evid. 5 Ed. 129, &c. but see Barnes, 116, *contra*.

(b) 1 Chit. Rep. 165.

(c) 4 Dowl. & Ryl. 144.

(d) R. M. 15 Car. II. *reg.* 1, K. B. 1 East, 18, 330. 4 Taunt. 154. 2 Barn. & Cres. 563. 4 Dowl. & Ryl. 45, S. C., but see 6 Taunt. 73, by which it appears that there is no such rule in the Common Pleas.

(e) 3 Maule & Sel. 165.

(f) 3 Bos. & Pul. 550.

(g) *Per Cur.* H. 45 Geo. III. K. B. 2 Smith R. 207, S. C.

(h) *Per Cur.* T. 41 Geo. III. K. B.

(i) 1 Maule & Sel. 103, and see 2 Chit. Rep. 15.

(kk) 1 Chit. Rep. 464, *in notis*.

(ll) 3 East, 154.

(mm) 11 East, 528.

[A] It is said that a partnership, as such, cannot make an affidavit. *Gaddis v. Dorothy*, 1 Green's N. J. Rep. 325.

[B] Where the plaintiff resides in a foreign country, and indeed generally, the affidavit made by an agent, that he the agent is informed and believes that the defendant is indebted to the plaintiff, has been held to be sufficient, the court in this case, reiterating the general rule, that the affidavit must be distinct and positive as to the existence of the debt or cause of action. *Kerr v. Phillips*, 2 Rich. S. C. Rep. 197. *Bank of Mobile v. Smith*, 14 Ala. 416, and see page 180, note [A].

resides in another, cannot regularly describe himself as *late* of the former.(n)

The affidavit may be sworn in court, or before a judge, or commissioner of the court authorized to take affidavits, by virtue of the statute 29 Car. II. c. 5,(o) or else before the officer who issues the process, or his deputy:(p) which deputy must be appointed for issuing process, and not merely for taking affidavits, 7 Barn. & Cres. 86.[A] And it may be sworn before a commissioner, although he be concerned as attorney for the plaintiff.(q) But, in the Common Pleas, an affidavit of debt sworn before a commissioner in the country, without stating him to be a commissioner in the *jurat*, is insufficient, although entitled in this court: and the court will not allow a supplementary affidavit to be filed, to aid the defect, 1 Moore & P. 22, 4 Bing. 393, S. C. In the King's Bench, when a bill of *Middlesex* issues, upon an affidavit of debt duly sworn pursuant to the statute 12 Geo. I. c. 29, § 2, an office copy of the same affidavit will authorize the issuing of a *latitat* into a different county, 7 Barn. & Cres. 526, 1 Man. & Ryl. 231, S. C. But a special *capias*, issued upon an affidavit sworn at the bill of *Middlesex* office, is irregular: and though it was contended, that the practice was for the filacer, upon transmitting to him either the original affidavit or an office copy of it, to issue the writ, yet *the court said that such [*180] could not be the practice; for that an affidavit made for one specific object, could not be transferred to another, and perjury could not be assigned on the office copy.(a) So, in the Common Pleas, where, on an affidavit of debt sworn before and filed with the filacer for *Devonshire*, a *capias ad respondendum* issued to the sheriff of that county against the defendant, who not being found there, an office copy of such affidavit was filed with the filacer for *London*, on which another *capias* issued, directed to the sheriffs of *London*, under which the defendant was arrested, the court held, that this was irregular; for, by the terms of the statute, an affidavit must be made before a judge, or commissioner of the court authorized to take affidavits, or before the officer who issues the process or his deputy; and in this case, therefore, the affidavit should have been sworn before and filed with the filacer in *London*.(b) But where the defendant was arrested on a *testatum capias* into *Devonshire*, without any affidavit filed on issuing the *testatum capias*, an affidavit having been filed on issuing a previous *capias* into *Cambridgeshire*, the court held it to be regular, though the *testatum* was not tested on the *quarto die post* of the original; the filacer for *Cambridgeshire* being the proper officer to issue writs into *Devonshire*.(c) By the *jurat* to an affidavit of debt, made by a

(n) *Id. ibid.*

(o) Extended to the isle of *Man*, by statute 6 Geo. III. c. 50, § 2. And see the statute 55 Geo. III. c. 157, for empowering the courts of law and equity in *Ireland*, to grant commissions to take affidavits, in all parts of *Great Britain*. The commission for taking affidavits in *England*, should be stamped with a ten shilling stamp. Stat. 55 Geo. III. c. 184. *Sched.* Part II. § 3.

(p) Stat. 12 Geo. I. c. 29, § 2.

(q) R. E. 15 Geo. II. *reg.* 2, K. B. R. E. 13 Geo. II. *reg.* 1, C. P.

(a) 1 Maule & Sel. 230; and see 7 Barn. & Cres. 527. 1 Man. & Ryl. 233, 235, S. C.

(b) 8 Taunt. 242. 2 Moore 192, S. C. and see 3 Bing. 39. 10 Moore, 318, S. C. *Ante*, 154.

(c) 4 Bing. 63; and see 2 Taunt. 164, 166. 1 Man. & Ryl. 233, 4. *Ante*, 154.

[A] An affidavit must on its face appear to have been taken by the proper officer, and the legal requisitions to have been complied with. The court cannot stop to inquire into the competency of the officer or the place where it was taken. *The State v. Green*, 3 Green's N. J. Rep. 90. *Saunders v. Erwin*, 2 How. Miss. 732. *Manufacturers' Bank v. Cowden*, 3 Hill, 461. *English v. Bonham*, 3 Green's N. J. Rep. 431.

foreigner, it was certified by the signer of the bills of *Middlesex*, that the affidavit was interpreted by F. C. professor of languages, (he having first sworn that he understood the *English* and *French* languages,) to the deponent, who was afterwards sworn to the truth thereof; and this was holden to be sufficient. (d)[A].

(d) 4 Barn. & Cres. 358. 6 Dowl. & Ryl. 514, S. C.

[A] Where an affidavit is made out of the state, there should be made before a judge or justice in the state where it is to be used an additional affidavit, setting forth that the original affidavit was made before a person who had authority to administer an oath; that the person who subscribed the affidavit did take the oath; that the handwriting so subscribed is the proper handwriting of the affiant; and that the attestation thereto attached is the proper handwriting of the officer before whom it purports to have been taken. *Spragella v. Montebruno*, 1 South Car. Const. Rep. 281, by Mill. It was held in this case that an affidavit made before a notary public in another state, and certified under his notarial seal, was insufficient to hold to bail. It, however, rests wholly upon the construction of the South Carolina act of 1769, though the opinion of Judge Johnston may be usefully consulted as to sufficiency of attestations and authentications done out of the state, and as to the principles which regulate exemplifications under the acts of Congress.

In *Belden v. Deroe*, 12 Wend. 225, the form of a certificate is given, and approved by *Savage*, Ch. J., after exceptions taken by counsel. The practice does not seem to be uniform. In *Tucker v. Ladd*, 4 Cow. 47, an affidavit taken before a notary public in New Hampshire, was allowed to be read in New York. The Supreme Court of New Jersey, in *The Trenton Bank v. Wallace*, 4 Halst. Rep. 83, and *Anony.*, 3 *Id.* 176, held that an affidavit made before a judicial officer in another state, verifying a plea in abatement, could not be read. This, however, depended on the construction of a rule of court.

In the absence of statutory regulations or rules of court, perhaps, the most satisfactory view of the whole matter is presented in *Walker v. Bamber*, 8 S. & R. 61, in the opinion of Ch. Just. *Tilghman*, where it was held, that a positive affidavit of debt, made before a justice of the peace in England, was held sufficient.

"The question," says he, "is, whether this affidavit be sufficient to hold the defendants to special bail, and a very important question it is; for it is contended by the counsel for the defendants, that no oath made in a foreign country, however positive, is sufficient to hold to bail, unless accompanied with some written acknowledgment of the debt by the defendant. If the law be so, it may create great embarrassment to foreigners, and be injurious to the commercial credit of the state. We have therefore endeavored to ascertain the ground on which the rule, set up by the defendant's counsel, is supported. We have no act of assembly or rule of court on the subject. But the authority of the case of *Taylor v. Knox*, 1 Dall. 159, decided by the late Ch. J. *Shippen*, when President of the court of Common Pleas, in the year 1785, is relied on. Of course, we have examined that case thoroughly; and it appears, that the president found himself embarrassed by a practice, which had been established before he came on the bench, of refusing special bail, unless the debt were sworn to before one of the judges of the court, agreeably to the stat. 12 Geo. I. This practice he considered as illegal, because that statute had never been extended to this state, before the revolution. The consequence ought to have been, the establishment of a practice, agreeably to the general principles of commercial law and the usage of the most enlightened nations. The mind of President *Shippen* was inclined to liberality, and we may plainly discover a struggle between his own view of the law, and his wish to avoid too wide a departure from the sentiments of his brethren who were not lawyers. Accordingly, he made a compromise, by striking out a middle way, as he called it, between the statute 12 Geo. I., which required an affidavit before one of the judges of the court, and the general principles of law which admitted an affidavit before a notary public, or magistrate, of a foreign country. President *Shippen* was aware, that in England, before the statute of 12 Geo. I., an affidavit before a notary public of a foreign country, was received in proof of cause of bail; for he cites a case to that purpose, reported in 8 Mod. 323, (11 Geo. I.) But he does not seem to have understood, that the same evidence has been received since that statute. Nevertheless, it certainly has. For, the construction put upon the statute by the English judges was, that although it prohibited a plaintiff from arresting the defendant and holding him to bail without an affidavit before a judge of the court, of his own authority, and without a judge's order, yet it did not restrain a judge from making an order to hold to bail, on an affidavit made in a foreign country. The reason why it is presumed that this had escaped the President is, that he says, the court of Common Pleas desired to keep up a reciprocity between this country and England, and therefore required an affidavit before a judge. But there could be no reciprocity if one country admitted an affidavit before a

There being no action depending in court, at the time when the affidavit is made, it ought not regularly to be *entitled* in a cause: and in one case, the King's Bench discharged the defendant out of custody on common bail, on account of its being so entitled; (e) but in a subsequent case, (f) they thought that as the practice had obtained so long, of adding a title to affidavits of this kind, it would be too much to determine, that such practice had been erroneous; particularly as this was a mere question of form, and did not interfere with the justice of the case. A rule of court, however, has been since made in the King's Bench, "that affidavits of any cause of action, before process sued out to hold defendants to bail, be not *entitled* in any cause, nor read if filed." (g) And, in the Common Pleas, if an affidavit to hold to bail be entitled in a cause, it is bad; and the defendant may be discharged, on entering a common appearance. (h) It was determined in one case, (i) to be no objection to an affidavit to hold to bail, that it was not entitled "In the King's Bench:" but in a subsequent case it was holden, that an affidavit of debt, not entitled in any court, and only subscribed with the words "*By the Court*," at the bottom of the *jurat*, *is not sufficient; (aa) though where the [*181] name of one of the judges of that court is affixed to the affidavit, it will entitle the party to read it, as sworn in court: (bb) And an affidavit not entitled in the *court*, but purporting at the foot, to have been sworn before the *deputy filacer*, is sufficient. (cc)

An affidavit made *abroad*, out of the king's dominions, is put on the same footing as an affidavit sworn in *Scotland* or *Ireland*; which, though not sufficient of itself to authorize an arrest, will be a good ground for applying to the court or a judge, for an order to hold the defendant to special bail. (d) The affidavit, however, when made out of *England*, ought to contain all the requisites that are essential to affidavits for holding to

(e) 6 Durnf. & East, 640; and see Say. Rep. 218.

(f) 7 Durnf. & East, 321.

(g) R. T. 37 Geo. III. K. B. 7 Durnf. & East, 454.

(h) 1 Bos. & Pul. 36, 227.

(i) 7 Durnf. & East, 451.

(aa) 3 Maule & Sel. 157.

(bb) *Id.* 157, 8; and see 13 East, 189. But see 1 Moore & P. 22. 4 Bing. 393, S. C. *Ante*, 179. And for the form of the *jurat*, on an affidavit to hold to bail, see Append. Chap. X. § 1.

(cc) 1 Chit. Rep. 165.

(d) *Ante*, 166.

foreign magistrate and the other did not. But we may see clearly which way the judgment of President *Shippen*, who was a man of large views, inclined; for in that very case of *Taylor v. Knox*, he held the affidavit before the lord Mayor of London, a sufficient ground for an attachment, and even in cases of *capias*, where a written acknowledgment of the defendant was required, he thus expresses himself: 'This rule, however, affects the inhabitants of other countries as well as England, and it may possibly be found necessary at some future time to make an alteration in it more conformable to the general law on these subjects.' Had he been now living, I make no doubt that he would have thought that future time was now come, especially had he been assured, (as we have been by very satisfactory evidence,) that in the year 1807, the court of King's Bench, in England, ordered special bail, on the affidavit of a citizen of the United States, made before a magistrate in Paris, proving a debt contracted in the United States. Our commerce has increased prodigiously since the year 1785, when the rule was laid down in the case of *Taylor v. Knox*, and in order to do justice, it is necessary that the law of evidence, in commercial cases, should keep pace with the progress of business. This court is unfettered by the rule of the Common Pleas, and after diligent search, we have found no case, either reported or in manuscript, in which we have decided that an affidavit made in a foreign country should not be received. Affidavits made in other states have always been received without scruple, and I understand that *sub silentio* it has been customary to demand special bail on affidavits made in Europe. It is time the matter should be settled. We have considered it deliberately, and are of opinion, that in the case before us, the plaintiffs have shown good cause for special bail."

bail in this country; and therefore, while the bank acts remained in force, it was deemed necessary to state, in an affidavit made in *Ireland*, for the purpose of arresting the defendant in this country, that he had not made a tender of the money in bank notes.(e) It has been said, that where an affidavit of debt is made in *Scotland* or *Ireland*, the party verifying it must swear, "that it was made by the plaintiff; that the hand-writing subscribed thereto, is of his own hand-writing; that the said affidavit was made and taken before a magistrate, who, deponent believes, had competent authority to administer an oath; and that the hand-writing of the person subscribing the said affidavit, is the hand-writing of such magistrate."(f) But in practice it is deemed sufficient, where the affidavit of debt is made in *Scotland* or *Ireland*, to swear to the hand-writing of the judge before whom it was made:(g) And accordingly, where an affidavit of debt contained no place in the *jurat*, but purported to be sworn before the Chief Justice of the King's Bench in *Ireland*, and to be assigned by him, and such signature was verified by affidavit here, the court held, that it was a sufficient foundation for arresting the defendant, under a judge's order, on mesne process:(h) Though if an affidavit of debt be made abroad, out of the king's dominions, it is usual to swear to the other circumstances before stated.(i) An affidavit to hold to bail, on an *Irish* judgment, must show the value of the sum recovered in *Irish* money.(k) And where an affidavit to hold to bail, made before a *British* Consul in a foreign country, stated that the defendant was indebted to the plaintiff in 100,000*l. sterling*, for money had and received, it was holden that the affidavit was insufficient: inasmuch as it did not appear with certainty, whether the defendant was indebted in *British* sterling money.(l) It is not settled, [*182] whether a *British* *Consul, or *Vice-Consul*, resident in a foreign country, has authority, by virtue of his office, to administer an oath, for the purpose of holding a defendant to bail in this country; the judges of the King's Bench, in a late case,(a) being equally divided in opinion on this point.

In point of *form*, the affidavit should be *direct* and *positive*, that the plaintiff has a *subsisting* cause of action: and therefore, if it be merely by way of *argument*, or *reference* to books or accounts, &c., or as the party making it *believes*, it will not in general be sufficient.(b)[A] But an affidavit

(e) *Nesbitt v. Pym*, 7 Durnf. & East, 376, (c). *Stewart v. Smith*, 1 Bos. & Pul. 132, (a). 1 Chit. Rep. 464, *in notis*; but see 2 Chit. Rep. 17. And for the form of an affidavit in *England*, to arrest in *Ireland*, see Append. Chap. X. § 6.

(f) 1 Sel. Prac. 2 Ed. 111. Lee's Prac. Dic. 2 Ed. 20.

(g) 1 Chit. Rep. 721. Append. Chap. X. § 7.

(h) 1 Maule & Sel. 302.

(i) *Per Lord Kenyon*, T. 36 Geo. III. K. B. *Sed quære?* and see 1 Chit. Rep. 463, 721, 2. 7 Durnf. & East, 251. *Haydon v. Frederici*, E. 38 Geo. III. K. B. 8 East, 364. 1 Chit. Rep. 464, *in notis*.

(k) 2 Chit. Rep. 16; and see 1 Chit. Rep. 28. 2 Barn. & Ald. 301, S. C.

(l) 4 Barn. & Cres. 886. 7 Dowl. & Ryl. 478, S. C. by three judges, *Abbott*, Ch. J. *dis-sentiente*.

(a) 4 Barn. & Cres. 886. 7 Dowl. & Ryl. 478, S. C. and see 8 East, 364. 1 Chit. Rep. 463. 8 Moore, 632. And for other cases, respecting the officer before whom affidavits made abroad are to be sworn, see 1 Chit. Rep. 463, *in notis*.

(b) 2 Str. 1157, 1209, 1219, 1226, 1270. 1 Wils. 121, 231, 279, 339. Say. Rep. 59, S. C. 2 Bur. 655. 3 Bur. 1447, 1687. 4 Bur. 2126. *Brown v. Phepoe*, H. 24 Geo. III. K. B. 1 Durnf. & East, 716. 2 Durnf. & East, 55. 3 Durnf. & East, 575. 5 Durnf. & East, 364. Barnes, 87; but see 3 Wils. 154. 2 Blac. Rep. 740, S. C. C. P. For the *forms* of affidavits in different cases, see Append. Chap. X. § 1, &c.

[A] The general rule as to certainty is the same in this country. *Wright v. Coggs*, 1

that the defendant is indebted to the plaintiff in such a sum, *as he computes it*, has been adjudged good.^(c) And in an affidavit to hold to bail, made by the plaintiff's agent, (the plaintiff himself being abroad,) the debt on a judgment being first positively sworn to, a subsequent statement that the judgment is still in force, unpaid and unsatisfied, *as deponent verily believes*, will not vitiate.^(d) Where the plaintiff sues as *executor* or *administrator*, or as *assignee* of a bankrupt, it is sufficient for him, or a clerk of the testator,^(e) &c. to swear that the defendant is indebted, &c. *as appears by books, &c. and as he verily believes*:^(f) but even in that case, a mere reference to books, &c. unsupported by the party's belief, is not sufficiently positive;^(g) and, in the Exchequer, an affidavit by an executor, of a debt due to his testator, "as appears by a statement made from the testator's books, by an accountant employed to investigate the same, *as deponent verily believes*," is insufficient to hold a defendant to special bail.^(h) So, where the affidavit to hold to bail was made by a bankrupt, who swore that, at and before the date and suing out of the commission, the defendant was indebted to deponent, and, *as he believed*, was still indebted to his assignees, on a bill of exchange accepted by the defendant, indorsed by the drawer to deponent, and, *as he believed*, still unpaid; the court thought the affidavit insufficient.⁽ⁱ⁾ A co-assignee of a debt, arising out of bills of exchange in his own possession, may sue in the name of the original creditor, and hold the defendant to bail on his own affidavit, swearing positively as to all the facts required which are within his own knowledge, and to the best of his knowledge and belief, as to such as are within the knowledge of his principal and co-assignees.^(k) And where the assignee of a bond swore, that the obligor was indebted in ninety pounds, *for principal [*183] and interest upon the bond, *as he believed*, the affidavit was deemed sufficient to hold the defendant to special bail:^(a) But it is usual, in such a case, for the obligee and assignee to join in an affidavit, stating the execution of the bond, the assignment of it, and how much is due for principal and interest.^(b) And where, in an action on a bond, at the suit of the obligee, for the benefit of the assignee, against the obligor, the affidavit to hold to bail was made jointly by the plaintiff (the obligee,) and the assignee, the former swearing that a certain sum was due for principal and interest on the bond, and that he had assigned it to the latter; and the latter, that the sum due on the bond still remained unpaid, and due and owing to him as

(c) 2 Bur. 1032; but see 1 Durnf. & East, 717.

(d) 1 Chit. Rep. 165.

(e) *Etherington v. —*, M. 45 Geo. III. K. B.

(f) 4 Bur. 1992, 2283. *Brown v. Phoebe*, II. 24 Geo. III. K. B. 1 Durnf. & East, 83. 4 Durnf. & East, 176. 8 Durnf. & East, 419, 20. 2 Bos. & Pul. 298; and see Append. Chap. X. § 93, 4, 97, 8, 102.

(g) 2 Str. 1219. 1 Durnf. & East, 83. 1 Chit. Rep. 92.

(h) 1 Price, 402.

(i) 4 Bing. 142.

(k) 8 Durnf. & East, 418. (a) 1 Wils. 232; and see 7 Taunt. 275. 1 Moore, 24, S. C.

(b) 2 Bos. & Pul. 355; and see Append. Chap. X. § 75.

M'Lean, 471. *Satterlee v. Lynch*, 6 Hill, 228. It should be sufficiently certain to make out a *prima facie* case. *Postly v. Higgins*, 2 M'Lean, 493. *Wade v. Judge*, 5 Ala. 130. *Read v. Randal*, 2 Harring. 327. *Harman v. Brotherton*, 1 Denio, 537. *Parker v. Ogden*, 1 Penning. 147. *Woodfolk v. Leslie*, 2 Nott & M'Cord, 585. *Lewis v. Breckenridge*, 1 Blac. 112. *Nevens v. Merrie*, 2 Whart. 499. *Thomas v. Crossin*, 3 Amer. Law Reg. 228, note. *Nelson v. Cutter*, 3 M'Lean, 326. *Brooks v. M'Lellan*, 1 Barb. 247. *Jennings v. Sledge*, 3 Kelly, 128.

It has been held in *Montague v. Leate*, 7 Geo. Rep. 366, that the plaintiff need not set forth nor describe the cause of action nor the character of the debt, but *Nisbet, J.*, says expressly, that the Georgia statute has superceded the act of 12 Geo. I. This case is therefore entirely local.

assignee; the court held this to be sufficient. 1 Moore & P. 179. An affidavit of debt, stating that A. was indebted to B. for goods sold and delivered in *Holland*, and that the debt was assigned to C. according to the laws of that country, and concluding with a statement that the assignee of a debt may sue the debtor according to the laws of *Holland*, "*as deponent is informed and believes*," has been deemed sufficient to hold the defendant to bail in this country.(c)

It is also requisite, that the affidavit should be *certain* and *explicit*, as to the nature of the cause of action: Therefore, an affidavit that the defendant is indebted to the plaintiff in such a sum, without more,(d) or generally upon *promises*,(e) or in so much upon a bond for *performance of covenants*,(f) or upon *breach of articles*(g) or as a *balance of accounts* between the parties,(h) has been holden to be too general. So an affidavit to hold to bail, stating only that the defendant is indebted to the plaintiff, "for goods sold and delivered, (without saying *by the plaintiff to the defendant*,) and as the acceptor of a bill of exchange,"(i) or "for goods sold and delivered (not saying *by the plaintiff*,) to the defendant,"(k) or "for goods sold and delivered *for* the defendant,"(l) is insufficient. And, in the King's Bench, an affidavit to hold to bail, stating that the defendant, being captain of a ship, was indebted to plaintiff, "for work and labour of plaintiff done on board the ship, and for materials found by plaintiff and used therein, and for goods sold and delivered, and money paid by plaintiff, at the request of defendant," was holden to be defective, in not stating that the work was done, or money paid for, or the goods sold to defendant.(m) But where it was stated in the affidavit, that the defendant was indebted, "for the use and occupation of a certain dwelling house, &c. of the plaintiff, held and enjoyed by the defendant as tenant thereof," without saying that he was tenant to the plaintiff, it was deemed sufficient.(n) So, in the Common Pleas, an affidavit to hold to bail, stating the debt to be "for money paid laid out and expended, and wages due to the plaintiff for his services on board the defendant's ship," is sufficient, without expressly stating that the wages were due from the defendant.(o) So an affidavit to hold to bail, which states that the defendant is indebted to the plaintiff, for the hire of divers carriages, &c. of the plaintiff, to and for the use of the defendant, [*184] is sufficient, without stating that they were hired of the *plaintiff, or by whom they were hired.(p) So, it has been deemed sufficient to state, in an affidavit to hold to bail, that the defendant is indebted to the plaintiff in such a sum, "for money had and received on account of the *plaintiff*," without adding, that it was received by the *defendant*.(b) And, in an affidavit of debt for money paid to the use of the defendant,(cc) or for work and labour as the defendant's servant,(dd) it is not necessary, in the Common Pleas, to state that it was at his *request*; but it is otherwise in the

(c) 4 Dowl. & Ry. 180.

(d) 1 H. Blac. 10.

(e) Doug. 467.

(f) Say. Rep. 109; and see 4 Maule & Sel. 330.

(g) *Booker v. Friend*, cited in Say. Rep. 109. *Per. Cur. M.* 41 Geo. III. K. B.

(h) 4 Taunt. 154. 2 Chit. Rep. 15.

(i) 7 East, 194.

(k) 8 East, 106. 11 East, 315. 6 Taunt. 192. 1 Marsh. 535 S. C.

(l) 2 Barn. & Ald. 596. 1 Chit. Rep. 331, S. C.

(m) 2 Maule & Sel. 603.

(n) 9 Price, 322.

(o) 1 Marsh. 317.

(p) 6 Taunt. 389. 2 Marsh. 83, S. C.

(b) 8 Durnf. & East, 338; and see *id.* 27.

(cc) 5 Taunt. 704, 751. 1 Marsh. 315, S. C. 8 Moore, 332. 1 Bing. 338, S. C. *accord.*

(dd) 5 Taunt. 756. 1 Marsh. 317, (a). S. C. 6 Taunt. 389, S. P.

King's Bench.(*ee*) An affidavit made by a married woman, that the defendant is indebted "for the rent of lodgings, and for money lent *by her* to the defendant," was held sufficient; although it did not state to whom the lodgings were let, and the person making the affidavit was herself incapable of lending money; for she might have lent it as agent to her husband.(*ff*) And an affidavit that *R. Patten* is indebted for money paid to the use of the said *R. Jackson*, is well enough.(*g*) But an affidavit stating the defendant to be indebted to the plaintiff, for money had and received to the use of his wife;(h) or that *E. I.* is indebted, &c., for money due from the said *G. P.*, *E. I.*, &c.,(*i*) is insufficient. An affidavit to hold to bail on a bill of exchange, has been deemed sufficient, though it do not state in what character the plaintiff sues, whether as payee or indorsee:(*k*) And an affidavit, stating that the defendant was indebted to the plaintiff on a bill of exchange, payable to a third person, at a day now past, was deemed sufficient; without stating at what day the bill was payable, or showing the connexion between the payee and the plaintiff.(l) But an affidavit, that the defendant is indebted to the plaintiff, "as indorsee of a promissory note, or bill of exchange, made or accepted by defendant," without stating the date of the note or bill, or that it was payable on demand, or at a day past, is insufficient:(*m*)[1] and it seems that the affidavit must state in what character the defendant is sued.(*n*) So, an affidavit stating the defendant to be indebted to the plaintiff, on a promissory note, drawn in favour of *J. E. & Co.*, and *duly* indorsed to the plaintiff, has been deemed insufficient.(o)

In an action on a *money* bond, the affidavit to hold to bail should regularly state that the defendant is indebted, &c., for principal and interest due on a bond, bearing date, &c., and made and entered into by the defendant to the plaintiff, in the penal sum, &c., conditioned for the payment *of ————*l.*, and interest, at a certain day now past.(a) [*185] And where the affidavit stated, that the defendant was indebted, &c., in a certain sum, for *principal and interest* due on a bond, made by the defendant, in a greater penal sum, it was holden to be good; though it did not state the condition of the bond to be for the payment of money.(b) But the affidavit must show that the bond was then due and payable; otherwise the defendant will be discharged on common bail.(c) And an affidavit, stating that defendant is indebted to the plaintiff in 6000*l.* "upon a bond, bearing date, &c., and made and entered into by defendant to plaintiff, in the penal sum of 25,000*l.*," without showing the condition of the bond, was holden insufficient; and the court discharged

(*ee*) 5 Maule & Sel. 446.

(*ff*) *Per. Cur.* T. 40 Geo. III. K. B.

(*g*) 3 Maule & Sel. 178.

(*h*) 4 Bing. 50.

(*i*) 1 Dowl. & Ryl. 150.

(*k*) 7 East, 94, 194. 3 Smith R. 117, S. C. K. B. 7 Taunt. 171. 2 Marsh. 483, S. C. C. P. *accord.* but see 6 Taunt. 25. 1 Marsh. 424, S. C. 6 Taunt. 531. 2 Marsh. 231, S. C. *contra.*

(*l*) 1 Chit. Rep. 648; and see 4 Moore, 18. 5 Moore, 52. 2 Brod. & Bing. 338, S. C. *Id.* 343. 2 Dowl. & Ryl. 148.

(*m*) 2 Maule & Sel. 148, 475. 3 Barn. & Ald. 495, K. B. 7 Taunt. 171. 2 Marsh. 483, S. C. 4 Moore, 18, C. P. *accord.* but see 1 New Rep. C. P. 157, *contra.*

(*n*) 2 Marsh. 231. 6 Taunt. 531, S. C.

(o) 4 Bing. 114.

(*a*) Append. Chap. X. § 73.

(*b*) 7 Taunt. 275. 1 Moore, 24, S. C.

(*c*) 7 Dowl. & Ryl. 232.

[1] And an affidavit of debt, stating that several persons are jointly indebted to the plaintiff accepted in a particular form, *by them, or one of them*, is insufficient. 10 Moore, 323.

the defendant on common bail.(d) So an affidavit to hold to bail, in an action against a *surety* on an arbitration bond, must set out the condition, and show that a demand of the money was made on the *principal*, if required by the award.(e)

In holding a defendant to bail for *stipulated* damages, for not performing an agreement, it is necessary that the affidavit should state what the agreement was, and the breach of it.(f) And as a party cannot be held to bail for a *penalty*, but only for the sum secured by it, an affidavit stating that the defendant was indebted to the plaintiff in 1000*l*." "under an agreement in writing, whereby the defendant undertook to pay the plaintiff the balance of accounts, &c., which balance is still due and unpaid," is insufficient, without stating that the balance was 1000*l*.(g) So an affidavit, that the defendant is indebted to the plaintiff in 50*l*." "by virtue of an agreement, whereby he bound himself in that sum for the performance of the said agreement, and which he had neglected and refused to perform," without stating what the agreement was, or the breach of it is not sufficient.(h) So an affidavit, stating that the defendant is indebted to the plaintiff in so much for interest money, under and by virtue of an agreement under the hand of the defendant,(i) or for his subscription as member of a certain reading club, according to the rules and regulations of the same,(k) is not sufficient. So, if a tenant bind himself in a penalty, for performance of repairs within a certain time, the court will not permit him to be arrested for the penalty, upon an affidavit which does not show in what respect, and to what amount, he has violated his contract.(l) So, where an affidavit stated, that the defendant was indebted to the plaintiff in 245*l*." "for money lent by plaintiff to defendant, for the use of another, and for which the defendant promised to be accountable, and repay or cause to be paid or *secured* to the plaintiff, &c.," the defendant was discharged on common bail; it not appearing in the affidavit, but that the money had been secured, according to the agreement.(m) And [*186] where an affidavit stated, *that the defendant was indebted to the plaintiff, upon a written agreement to marry plaintiff, at a time specified, or pay her 1000*l*., and that he had not done either, although the time had elapsed, and plaintiff was ready and willing to marry defendant, and requested him to marry her; the court held that this was insufficient, as they can take nothing by intendment in an affidavit of debt; and here, no consideration for the defendant's promise was shown.(a)[1] But, in the Common Pleas, an affidavit to hold to bail, stating the defendant to be indebted, "for damages awarded, and for costs and expenses taxed and allowed," is sufficiently certain; for it will be inferred, that the award and taxation are such as will support the action.(b) And, in that court, an affidavit stating that the defendant was indebted to

(d) 4 Maule & Sel. 330; but see 7 Taunt. 275. 1 Moore 24, S. C. *Ante*, 183.

(e) 7 Taunt. 405. 1 Moore, 110, S. C.

(f) 6 Durnf. & East, 13. *Per Cur. H.* 41 Geo. III. K. B. 2 East, 409.

(g) 6 Durnf. & East, 217.

(i) 10 East, 358.

(k) 1 Dowl. & Ryl. 150.

(h) 2 East, 409.

(l) 5 Taunt. 247.

(m) 5 Durnf. & East, 552; and see 2 Bos. & Pul. 48.

(a) 1 Barn. & Cres. 108. 2 Dowl. & Ryl. 69, S. C.

(b) 1 Bos. & Pul. 365; and see 6 Dowl. & Ryl. 15.

[1] So, an affidavit of debt on an award, directing money to be paid by the defendant to the plaintiff on *demand*, without alleging a demand, was deemed insufficient. 7 Barn. & Cres. 494. 1 Man. & Ryl. 324, S. C.

the plaintiff, "upon and by virtue of a certain charter-party of affreightment, bearing date, &c., for and on account of the hire of a ship, let to hire by the plaintiff to the defendant, and by him taken, for a certain voyage from ——— to ———," was deemed sufficient.(c) So, an affidavit to hold to bail, stating that the defendant was indebted to the plaintiff, in trust for the deponent, under a deed, by which the defendant had covenanted to pay money, "at certain times, and on certain events, now past and happened," was holden to be sufficient.(d) In the Exchequer, a defendant cannot be held to bail, on an affidavit stating him to be indebted to the plaintiff, "in respect to a certain sale of land, in possession of the defendant," 2 Younge & J. 2. And an affidavit to hold to bail, stating that the defendant was indebted to the plaintiff, by virtue of certain articles of agreement, by which the latter agreed to sell, and the former to purchase certain lands, and that defendant had been let into possession in pursuance of the agreement, was deemed insufficient, without stating that a conveyance had been tendered to the defendant. *Id.* 31.

It was formerly sufficient, in order to hold to bail in *trover*, to make a general affidavit, that the defendant had possessed himself of divers goods and chattels of the plaintiff, of the value, &c. which he had refused to deliver to the plaintiff, and had converted the same to his own use.(e) But an affidavit, stating that the defendant was indebted to the plaintiff "in *trover*,"(f) or that the defendants had possessed themselves of certain goods, &c. of the plaintiff, *and of other persons*,(g) or that "the plaintiff's cause of action against the defendant was for converting and disposing of divers goods of the plaintiff, to the value of 250*l.* which he refused to deliver, though the plaintiff had demanded the same, and that neither the defendant nor any person on his behalf had offered to pay to the plaintiff the 250*l.* or value of the goods,"(h) has been deemed insufficient. And to obtain a judge's order, under the late rule,(i) the affidavit should fully set forth the circumstances under which the defendant had possessed himself of the goods, the particulars of which they consist, and the value of them, and in what manner the defendant has converted them to his own use. In order to hold to bail in *trover* for a bill of exchange, it should be stated that the bill remains unpaid.(k) And an affidavit to hold to bail in *trover* by the assignees of a bankrupt, stating that "the defendant possessed himself of the goods, which he refused to deliver, and has converted them to his own use, as appears by the bankrupt's books of account, and by the *letters of S. (the agent,) and letters of the plaintiffs, [*187] *as deponent believes*," was holden not to be sufficiently certain, to show a conversion; and therefore the court discharged the defendant on common bail.(a)

An affidavit to hold to bail on the *lottery* act, must specify the nature of the offence, and aver that the defendant has incurred the forfeiture:(b) but the offence need not be described circumstantially, nor is the plaintiff obliged to swear, that the defendant is indebted to him to the amount of

(c) 8 Moore, 107. 1 Bing. 242, S. C.

(e) Append. Chap. X. § 82, &c.

(g) *Per Cur. T.* 42 Geo. III. K. B.

(i) R. II. 48 Geo. III. K. B. C. P. & Excheq. *Ante*, 172. And for the form of an affidavit in *trover*, since the above rule, see Append. Chap. X. § 85.

(k) 7 Durnf. & East, 321.

(a) 2 Maule & Sel. 563.

(d) 3 Bing. 126.

(f) 1 H. Blac. 218.

(h) 7 Durnf. & East, 550.

And for the form of an affidavit

(b) 1 Durnf. & East, 705.

the penalty: (c) In such an affidavit, several offences of the same nature may be included: (d) and it need not state that the defendant received any consideration for making the insurances, or set out the plaintiff's authority to bring the action. (ee)

By the *Bank acts*, (ff) which were passed during the late reign, for restraining cash payments, the affidavit to hold to bail was required to state, that no offer had been made to pay the sum sworn to, in notes of the governor and company of the Bank of *England*, expressed to be payable on demand, (fractional parts of the sum of 20s. only excepted.) (g) These acts of parliament were construed to extend to affidavits made in *Ireland*, for the purpose of being used in this country: (h) And if an affidavit was made here, to be used in *Ireland*, it must have negatived the tender in *Irish*, as *English* bank notes. But the acts did not apply to the case of a defendant holden to bail in *trover*, which could only be done under a judge's order, on an affidavit of the circumstances. (i) By these acts, (k) "no action or suit could have been prosecuted against the governor and company of the Bank of *England*, during the continuance of the restriction thereby imposed on payments by the said governor and company in cash, to compel payment of any note of the said governor and company, expressed to be payable on demand, or of any note of the said governor and company, made payable otherwise than on demand, or of any sum of money whatsoever by the said governor and company, which they were willing to pay in their notes expressed to be payable on demand." But in other cases, bank notes, if objected to, were not made a legal tender by these acts: (l)

though they are so considered, if not objected to at the time. (m)
 [*188] *It was not necessary, however, that the affidavit should be very particular, in negating a tender in bank notes: for, by the statute 43 Geo. III. c. 18, § 2, it was enacted, that "in case of any application to any of his majesty's courts in *Westminster hall*, by any person who had been or should be held to special bail, under or by virtue of any process out of such court, to be discharged upon common bail, by reason of any defect in such part of the affidavit on which he was so held to bail, as negatived or was intended to negative any offer having been made to pay the sum in such affidavit mentioned, in notes of the governor and company of the bank of *England*, the person or persons making such application so to be discharged, should not be entitled to such discharge, unless

(c) *Id.* 2 Durnf. & East, 654.

(d) 4 Durnf. & East, 228.

(ee) 6 Durnf. & East, 640; and see 2 H. Blac. 17. Append. Chap. X. § 81.

(ff) 37 Geo. III. c. 45, § 9. 37 Geo. III. c. 91, § 8. 38 Geo. III. c. 1, § 8. 42 Geo. III. c. 40. 43 Geo. III. c. 18, § 2; and see the statutes 51 Geo. III. c. 127; 52 Geo. III. c. 50; 53 Geo. III. c. 5; and 54 Geo. III. c. 52, for preventing bank notes from being received for less than the sum specified therein, &c.; and stat. 59 Geo. III. c. 23, for restraining, and *id.* c. 49; 1 & 2 Geo. IV. c. 26, for the gradual resumption of cash payments. And for the determinations on these acts, see the *eighth* edition of this work, p. 187, &c.

(g) Append. Chap. X. § 1.

(h) *Nesbitt v. Pym*, 7 Durnf. & East, 376, *in notis*; *Stewart v. Smith*, 1 Bos. & Pul. 132, *in notis*, S. P. *Ante*, 181.

(i) 4 Price, 307. *Ante*, 171, 2, 186.

(k) See stat. 37 Geo. III. c. 43, § 2, and the other statutes referred to in note (f), *opposite*.

(l) 2 Bos. & Pul. 526. And see the statute 56 Geo. III. c. 68, § 11, by which gold coin is declared to be the only legal tender.

(m) 3 Durnf. & East, 554. 4 Esp. Rep. 267. *Per Buller J.* in *Wilby v. Warren*, Sit. *Mid.* after M. T. 28 Geo. III. K. B., and he held, that the same doctrine applied to a draft on a banker.

he she or they should at the same time make proof, by affidavit, that the whole sum of money, for which he she or they had been so held to bail, had been or was, before such holding to bail, offered to be paid, either wholly in such notes, or partly in such notes and partly in lawful money of this kingdom." This statute, however, was not intended to remedy the total omission of a clause in the affidavit, negating a tender in bank notes, but merely to cure formal slips.(a) And by the statute 59 Geo. III. 49, § 1, the restrictions on payments in cash, under the several bank acts, finally ceased and determined on the *first* day of *May* 1823: So that it is no longer necessary to negative a tender of the debt in bank notes, in an affidavit to hold to bail.

Lastly, it is a general rule, that the affidavit to hold to bail should be *single*: and therefore if it contain two or more different causes of complaint, that cannot be joined in the same action, either at the suit of one or several plaintiffs,(b) or against one(e) or several(d) defendants, it is irregular, and the courts on motion will set aside the proceedings.(e)

If there be *no* affidavit, or the affidavit be *defective*,(f) or materially different from the process(g) or declaration,(g) or not *duly filed*,(h) or if the sum sworn to be not *indorsed* on the writ,(i) the court will discharge the defendant upon common bail. But if the affidavit be merely informal, the defendant cannot object to it, after he has *voluntarily* given a bail-bond,(k) put in(l) or perfected(m) bail above, taken the declaration out of the office,(n) *pleaded to the action,(aa) or let judgment go by default.(bb) And it is a rule in the King's Bench, that when the affidavit to hold to bail is regular, the court will not go out of it, or prejudge the cause, by entering into the merits upon which it is founded.(cc)[A] The plaintiff, therefore, in that court, must stand or fall by his affidavit; it being the constant and uniform practice of the court, in cases of arrest, not to receive a *supplemental* or *explanatory* affidavit on the part of the plaintiff, nor a *counter* or *contradictory* one on the part

(a) *Wood v. Jenkins*, M. 45 Geo. III. K. B. 2 Smith, R. 156, S. C. and see 1 Bos. & Pul. 176. 7 Taunt. 405. 1 Chit. Rep. 58, (a). 59, 60, 161, (a). 2 Chit. Rep. 18. 9 Price, 322.

(b) 6 Durnf. & East, 688.

(c) 5 Burr. 2690.

(d) Doug. 217. *Fry v. Montgomery and others*, M. 26 Geo. III. K. B. 4 Durnf. & East, 577, 695. 5 Durnf. & East, 234, 722. 4 East, 589. 1 Maule & Sel. 55. Barnes, 70. 1 Bos. & Pul. 49. 2 New Rep. C. P. 82. 1 Marsh, 274.

(e) See further, as to the affidavit to hold to bail, Petersd. Part I. Chap. V.

(f) 7 Durnf. & East, 375.

(g) *Post*, Chap. XII.

(h) *Hussey v. Baskerville*, cited in 2 Wils. 225. 2 Taunt. 163. 1 Maule & Sel. 230. 2 Moore, 192. 8 Taunt. 242, S. C.

(i) 2 Wils. 69.

(k) 7 Durnf. & East. 375. 2 Dowl. & Ryl. 252.

(l) 1 East, 330. 1 Maule & Sel. 230. In the latter case, Mr. Justice *Bayley* observed, that there was not any instance, in which the party, after putting in bail above, had been permitted to take advantage of a defect in the affidavit to hold to bail. See also 6 Taunt. 185, C. P. *accord*.

(m) 1 East, 81. 1 Bos. & Pul. 132, S. P.

(n) 7 Durnf. & East, 451.

(aa) 7 Durnf. & East, 376, *in notis*: and see 1 East 77.

(bb) 8 Durnf. & East, 77. 1 East, 19, *in notis*, S. C.

(cc) 1 Salk. 100, but see *Forrest*, 153. 3 East, 169. 2 Chit. Rep. 20. 5 Barn. & Ald. 904. 13 Price, 8. McClel. 2, S. C. 6 Dowl. & Ryl. 24.

[A] See *Samson v. Kulse*, 1 Browne, 341. *Oliver v. Parrish*, 2 Wash. C. C. R. 462. *Champion v. Ross*, 4 Ib. 325. *Conly v. Knight*, 1 Browne, 286. An affidavit need not be signed by the affiant to render it valid, provided it be sworn to and so certified by the proper officer. *Melleus v. Shaffer*, 3 Denio, 60. *Gaddis v. Durashy*, 1 Green, N. J. Rep. 325. *Hitsman v. Garrard*, 1 Harr. 124. And if it begin with the deponent's name it is a sufficient signing. *Huff v. Spicer*, 3 Caines, 190. *Jackson v. Virgil*, 3 Johns. 540. Neither is a date essential, and if stated erroneously, the mistake may be shown. *Freas v. Jones*, 3 Green, 20.

of the defendant.(*dd*)[A] Even an affidavit of the plaintiff's confession, that the defendant owes him nothing, will not be received.(*ee*) This practice however must be understood with reference to the merits of the cause; it being competent to the defendant to show by a *counter* affidavit, that he was privileged from arrest, or had been before holden to bail in this country, for the same cause of action.(*ff*)[B]

In the Common Pleas, where the affidavit to hold to bail is defective, by reason of the omission of some circumstance necessary to complete it, as where it is not sworn, in an affidavit made by an executor, that he believes the debt to be due,(*gg*) or that the defendant acknowledged an account stated,(*hh*) &c., the court will permit the deficiency to be supplied by a *supplemental* affidavit. And so, where the matter of bail is discretionary, as in an action for a malicious prosecution,(*ii*) &c., the court, in determining whether an order shall be granted for special bail, will permit a *contradictory* affidavit to be read on the part of the defendant. But where the affidavit is a mere nullity, as being made by a person convicted of felony,(*k*) or does not contain any positive oath,(*l*) or cause of action,(*m*) the court will not receive a *supplemental* affidavit: nor will they try the merits of the cause on a *contradictory* one, except in cases where the matter of bail is discretionary.(*n*) In the Exchequer, if there be probable ground to suspect that the securities upon which the defendant is held to bail are illegal, the court, it is said, will discharge him upon filing common bail.(*o*)

[*190] *An affidavit to hold to bail continues in force for a year;[c] during which period the defendant may be arrested, on the first or any subsequent process sued out thereon.(*a*) But an affidavit made more than a year before the suing out of the writ, is not sufficient to authorize an arrest, in the King's Bench; for the act requires an oath of a subsisting debt, at the time of suing out the process; and after a year, it will be presumed that the debt has been paid, if nothing appears to the contrary.(*b*) It is therefore necessary that a new affidavit should be made,

(*dd*) 2 Str. 1157. 1 Wils. 335. Say. Rep. 53, S. C. 1 Ken. 424. 2 Wils. 225. 1 Blac. Rep. 192. 2 Bur. 655. 4 Bur. 2017. Doug. 450, 467. — v. *Malone*, M. 22 Geo. III. K. B. *Jacques v. Nixon*, E. 26 Geo. III. K. B. 1 Durnf. & East, 716. 5 Durnf. & East, 552, 3. *Spragg v. Young*, H. 35 Geo. III. K. B. 2 Maule & Sel. 563. 7 Taunt. 408. 1 Moore, 112, S. C. 4 Bing. 148; but see 2 Blac. Rep. 850, 886. 1 H. Blac. 301, C. P.

(*ee*) 1 Wils. 335, and see Forrest, 155. 2 Chit. Rep. 20, (*a*).

(*ff*) 2 East, 453.

(*gg*) 2 Blac. Rep. 850.

(*hh*) Barnes, 100, and see *id.* 87. 1 H. Blac. 248. 1 Bos. & Pul. 36, 228. 2 Bos. & Pul. 110, 298.

(*ii*) Cas. Pr. C. P. 148. Pr. Reg. 66. Barnes, 76, S. C. and see Pr. Reg. 63. Barnes, 61, S. C. *Id.* 72, 87.

(*k*) Pr. Reg. 49. Barnes, 79, S. C. 1 Chit. Rep. 167.

(*l*) 2 Wils. 224.

(*m*) 1 H. Blac. 10. 7 Taunt. 405. 1 Moore, 110, S. C. 4 Moore, 18, 19.

(*n*) Barnes, 61. Pr. Reg. 63, S. C. Barnes, 109. 7 Taunt. 235. 2 Marsh. 548, S. C. 4 Moore, 4.

(*o*) Forrest, 153.

(*a*) *Ante*, 154, 176.

(*b*) 2 Str. 1270. *Pitches v. Davy and others*, H. 44 Geo. III. *Stewart v. Freeman*, E. 47 Geo. III. K. B. but see 1 Bos. & Pul. 176, C. P.

[A] *Tower v. Kingston*, 1 Browne, 33. *Eldridge v. Robinson*, 4 Serg. & R. 548. *Campbell v. Grove*, 2 Johns. Cases, 105. *Norton v. Barnum*, 20 Johns. 337.

[B] Generally, counter affidavits are not admitted where the affidavit is positive as to the debt or merits. *Welsh v. Hill*, 2 Johns. 100; *Jordan v. Jordan*, 6 Wend. 524. *Hart v. Faulkner*, 5 Johns. 362, admits the principle, but that case was not within it.

[C] *Corrin v. Wellington*, 2 Miles, 267.

before a writ is sued out, when more than a year has elapsed since the making of the former affidavit.[A]

Having thus shown for what cause of action, and upon what affidavit, the defendant may be arrested and held to special bail, it will next be proper to consider the *privilege* from arrest; which is *personal*, *temporary*, or *local*:(c) and either existed at common law, or was created by act of parliament.[B]

Where the defendant is not subject to a *capias*, he cannot of course be arrested and held to special bail. Thus, in the first place, not to mention the sovereign, it is holden that the *servants in ordinary* of the *king*, or *queen regent*, though subject to a *capias*, ought not to be arrested, even upon process of execution,(d) without notice first given to, and leave obtained from the lord chamberlain of his majesty's household:(e) And a servant of this nature is not liable to be arrested, although the debt be contracted in the course of trade, which he publicly carries on.(f) But the servants of a queen *consort* or *dowager* have no such privilege.(g) And as the privilege is confined to the king's servants in ordinary with fee, in regard of their attendance on his person, it has been determined, that a gentleman of the king's privy chamber,(h) or the fort major or deputy governor of the tower of *London*,(i) is not privileged from arrest. So, where one of the wardens of the *tower*, on being arrested, claimed his privilege, but afterwards executed a bail-bond, the court refused to order it to be delivered up to be cancelled.(kk) The *king* hath moreover a special prerogative, (which indeed is very seldom exerted,) that he may, by his *writ of protection*, privilege a defendant from all personal and many real suits, for one year at a time, and no longer, in respect of his being engaged in his service out of the

(c) 2 Salk. tit. *Privilege*. And see further, as to the privilege from arrest, and what persons may or may not be arrested, and held to special bail, Petersd. Part. Chap. III.

(d) 5 Durnf. & East, 686; but see 2 Chit. Rep. 46. 1 Dowl. & Ry. 127, n.

(e) T. Raym. 152. 2 Keb. 3, 485; but see 1 Barn. & Cres. 139. 2 Dowl. & Ry. 250, S. C.

(f) 2 Taunt. 167.

(g) 1 Keb. 842, 877.

(h) 2 Barn. & Ald. 234. 1 Dowl. & Ry. 79.

(i) 2 Chit. Rep. 48, 51; and see 6 Barn. & Ald. 139. 2 Dowl. & Ry. 250, S. C.

(kk) 6 Barn. & Cres. 84. 9 Dowl. & Ry. 153, S. C.; and see 1 Moore & P. 309. 4 Bing. 523, S. C.

[A] Recent legislation in England has materially changed many of the positions stated by Mr. Tidd, but inasmuch as the whole subject-matter of this chapter has been modified in this country, the reader is referred simply to the later books of English practice, where he will find all that can be useful by way of analogy. See 1 Chitty's Archbold's Pract. p. 662, 8 Ed. Exchequer Dig. tit. Affidavit, and Affidavit to hold to Bail.

[B] Imprisonment for debt in most of the states no longer exists. Arrests cannot be made except in the cases specially provided in the statutes. It is not within the scope of these notes to do more than refer to the several statutes without stating their various and complicated provisions. See Rev. Stat. Maine, Title 10, p. 624, 2d Ed. 1847. Rev. Stat. Verm. Tit. 11, ch. 28, p. 187, 188, Ed. 1840. New Hamp. Comp. Stat. Tit. 21, ch. 197, p. 476, Ed. 1853. Mass. Rev. Stat. Pt. 3, Tit. 2, p. 560, Ed. 1836. Curwen's Laws of Ohio, 1185, Ed. 1854. Rev. Stat. New York, p. 744, Ed. 1848. Gen. Stat. of New York, Pt. 2, Tit. 7, Ch. 1, p. 242, 418 and note, Blatchford's Ed. 1852. Nixon's Elmer's Dig. New Jersey, p. 330. Ed. 1855. Rev. Stat. N. J. p. 323, Ed. 1847. Brightly's Purd. Dig. Penn. p. 28, Ed. 1853. Laws of Delaware, Tit. 16, Ch. 102, 103, p. 368, Ed. 1852. Michigan Rev. Stat. Pt. 3, Tit. 1, Ch. 5, p. 391. Arkansas Rev. Stat. p. 38, Ed. 1838. Const. Arkan., Art 7, Sect. 11. Dorsey's Laws of Maryland, Vol. 1, p. 460, Ed. 1840.

[*191] realm. And the king also, by the common law, might *take his debtor into his protection, so that no one might sue or arrest him, till the king's debt were paid: but by the statute 25 Edw. III. stat. 5, c. 19, notwithstanding such protection, another creditor may proceed to judgment against him, with a stay of execution till the king's debt be paid unless such creditor will undertake for the king's debt, and then he shall have execution for both.(a)

By the law of nations,[A] as declared by the statute 7 Ann. c. 12, *Ambassadors*, and other *public ministers*,(b) are privileged from arrest; as are also their domestic servants; it being enacted by the above statute, that "all writs and process against the person or goods of an *ambassador* or other *public minister* of a foreign prince or state, or the *domestic servant* of such ambassador or public minister, shall be utterly null and void, to all intents and purposes whatsoever." But a *consul* is not considered as a public minister, nor consequently privileged from arrest.(c) And it has been adjudged,(d) that a defendant claiming the benefit of this act, as domestic servant to a public minister, must be really and *bonâ fide* his servant, at the time of the arrest;(e) and must clearly show by affidavit, the general nature of his service, and actual performance of it, and that he was not a trader or object of the bankrupt laws.(f) For, by the laws of nations, a public minister cannot protect a person who is not *bonâ fide* his servant. It is the law that gives the protection: and though the process of the law shall not take a *bonâ fide* servant out of the service of a public minister, yet, on the other hand, a public minister shall not take a person, who is not *bonâ fide* his servant, out of the custody of the law, or screen him from the payment of his just debts.(g) So, where the servant of an ambassador did not reside in his master's house, but rented and lived in another, part of which he let in lodgings; the court held, that his goods in that house, not being necessary for the convenience of the ambassador, were liable to be distrained for the poor rates.(h) And where the wife of an ambassador's secretary was arrested, upon a writ issued against her and her husband, the court refused to quash the writ, though the husband swore that, before and at the time of the arrest, he was in the actual employment of the ambassador, and in daily attendance upon him, in writing dispatches, and other official documents; it not being sworn that he was a domestic servant, or employed in the ambassador's house.(i)

This privilege, however, has been long settled to extend to the servants of a public minister, being *natives* of the country where he resides, as well as to his *foreign* servants;(k) and not only to servants lying in [*192] his house, *for many houses are not large enough to contain and lodge all the servants of some public ministers, but also to real

(a) 3 Blac. Com. 289, 90.

(b) Cas. temp. Talb. 281. 4 Bur. 2016.

(c) 3 Maule & Sel. 284; and see Cas. temp. Talb. 281. 3 Bur. 1481, S. C. cited. Com. Dig. tit. *Ambassadors*, B. 1 Taunt. 106. 9 East, 447, by which it appears that this point was formerly considered as doubtful.

(d) 2 Str. 797. 2 Ld. Raym. 1524. Fitzgib. 200, S. C. 1 Wils. 20, 78. 1 Blac. Rep. 48. 1 Bur. 401. 3 Bur. 1478. 1 Blac. Rep. 471, S. C. 3 Bur. 1676, 1731. 3 Wils. 33, and see 3 Campb. 47.

(e) *Flint v. De Loyant*, M. 42 Geo. III. K. B.

(f) See the statute, § 5.

(g) 4 Bur. 2016, 17.

(h) 1 Barn. & Cres. 554. 2 Dowl. & Ryl. 833, S. C.

(i) 3 Dowl. & Ryl. 25.

(k) 3 Bur. 1676.

[A] See Wheaton's Elm. Inter. Law, p. 139, 3d Ed. 1846.

and actual servants lying out of his house : (a) Nor is it necessary, to entitle them to the privilege, that their names should have been registered in the secretary of state's office, and transmitted to the sheriff's office ; (b) though, unless they have been so registered and transmitted, the sheriff or his officers cannot be proceeded against for arresting them. (c) And it is not to be expected, that every particular act of service should be specified : 'Tis enough, if an actual *bonâ fide* service be proved : and if such a service be sufficiently made out by affidavit, the court will not, upon bare suspicion, suppose it to have been merely colourable and collusive. (d)

By the common law, *Peers* of the realm of *England*, (e) and *Peeresses*, whether by birth or marriage, (f) are constantly privileged from arrest in civil suits, on account of their dignity, and because they are supposed to have sufficient property, by which they may be compelled to appear : which privilege is extended, by the act of union with *Scotland*, (g) to *Scotch* peers and peeresses ; and by the act of union with *Ireland*, (h) to *Irish* peers and peeresses. An *Irish* peer, who has voted in the election of representative peers, cannot be arrested or sued by *capias*. 7 Barn. & Cres. 388. 1 Man. & Ryl. 110, S. C. And they are not liable to be *attached*, for the non-payment of money, pursuant to an order of *nisi prius*, which has been made a rule of court. (i) But this privilege will not exempt them from *attachments*, for not obeying the process of the courts ; (k) nor does it extend to peeresses by marriage, if they afterwards intermarry with commoners. (l) And though the *servants of peers*, necessarily employed about their persons and estates, could not formerly have been arrested, (m) yet this privilege seems to have been taken away by the statute 10 Geo. III. c. 50, § 1. (n) Where a *capias* issues against a *peer*, the court will set aside the proceeding for irregularity : (o) But it seems, that the sheriff is not a trespasser for executing it. (p) And the court will not, on motion, cancel a bail-bond, given by a person claiming to be an *Irish* peer, unless his peerage be clearly made out. (q)

By the law and custom of parliament, *Members of the House of Commons* are privileged from arrest, not only during the actual sitting of parliament, but for a convenient time, sufficient to enable them to come from, and return to any part of the kingdom, before the first meeting, and after the *final dissolution of it ; (aa) and also for *forty* days (bb) [*193] after every prorogation, and before the next appointed meeting : which is now in effect as long as the parliament exists, it being seldom

(a) 2 Str. 797. 3 Wils. 35, and see 1 Barn. & Cres. 563. 2 Dowl. & Ryl. 480, S. C., per Abbott, Ch. J.

(b) 4 Bur. 2017. 3 Durnf. & East, 79.

(c) See the statute, § 5. 1 Wils. 20, and a modern order.

(d) 3 Bur. 1481.

(e) 6 Co. 52. 9 Co. 49, a. 68, a. Hob. 61. Sty. Rep. 222. 2 Salk. 512. 2 H. Blac. 272. 3 East, 127.

(f) 6 Co. 52. Sty. Rep. 252. 1 Vent. 298. 2 Chan. Cas. 224.

(g) 5 Ann. c. 8, art. 23, and see Fort. 165. 2 Str. 990.

(h) 39 & 40 Geo. III. c. 67, art. 4 ; but see 7 Taunt. 679. 1 Moore, 410, S. C.

(i) Ld. *Falkland's* case, E. 36 Geo. III. K. B. 7 Durnf. & East, 171, and see *id.* 448.

(k) 1 Wils. 332. Say. Rep. 50, S. C. 1 Bur. 631.

(l) Co. Lit. 16. 2 Inst. 50. 4 Co. 118. Dyer, 79.

(m) *Ordo Dom. Proc.* 28 Junii. 1715. 1 Mod. 146. 2 Str. 1065. 1 Wils. 278.

(n) 5 Durnf. & East, 687. 1 Chit. Rep. 83.

(o) 4 Taunt. 668. *Ante*, 118. (p) Doug. 671.

(q) 3 Dowl. & Ryl. 488.

(aa) Stat. 10 Geo. III. c. 50. 2 Str. 985. Fort. 159. Com. Rep. 444, S. C. 1 Ken. 125.

(bb) 2 Lev. 72. 1 Chan. Cas. 221, S. C., but see 1 Sid. 29.

prorogued for more than fourscore days at a time.(cc)[A] And the courts will not grant an attachment against a member of the house of commons, for non-payment of money pursuant to an award.(dd)

Members of convocation are allowed, by statute(e) the same privilege from arrest in coming, tarrying, and returning, as members of the house of commons. And members of *corporations aggregate*(f) and *hundredors*,(g) not being liable to a *capias*, cannot be arrested for any thing done in their corporate capacity, or on the statute 7 & 8 Geo. IV. c. 31.

Attorneys and other *Officers*, on account of the supposed necessity of their attendance, in order to transact the business of the courts, are generally speaking, privileged from arrest.(h) And a *barrister* has been discharged from an arrest on the circuit.(i) But the sheriff cannot take notice of their privilege;(k) nor is he bound to discharge them, even upon producing their writs of privilege, except where the arrest was by process issuing out of an *inferior* court, in which case their writs of privilege ought to be allowed *instantanter*.(l)

All other persons, being subject to a *capias*, were formerly liable to be arrested. And indeed, before the statute 12 Geo. I. c. 29, where a *capias* issued, there was no other way of bring them into court. But *executors* and *administrators* are privileged from arrest, where they merely act *en auter droit*, and have duly administered the effects of the deceased;(m) though where an executor or administrator hath personally promised to pay a debt or legacy,(n) he may be arrested on such promise. So, he may be arrested in an action of *debt* on judgment, suggesting a *devastavit*;(o) if it appear by affidavit, or the sheriff's return,(p) that he has *wasted* the effects of his testator, or intestate. *Heirs* and *devisees*, in like manner are privileged from arrest, when sued on the obligation of their ancestors, or devisors: For although an heir, having assets by descent in fee simple, is liable to be sued in the *debet* and *detinet*, on the obligation of his ancestor; yet the action, being rather instituted to recover the value of the assets descended and in his possession, than brought against him personally, he cannot be arrested and holden to bail on his ancestor's bond: And the

[*194] *same rule and reasoning apply to devisees, chargeable under the statute 3 & 4 W. & M. c. 14.

In an action against *Husband* and *Wife*, the husband alone is liable to be arrested, on *mesne* process; and shall not be discharged, until he have put in bail for himself and his wife.(a) If the wife be arrested on *mesne* pro-

(cc) 1 Blac. Com. 165.

(dd) 7 Durnf. & East, 448.

(e) 8 Hen. VI. c. 1. 1 Eq. Cas. Abr. 349.

(f) Bro. Abr. tit. *Corporation*, 43.

(g) 3 Keb. 126, 7.

(h) 1 Mod. 10, but *vide ante*, 80, 81.

(i) 1 H. Blac. 636.

(k) Co. Lit. 131. 1 Salk. 1, and see Doug. 671. 4 Taunt. 631. 4 Moore, 36, (b).

(l) Cas. Pr. C. P. 2. 2 Blac. Rep. 1087. *Ante*, 81.

(m) Yelv. 53. Brownl. 293. 3 Bulst. 316. R. M. 15 Car. II. reg. 2. K. B. R. M. 1654, 2 12, C. P. Gilb. C. P. 37.

(n) 1 Durnf. & East, 716.

(o) 1 Sid. 63. 1 Lev. 39. Carth. 264. 1 Salk. 98. Highmore on *Bail*, 10.

(p) Comb. 206, 325.

(a) 1 Vent. 49. 1 Mod. 8, S. C. 6 Mod. 17, 86, R. E. 5 Geo. II. 1, (b), K. B. 1 Barn. & Ald. 165. 2 Dowl. & Ryl. 225; but see 1 H. Blac. 235.

[A] Members of Congress are also privileged. *Lewis v. Elmendorf*, 2 Johns. Cas. 222. *Cox v. M' Lanahan*, 3 Dall. 478. *United States v. Cooper*, 4 Id. 341. *King v. Coil*, 4 Day, 133. *Gibbs v. Mitchell*, 2 Bay, 406; and members of the State Legislatures or State Conventions. *Calvin v. Morgan*, 1 Johns. Cas. 415. *Correy v. Russell*, 4 Wend. 204. *Bolton v. Martin*, 1 Dall. 296.

cess, she shall be discharged on common bail; and that, whether she be arrested singly,^(b) or jointly with her husband.^(c) But where the wife is taken in *execution*, she shall not be discharged;^(d) unless it appear that she has no separate property, out of which the demand can be satisfied;^(d) or that there is fraud and collusion between the plaintiff and her husband, to keep her in prison.^(e) And where a woman, who had given a warrant of attorney, married during the term, and was afterwards taken in execution, on a judgment signed as of that term, and therefore having relation to the first day of the term, it was holden that she could not be relieved.^(f) In an action against the wife only, if it be clear and notorious that she is covert, the court will discharge her out of custody, upon her own affidavit of the fact, which must be positively sworn to,^(g) and that her husband is alive; or, if she has given a bail-bond, will order it to be delivered up to be cancelled, on filing common bail, or entering a common appearance;^(h) unless she has deceived the plaintiff, by representing herself to be a feme sole.⁽ⁱ⁾ And common bail was ordered, in a case where the plaintiff, at the time of giving credit to the defendant, knew that she was a married woman, though living apart from her husband, with a separate maintenance.^(k) So where a feme covert, separated from her husband by a sentence of divorce *a mensâ et thoro*, was holden to bail, while an appeal was still pending against the sentence, the court, on motion, ordered the bail-bond to be cancelled, on her entering a common appearance.^(l) In order to entitle a feme-covert to her discharge, it is not necessary that her coverture should be known to the plaintiff; nor is it sufficient to prevent it, that she has appeared and acted as a feme sole, and obtained credit in that character, unless she represented herself to be single.^(m) And where no fraud was intended, the court of King's Bench discharged her on common bail; though at the time of the credit given her by the plaintiff, she informed him by mistake that her husband was dead.⁽ⁿ⁾ But if the fact *of the coverture be [*195] doubtful, or the defendant has obtained credit by imposing herself on the plaintiff as a feme sole, she must find special bail, and plead her coverture, or bring a writ of error.^(a) And the court of Common Pleas refused to discharge a defendant on the ground of coverture, she being a *foreigner*, and her husband abroad; though she was not separated from him by deed, had no separate maintenance, nor had ever represented herself as a single woman.^(bb) So that court would not upon a summary application;

(b) Cro. Jac. 445. Pr. Reg. 65, G. 1 Barn. & Ald. 165. 6 Moore, 128.

(c) 1 Lev. 216. 1 Salk. 115. 6 Mod. 17. 2 Str. 1272. 1 Durnf. & East, 486. 2 Dowl. & Ry. 225, K. B. Barnes, 96. 3 Wils. 124. 2 Blac. Rep. 720, S. C. 6 Moore, 128, C. P., but see 1 Taunt. 254, *contra*.

(d) *Chalk v. Deacon & wife*, T. 2 Geo. IV. C. P. 6 Moore, 128, and see 5 Barn. & Ald. 759.

(e) 2 Str. 1167, 1237. 1 Wils. 149, K. B. Barnes, 203. 3 Wils. 124. 2 Blac. Rep. 720, S. C. C. P.

(f) *Per Bayley, J. in Triggs v. Triggs*, Trin. Vac. 1815. Man. Excheq. 67, 8, and see 4 East, 521.

(g) 5 Barn. & Ald. 747.

(h) 2 H. Blac. 17. 3 Taunt. 307.

(i) 6 Mod. 105. 7 Mod. 10. 6 Durnf. & East, 451. 1 New Rep. C. P. 54.

(k) 7 East, 582. 3 Taunt. 307.

(l) 6 Moore, 265. 3 Brod. & Bing. 92, S. C., and see 3 Barn. & Cres. 291.

(m) 1 New Rep. C. P. 54.

(n) 1 East, 16.

(a) *Wilson v. Campbell*, M. 20 Geo. III. K. B. 2 Blac. Rep. 903. 3 Bos. & Pul. 220. 5 Durnf. & East, 194. 1 East, 16.

(bb) 2 New Rep. C. P. 380. *March v. Capelli*, H. 39 Geo. III. 1 East, 17, (a), *semb. contra*;

cancel the bail-bond, and permit the defendant to enter a common appearance, where a great part of the debt sued for was contracted before she disclosed her coverture, and it appeared that she had acted with great duplicity in eluding payment, and, at the time of the application, was residing out of the jurisdiction of the court.(c) Where a married woman had been arrested as *acceptor* of a bill of exchange, at the suit of an *indorsee*, the court of Common Pleas would not order the bail-bond to be cancelled on an affidavit that the *drawer*, when he drew the bill, knew the defendant to be a married woman:(d) And where a woman was arrested as *drawer* of a bill, at the suit of an *indorsee*, that court refused to discharge her, on the affidavit of a third person, that she was married.(e) But where a married woman had been arrested as *acceptor* of a bill of exchange, at the suit of an administratrix, to whose intestate the bill was indorsed, the court ordered the bail-bond to be delivered up to be cancelled, on an affidavit that the drawer and intestate knew, at the time the bill was drawn, accepted and indorsed, that the defendant was married.(f) If a plaintiff knowingly arrest a married woman, the court of Common Pleas will make him pay the costs of the motion for her discharge:(g) And, in the Exchequer, the court would not order a *feme covert* to pay costs, nor impose any terms, on her being discharged, although it was sworn that she was carrying on business on her own separate account, and that the action was brought for goods furnished to her in the way of her trade.(h)

The *Parties* to a suit, and their *Attorneys* and *Witnesses*, are for the sake of public justice, protected from arrest, in coming to, attending upon, and returning from the courts; or, as it is usually termed, *eundo, morando, et redeundo*.(i)[A] And this protection extends to persons attending the insolvent debtors' court;(k) or who come from abroad to give [*196] evidence, *without a *subpœna*.(a) Nor have the courts been nice in scanning this privilege; but have given it a large and liberal construction. Thus a plaintiff, who was attending from day to day at the sittings, in expectation of his cause being tried, was held to be privileged from arrest, whilst waiting for that purpose at a coffee house in the vicinity of the court, before the actual day of trial.(b) And where the defendant was attending his cause at the sittings, and though it was put off early in the day, stayed in court till five in the afternoon, and then went with his attorney and witnesses to dine at a tavern, where he was arrested during dinner; the court held, that such a necessary refreshment as this ought not to be looked upon as a deviation, so as to cancel the defendant's privilege *redeundo*.(cc) So where a witness, having attended a trial at *Winchester* assizes, which was over on Friday about four in the afternoon, was arrested on Saturday about seven in the evening, as she was going home in a coach to *Portsmouth*, the court held that

but this was said by *Heath, J.* to be a very loose note. 2 New Rep. C. P. 381; and see 2 Salk. 646. 2 Esp. Rep. 554. 1 Bos. & Pul. 357.

(c) 1 Bing. 344. 3 Moore, 346, S. C.

(d) 2 Marsh. 40.

(e) 7 Taunt. 55. 2 Marsh. 385, S. C.

(f) 2 Moore, 211.

(g) 3 Taunt. 307.

(h) 9 Price, 161.

(i) 2 Rol. Abr. 272. 2 Lil. P. R. 369. 1 Mod. 66, S. C. 1 Vent. 11. Gilb. C. P. 207, &c., Barnes, 27, 378. 2 Str. 986. Peake's Evid. 5 Ed. 193, 9. 1 Campb. 229. 4 Moore, 34.

(k) 6 Taunt. 356. 2 Marsh. 57, S. C.

(a) *Walpole v. Alexander*, H. 22 Geo. III. K. B.

(b) 11 East, 439.

(cc) 2 Blac. Rep. 1113.

[A] See 1 Greenl. on Evid., § 316, 317, 318.

she ought to be discharged, her protection not being expired; and that a little deviation or loitering would not alter it.(d) There is indeed a case in the year books,(ee) where a man was arrested in a town, which was forty miles out of his way, and yet was allowed his privilege; for perhaps, it is said, he went there to buy a horse, or other necessities for his journey. But the sheriff, not being bound to take notice of the privilege of a witness, is not liable to an action of false imprisonment for arresting him when privileged *redeundo* from attending the court.(ff) And where an attorney had been attending a cause at the *Middlesex* sittings in term, which was put off to the adjournment day, after which he went with his witnesses to a coffee house, where he was arrested, three hours after the rising of the court, on an attachment for non-payment of money, the court held that an attorney was not to be allowed so long a time to speak to his witnesses on such an occasion, before he went home; and that he was properly taken.(g) In the same case, the attorney having been discharged, on payment of the money for which the attachment issued, was taken in execution at the door of the court, as he was going away; and the court held, that as he was decided to have been in legal custody, he was not entitled to any privilege *redeundo*.

The privilege we are speaking of has been holden to extend to all persons who have any relation to a cause, which calls for their attendance in court, and who attend in the course of that cause, though not compelled by process; such as bail, &c.(h) And it has been determined, that the party to a cause is privileged from arrest for debt, during his attendance on an arbitration, under an order of *nisi prius*, made a rule of court;(i) or *on [*197] the execution of a writ of inquiry.(a) So, the summons of an arbitrator, to whom a cause has been referred by order of the court of Chancery, protects a party from arrest, under process of the court of King's Bench, whilst employed in *bona fide* obedience to the summons.(b) But where a party residing in *London*, was summoned to attend an arbitrator at *Exeter*, and required to bring with him certain papers then at *Clifton*, and he went to the latter place, where all his papers were, to make a selection, and having stayed there more than *twenty-four* hours for that purpose and necessary refreshment, was arrested; a majority of the judges of the court of King's Bench held, that he was not entitled to be discharged out of custody, having no right to stop and sort his papers.(b) It is likewise holden, that all persons attending under the summons of commissioners of bankrupt, are protected from arrest:(c) And a witness attending commissioners, in order to tender his testimony upon a subject of inquiry before them, without having been summoned for that purpose, is privileged from arrest during such attendance and in returning.(dd) But the court of King's Bench would not discharge a

(d) Gilb. Cas. K. B. 308. 2 Str. 986, S. C. cited.

(ee) Bro. Abr. tit. *Privilege*, 4.

(ff) 2 Blac. Rep. 1190.

(g) *Rez v. Priddle*, M. 27 Geo. III. K. B., and see 1 Smith, R. 355.

(h) *Walpole v. Alexander*, H. 22 Geo. III. K. B. 1 H. Blac. 636. 1 Maule & Sel. 638. 2 Rose, 23, (d).

(i) 2 Blac. Rep. 1110. 1 Durnf. & East, 536. 3 East, 89. 3 Barn. & Ald. 252. 1 Chit. Rep. 679, S. C. *Id.* 682.

(a) 4 Moore, 34.

(b) 3 Barn. & Ald. 252. 1 Chit. Rep. 679, S. C. But, in the same case, a majority of the judges of the court of Exchequer were of a different opinion. 1 Chit. Rep. 682. 7 Price, 699.

(c) 7 Ves. 312. 1 Rose, 265, n.

(dd) 1 Ves. & B. 316. 1 Rose, 451, S. C., *sed quare* if protected *eundo*? *Id.*

person in custody by process of the sheriff's court, in a cause afterwards removed into the King's Bench, because he was arrested while attending commissions of bankrupt, to prove a debt.(e) A witness is not privileged from arrest by his bail, on his return from giving evidence:(f) And where he has absconded from his bail, he may be retaken by them, even during his attendance in court.(gg) So, a capital burgess of a borough, attending an election of co-burgesses, under a summons from the mayor, issued in obedience to a *mandamus*, directing the corporation to proceed to such election, is not privileged from arrest, during his attendance there for that purpose.(hh) If a party be arrested, in coming to attend the trial of his cause, the judge at *nisi prius* will grant a *habeas corpus* to discharge him; and will put off the trial until he is released.(ii) So, where a witness from the country, on his arrival in *London*, for the purpose of giving evidence in a cause which stands for trial during the sittings, is arrested for debt, the proper course for obtaining his discharge, is to bring him before a judge at chambers, by writ of *habeas corpus*.(k) If a defendant be arrested by *quo minus*, while protected as a suitor, by the privilege of the Common Pleas, he may be discharged either by that court, or the court of Exchequer.(l) And where a solicitor was arrested on his way to *Lincoln's Inn Hall*, for the purpose of attending a petition in bankruptcy, he was ordered to be discharged on motion, having been first sworn by the Register, and examined [*198] by the *Lord Chancellor.(a) But an arbitrator, or commissioner of bankrupt, is not empowered to discharge a person arrested during his attendance before them;(b) nor can the under sheriff discharge a person arrested, when attending on the execution of a writ of inquiry.(c)

By the *mutiny* and *marine* acts,(d) "all witnesses duly summoned by the judge advocate, or person officiating as such, shall during their necessary attendance on courts martial, and in going to and returning from the same, be privileged from arrest, in like manner as witnesses attending any of his majesty's courts of law are privileged; and if any such witness shall be unduly arrested, he shall be discharged from such arrest, by the court out of which the writ or process issued, by which such witness was arrested, or if the court be not sitting, then by any judge of the court of King's Bench, &c., as the case shall require, upon its being made appear to such court or judge by affidavit, in a summary way, that such witness was arrested in going to, or returning from, or attending upon such court martial."

Seamen, marines, and soldiers are also, under certain circumstances, privileged from arrest. Thus, with regard to *seamen* and *marines*, it is enacted,(ee) that "no person who shall serve as a *petty officer*(ff) or *seaman*,

(e) 4 Durnf. & East, 377, but see 7 Ves. 416. 1 Rose, 265, n. 2 Rose, 24, *semb. contra.*, and see 1 Atk. 55. 2 Blac. Rep. 1142. 1 H. Blac. 636. West on Extents, 95.

(f) 3 Stark. Ni. Pri. 132.

(gg) Dowl. & Ryl. Ni. Pri. 20, and see 1 Sel. Pr. 1 Ed. 180.

(hh) 7 Taunt. 682. 1 Moore, 413, S. C.

(ii) 1 Camp. 229.

(k) 1 Stark. Ni. Pri. 470.

(l) 3 Anst. 941, and see 4 Moore, 36.

(a) 16 Ves. 413. See also 14 Ves. 183, S. P., in which the Lord Chancellor administered the oath, and examined the party, in the absence of the Register.

(b) 4 Moore, 36, *per Park, J.*

(c) 4 Moore, 34.

(d) 7 & 8 Geo. IV. c. 4, § 28.

(ee) Stat. 1 Geo. II. Stat. 2, c. 14, § 15. Barnes, 95, 114, and see the statutes 32 Geo. III. c. 33, § 22. 44 Geo. III. c. 13. 11 East, 25. 9 Geo. IV. c. 3, § 70.

(ff) For a description of *petty* or inferior officers, seamen, and non-commissioned officers of marines, or marine, see the stat. 32 Geo. III. c. 34, § 8.

or be embarked as a *non-commissioned officer* of marines, or *marine*, on board any of his majesty's ships or vessels, shall be liable to be taken out of his majesty's service, by any process or execution whatsoever, either in *Great Britain, Ireland*, or any other part of his majesty's dominions, other than for some criminal matter, unless such process or execution be for a real debt, which shall have been contracted by such petty officer or seaman, non-commissioned officer of marines, or marine, when he did not belong to any ship or vessel in his majesty's service, or other just cause of action; and unless, before the taking out of such process or execution, not being for a criminal matter, or for a debt contracted in the service as aforesaid, the plaintiff or plaintiffs therein, or some other person or persons on his or their behalf, shall make affidavit, before one or more judge or judges of the court of record, or other court out of which such process or execution shall issue, or before some person authorized to take affidavits in such courts, that to his or their knowledge, the sum justly due to the plaintiff or plaintiffs, from the defendant or defendants in the action, or cause of action on which such process shall issue, or the debt or damage and costs for which such execution shall be issued out, amounts to the value of *twenty pounds* at the least, and that such debt, so amounting to twenty pounds or upwards, was contracted by the said defendant, when he did not belong *as aforesaid to any ship in his [*199] majesty's service; a *memorandum* of which oath shall be marked on the back of such process or writ, for which *memorandum* or oath no fee shall be taken."

A similar privilege is allowed, by the annual *mutiny* and *marine* acts,(a) to *volunteer soldiers*, who are not liable to be taken out of his majesty's service, by any process or execution whatsoever, other than for some criminal matter unless for a real debt, or other just cause of action; and unless, before the taking out of such process or execution, (not being a criminal matter,) an affidavit shall be taken as before mentioned, that the original sum justly due and owing to the plaintiff or plaintiffs, from the defendant or defendants in the action, or cause of action on which such process shall issue, or the original debt for which such execution shall be sued out, amounts to the value of *twenty pounds* at least, over and above all costs of suit in the same action, or in any other action on which the same shall be grounded.

These acts have been construed to extend not merely to *common* soldiers, and *troopers*(b) in the life guards, &c. but also to *non-commissioned* or *warrant* officers, as gunners,(c) serjeants, and drummers:(d) For a *serjeant* is a soldier with a halbert; and a drummer is a soldier with a drum.(e) These acts, however, do not extend to *commissioned* officers; nor to the case of *soldiers* imprisoned for disobeying orders of justices,(f) or on any other *criminal* account.(g) And if a non-commissioned officer has been arrested and given bail, the court of Common Pleas will not, after judgment recovered against the bail, set aside the proceedings, and cancel the bail-bond.(h) It should also be observed, that volunteer drill serjeants, &c. though subject to the regulations of the mutiny act, so far as relates to trial

(a) 37 Geo. III. c. 33, § 63, and see 7 & 8 Geo. IV. c. 5, § 70, c. 4, § 129. 9 Geo. IV. c. 4, § 129.

(b) 1 Str. 2. Say. Rep. 107.

(d) 1 Wils. 216. 1 Blac. Rep. 29, S. C.

(f) 2 Durnf. & East, 270.

(h) 4 Taunt. 557.

(c) 1 Str. 7.

(e) 1 Blac. Rep. 30.

(g) 5 Durnf. & East, 156.

and punishment by volunteer courts marshal, according to the statute 44 Geo. III. c. 54, § 21, are not privileged from arrest, for debts under 20*l*. as regular soldiers.(i)

By the same acts of parliament, “if any *petty officer* or *seaman*, *non-commissioned officer* of marines, or *marine*, or any *volunteer soldier*, shall nevertheless be arrested contrary thereto, it shall and may be lawful for one or more judge or judges of the court out of which the process or execution shall issue, upon complaint thereof made by the party himself, or by any of his superior officers, to examine into the same, by the oath of the parties or otherwise, and by warrant under his or their hands and seals, to discharge such petty officer, &c. so arrested, without paying any fee or fees, upon due proof made before him or them, that such petty officer or seaman, non-commissioned officer of marines, or marine, was actually belonging to one of his majesty’s ships or vessels, or that such soldier was legally enlisted as a soldier in his majesty’s service, and arrested contrary to the [*200] intent of the before-mentioned acts ; *and also to award the party so complaining, such costs as such judge or judges shall think reasonable ; for the recovery whereof, he shall have the like remedy, that the person who takes out the said execution might have had for his costs, or the plaintiff in the like action might have had for the recovery of his costs, in case judgment had been given for him with costs, against the defendant in the said action.”(a)

By other acts of parliament,(b) for the speedy and effectual recruiting of his majesty’s land forces and marines, “no person, *listed* by virtue of those acts, shall be liable to be taken out of his majesty’s service, by any process, other than for some criminal matter.” But these latter acts were only meant to privilege such persons as were compelled to serve against their will:(c) or rather to prevent their being taken out of the service, by means of *feigned* actions.

The privilege of *bankrupts* from arrest may be considered in a threefold point of view : first, as it respects the time allowed them for coming to surrender, and finishing their examination ; secondly, after the time allowed for these purposes is expired, and *before* they have obtained their certificates ; and thirdly, *after* they have obtained their certificates.

By the statute 5 Geo. II. c. 30, § 5, bankrupts, who are not previously in custody, were exempted from the arrest of their creditors, in coming to surrender ; and from their actual surrender, for the *two* and *forty* days mentioned in the act,(d) or such further time as should be allowed for finishing their examination : which privilege was allowed in all cases, except that of a surrender in discharge of bail.(e) On this statute it was holden, that the surrender of the bankrupt to the commissioners ; at a private meeting, entitled him to the benefit of this privilege ;(f) and it extended to the end of the forty second day,(g) and afterwards, if the bankrupt surrendered within two and forty days, to the end of the enlarged time allowed by the commissioners, or the lord chancellor, in pursuance of the statute 5 Geo. II. c. 30, § 3.(h) But commissioners of bankrupt were not authorized by that

(i) 8 East, 105.

(a) Stat. 1 Geo. II. c. 14, § 15. 32 Geo. III. c. 33, § 22. 37 Geo. III. c. 33, § 63. 9 Geo. IV. c. 3, § 70, and c. 4, § 129.

(b) 29 Geo. II. c. 4, § 14. 30 Geo. II. c. 8, § 20.

(c) 1 Bur. 339, 466.

(d) § 1.

(e) 5 Durnf. & East, 209.

(f) 1 Rose, 46, 230.

(g) 7 Ves. 317.

(h) 8 Durnf. & East, 475. 3 Esp. Rep. 40, S. C. 1 Rose, 264, *n.* and see stat. 6 Geo. IV. c. 16, § 113.

statute, to enlarge the time, for an indefinite period, in order to enable a bankrupt to make a full disclosure of his estate and effects.(i) Where a bankrupt, whose last examination had been adjourned *sine die*, gave his voluntary attendance before the commissioners, in order to be examined at a meeting under his commission for a distinct purpose, and was there arrested the chancellor held him to be entitled to his discharge.(k) So it was holden, that a bankrupt attending the hearing of a petition for leave to surrender, after the time had expired, was privileged from arrest, as a party attending his own cause.(l) So, a bankrupt attending, upon notice for that purpose, a meeting of the commissioners, to declare a dividend of [*201] *his estate, was protected from arrest, at the suit of a creditor, during such attendance although several years after his last examination.(aa) And where a bankrupt was arrested on a writ of *extent*, while actually attending to give evidence before commissioners of bankrupt, the chancellor discharged him, as being privileged from arrest at common law.(bb) But as the *king* was not bound by the statute 5 Geo. II. c. 30, it was holden, that a bankrupt was not entitled to be discharged by virtue of that statute, when arrested on a writ of *extent*, during the time of privilege.(c) It should also be observed, that the privilege we are now speaking of, is a *particular* privilege, to enable bankrupts to surrender, and till their actual surrender, is confined to the act of going with that view; not a *general* privilege, during the whole time which the act of parliament allows them for that purpose.(d) And they may be taken, in order to be surrendered by their *bail*, at any time; even during their examination before the commissioners.(e) So where a bankrupt, having escaped out of the custody of the marshal, and being at large, surrendered to a commission subsequently issued, and received the protection conferred by the statute; the court held, that he might notwithstanding be retaken, and detained in custody by the marshal.(f)

At present, the privilege of bankrupts from arrest, in coming to surrender, &c. depends on the statute 6 Geo. IV. c. 16,(g) by which it is enacted, that "the bankrupt shall be free from arrest or imprisonment, by any creditor, in coming to surrender; and after such surrender, during the *forty-two* days mentioned in the act,(h) and such further time as shall be allowed him for finishing his examination; provided he was not in custody at the time of such surrender: And if such bankrupt shall be arrested for debt, or on any escape warrant, in coming to surrender, or shall, after his surrender, be so arrested within the time aforesaid, he shall, on producing the summons under the hands of the commissioner to the officer who shall arrest him, and giving such officer a copy thereof, be immediately discharged: And if any officer shall detain any such bankrupt, after he shall have shown such summons to him, so signed as aforesaid, such officer shall forfeit to such bankrupt, for his own use, the sum of *five* pounds for every day he shall detain

(i) 1 Barn. & Cres. 652. 6 Dowl. & Ryl. 831, S. C.

(k) 1 Rose, 260.

(l) 15 Ves. 117.

(aa) 8 Durnf. & East, 534. 3 Esp. Rep. 117, S. C.

(bb) *Ex parte Russel*, 1 Rose, 278.

(c) *Ex parte Temple*, 2 Rose, 22; and see West on *Extents*, 95.

(d) Cowp. 156.

(e) 1 Atk. 238. 1 Bur. 339, 466. 5 Durnf. & East, 209. 3 Taunt. 425; and see Co. B. L. 133. Ed. B. L. 79.

(f) 1 Barn. & Ald. 308. And for the cases in which a bankrupt is protected from arrest, see 1 Rose, 264, 5, n.; and for those in which he may be discharged on *motion*, or must apply by *petition*, *id.* 230.

(g) § 117, and see stat. 5 Geo. II. c. 30, § 5.

(h) § 112.

such bankrupt, to be recovered by action of *debt*, in any court of record at *Westminster*, in the name of such bankrupt, with full costs of suit." This provision being similar in substance to that of 5 Geo. II. c. 30, § 5, the decisions on the latter statute, which have been already stated,⁽ⁱ⁾ will of course be applicable thereto.

[*202] *And, by a subsequent clause in the statute 6 Geo. IV. c. 16,^(a) "it shall be lawful for the commissioners, at the time appointed for the last examination of the bankrupt, or any enlargement or adjournment thereof, to adjourn such examination *sine die*; and he shall be free from arrest or imprisonment for such time, not exceeding *three* calendar months as they shall, by indorsement upon such summons as aforesaid, appoint, with the like penalty upon any officer detaining such bankrupt, after having been shown such summons."

When a bankrupt is in *prison*, or in custody, under any process, attachment, execution, commitment or sentence, the commissioners are authorized by the statute 6 Geo. IV. c. 16^(b) "by warrant under their hands, directed to the person in whose custody such bankrupt is confined, to cause such bankrupt to be brought before them, at any meeting, either public or private; and if any such bankrupt is desirous to surrender, he shall be so brought up, and the expense thereof shall be paid out of his estate; and such person shall be indemnified by the warrant of the commissioners, for bringing up such bankrupt; provided that the assignees may appoint any persons to attend such bankrupt from time to time, and to produce to him his books, papers and writings, in order to prepare an abstract of his accounts, and a statement to show the particulars of his estate and effects, previous to his final examination and discovery thereof; a copy of which abstract and statement, the said bankrupt shall deliver to them, *ten* days at the least before his last examination."

When the time of privilege allowed to the bankrupt, in coming to surrender, and for finishing his examination, has expired, he is liable to be arrested, till he has obtained his certificate, for debts contracted previous to the date and issuing of the commission, and not proved or claimed under it. And the court would not discharge a defendant out of custody on common bail, on the ground that the plaintiffs, at whose suit he was arrested, were assignees under a commission of bankrupt, sued out above three years before, against the defendant, under which they had received dividends; though they suspended the execution of the rule on the sheriff to bring in the body, to give the defendant time to make application to the lord chancellor for relief.^(c) So, where the plaintiff had petitioned for a sequestration in *Scotland* against the defendant, this was holden not to be a sufficient cause for discharging him on common bail.^(d) And the drawer of a bill of exchange, who has paid the amount to the holder, after a commission of bankrupt issued against the acceptor, may sue the latter, before he has obtained his certificate, and arrest him upon the bill, notwithstanding the holder has proved it under the commission.^(e) But by the

(i) *Ante*, 200, 201.

(a) § 118, and see stat. 5 Geo. II. c. 30, § 3.

(b) § 119, and see stat. 5 Geo. II. c. 30, § 6. 49 Geo. III. c. 121, § 13.

(c) 8 Durnf. & East, 364, and see 1 Bos. & Pul. 302, 424. 3 Bos. & Pul. 6. 9 Price, 391.

(d) *Curruthers v. Parkin*, H. 41 Geo. III. K. B., but see 3 Barn. & Cres. 12. 4 Dowl. & Ry1. 658, S. C.

(e) 3 Maule & Sel. 91, and see 3 Dowl. & Ry1. 269.

*statute 6 George IV. ch. 16,(a) “no creditor who has brought [*203] any action, or instituted any suit, against any bankrupt, in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the commission against such bankrupt, shall prove a debt under such commission, or have any claim entered upon the proceedings under such commission, without relinquishing such action or suit; and in case such bankrupt shall be in prison or custody, at the suit of or detained by such creditor, he shall not prove or claim as aforesaid, without giving a sufficient authority in writing, for the discharge of such bankrupt; and the proving or claiming a debt under a commission, by any creditor, shall be deemed an *election* by such creditor to take the benefit of such commission, with respect to the debt so proved or claimed: Provided that such creditor shall not be liable to the payment to such bankrupt, or his assignees, of the costs of such action or suit so relinquished by him; and that where any such creditor shall have brought any action or suit against such bankrupt, jointly with any other person or persons, his relinquishing such action or suit against the bankrupt, shall not affect such action or suit against such other person or persons: Provided also, that any creditor who shall have so elected to prove or claim as aforesaid, if the commission be afterwards superseded, may proceed in the action, as if he had not so elected; and in bailable actions, shall be at liberty to arrest the defendant *de novo*, if he has not put in bail below, or perfected bail above; or if the defendant has put in and perfected such bail, to have recourse against such bail, by requiring the bail below to put in and perfect bail above, within the first *eight* days in term, after notice in the *London Gazette*, of the superseding such commission, and by suing the bail upon their recognizance, if the condition thereof is broken.”

In the construction of a similar clause, in the statute 49 Geo. III. c. 121,(b) it has been holden, that the words of the statute must be taken to relate to cases where a party, who has proved under a commission, arrests the same person under whose commission he has proved;(c) Therefore, where separate commissions of bankruptcy had been issued against three or four partners, to which they conformed and passed their examinations, and an order was made for allowing the joint creditors to prove their debts under the commission of one of the three bankrupts, under which commission the plaintiffs proved their joint debt, and afterwards sued all the partners for the same debt, and arrested one of the other two, under whose commission they had not proved; the court held, that he was not entitled to be discharged out of custody.(c) The election also is confined to the debt actually proved: Therefore, where two parcels of goods were sold at different times, and paid for by bills, and the vendee afterwards becoming bankrupt, the vendors proved under the commission, for the amount of the first parcel, for which they still held the bill of exchange; and the bill for the other parcel having been negotiated by them *prior to the [*204] bankruptcy, and being then outstanding, was afterwards dishonoured; the court held that the vendors were not precluded by the above statute, from suing the bankrupt for the amount of the last parcel of goods.(at) And the proof of a debt under the commission, cannot be pleaded in bar to an action brought for its recovery; though it may be a

(a) § 59, and see stat. 49 Geo. III. c. 121, § 14.

(b) § 14.

(c) 16 East, 252.

(at) 1 Barn. & Ald. 121, and see 5 Barn. & Ald. 95. 2 Dowl. & Ry. 337. 4 Bing. 18.

ground for the defendant to apply to the court in which the action is brought, to stay the proceedings, or to the chancellor, to expunge the debt.(bb) But it seems that the proving of a debt under a commission, is an *election* by the creditor, within the statute 49 Geo. III. c. 121, § 14, which deprives him of his remedy by action against the bankrupt, in the cases excepted by the statute 5 Geo. II. c. 30, § 9,(cc) And where the plaintiff, in an action against a bankrupt, makes his election to proceed under the commission, the defendant is entitled to have some entry or suggestion, recording the election, put on the record.(d)

After a bankrupt has obtained his certificate, his privilege from arrest principally depends on the statute 6 Geo. IV. c. 16,(e) by which it is enacted, that "every bankrupt who shall have duly surrendered, and in all things conformed himself to the laws in force concerning bankrupts, at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands thereby made proveable under the commission, in case he shall obtain a certificate of such conformity, so signed and allowed, and subject to such provisions, as thereafter directed: but no such certificate shall release or discharge any person who was partner with such bankrupt, at the time of his bankruptcy, or who was then jointly bound, or had made any joint contract with such bankrupt."(f)

The bankrupt being discharged, by the above statute, from all debts proveable under the commission, it may not be deemed an improper digression to consider, in the next place, what debts may or may not be proved under it. By that statute,(g) every person with whom any bankrupt shall have really and *bonâ fide* contracted any debt or demand before the issuing of the commission against him, shall, notwithstanding any prior act of bankruptcy committed by such bankrupt, be admitted to prove the same, and be a creditor under such commission, as if no such act of bankruptcy had been committed: provided such person had not, at the time the same was contracted, notice of any act of bankruptcy by such bankrupt committed." And with regard to debts payable on a future day, "any person who shall have given credit to the bankrupt upon valuable consideration, or for any money or other matter or thing whatsoever, which shall not have become payable, when such bankrupt committed an act of bankruptcy, and whether such credit shall have been given upon any bill, bond, [*205] note, or other negotiable security, or not, shall be entitled to prove such debt, bill, bond, note, or other security, as if the same was payable presently, and receive dividends equally with other creditors, deducting only thereout a rebate of interest for what he shall so receive, at the rate of five *per cent.*, to be computed from the declaration of a dividend, to the time such debt would have become payable, according to the terms upon which it was contracted."(a)

Previously to the above statute, *contingent* debts, not due at the time of issuing the commission, were not in general proveable under it; and therefore, where the action was founded upon a recognizance of bail in

(bb) 5 Barn. & Ald. 95.

(d) 6 Taunt. 549.

(e) § 121, and see stat. 5 Geo. II. c. 30, § 7. 46 Geo. III. c. 135, § 4.

(f) See stat. 10 Ann, c. 15, § 3.

(g) § 47, and see stat. 46 Geo. III. c. 135, § 2.

(a) 6 Geo. IV. c. 16, § 51, and see stat. 7 Geo. I. c. 31, § 1, 2. 49 Geo. III. c. 121, § 9. 2 Str. 949. Barnes, 101. 3 Wils. 17. Cowp. 22. Doug. 669. 1 Durnf. & East, 17.

(cc) 3 Maule & Sel. 78.

error,(b) or bail-bond,(c) or on a bond given by a member of parliament, being a trader, under the statute 4 Geo. III. c. 33, § 1,(d) which was not forfeited at the time of issuing the commission, or upon a promise of indemnity which was then unbroken,(e) or upon a promissory note subsequently indorsed by the bankrupt,(ff) he might have been arrested thereon, notwithstanding his certificate. So, where the obligor is in a bastardy bond, after the bond had been forfeited, became bankrupt, and obtained his certificate, the court held, that the parish officers were not precluded thereby from recovering upon the bond, further expenses incurred subsequent to the bankruptcy.(gg). But now, by 6 Geo. IV. c. 16,(h) "if a bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a *contingency*, which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners, to set a value upon such debt, and the commissioners are thereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be so ascertained, before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividend with the other creditors, not disturbing any former dividends; provided such person had not, when such debt was contracted, notice of an act of bankruptcy, by such bankrupt committed."

This statute, however, is confined to *debts* payable on a contingency: And therefore, where the demand rests in *damages*, and cannot be *ascertained without the intervention of a jury, it is not prove- [*206] able under the commission.(a) So where the defendant co-ventanted for the due payment by *A. B.* of a *premium* upon a policy of insurance effected to secure a debt due from *A. B.* to the plaintiff; which premium became due *June 17th*, and being unpaid by *A. B.* or the defendant, was paid by the plaintiff; and on *June 20th*, the defendant obtained his certificate under a commission of bankruptcy; the court held, that his certificate did not discharge him from the amount of the premium.(bb) So, where an action is brought for the recovery of general damages, and the defendant becomes bankrupt between verdict and judgment, he is not discharged by his certificate.(c) But where the plaintiff in an action of *trespass*, having obtained a verdict, signed final judgment after the defendant had committed an act of bankruptcy, *but before the issuing of the commis-*

(b) 2 Str. 1043, and see 2 Blac. Rep. 811. 2 Taunt. 246, 7.

(c) 1 Bur. 436, but see Cowp. 25. 4 Moore, 350. 3 Dowl. & Ry. 533. 2 Barn. & Cres. 626. 4 Dowl. & Ry. 160, S. C.

(d) 5 Barn. & Ald. 250. 8 Moore, 281. 1 Bing. 320, S. C., in Error.

(e) 3 Wils. 13. 2 Blac. Rep. 794, 839.

(ff) 1 Bing. 281. 8 Moore, 261, S. C., but see 5 Barn. & Cres. 360. 8 Dowl. & Ry. 110, S. C.

(gg) 1 Barn. & Ald. 491. 2 Stark. Ni. Pri. 188, S. C., and see 5 Maule & Sel. 21. 1 Moore, 196. 2 Moore, 326. 8 Taunt. 315, S. C. 3 Barn. & Ald. 521, S. C. in Error. 2 Barn. & Ald. 302. 3 Bing. 154.

(h) § 56. And see stat. 19 Geo. II. c. 32. 49 Geo. III. c. 121, § 16, and 6 Geo. IV. c. 16, § 53, as to the claim and proof of debts on bottomry or *respondentia* bonds, and policies of assurance, where the loss or contingency has not happened at the time of issuing the commission.

(a) 7 Durnf. & East, 612.

(bb) 4 Bing. 209.

(c) *Ex parte Charles*, 14 East, 197. 2 Maule & Sel. 70. Wightw. 16, but see the case of *Langford v. Ellis*, 25 Geo. III. K. B. 1 H. Blac. 29, n. 14 East, 202, (b), which seems to have been overruled by the case *Ex parte Charles*; and see 4 Bing. 37.

sion; the court held, that the debt was provable under a commission subsequently issued, and that the defendant, who had been arrested on a *capias ad satisfaciendum*, was entitled to be discharged, on obtaining his certificate.(d) So where the plaintiff, in an action of *assumpsit*, obtained a verdict against the defendant on the 4th June; and on the 18th June, judgment was signed as of *Trinity* term, which commenced on the 7th of that month; and on the 15th June, a commission of bankrupt issued against the defendant, on an act of bankruptcy committed on the 7th May preceding; the court held, that at the time of issuing the commission, the plaintiff had a debt proveable under it.(e)

Before the making of the statute 49 Geo. III. c. 121, a *surety*, or person liable for the debt of another, could not have come in and proved the debt, under a commission issued against the principal, unless it had been before the issuing of the commission:(f) nor could the grantee of an *annuity* have proved the value of it as a debt under the commission issued against the grantor, unless the annuity had been secured by bond, which was forfeited by non-payment of the arrears, before the bankruptcy:(g) and consequently an action might have been maintained in these cases, notwithstanding the certificate, for the money paid, or arrears of the annuity, after the issuing of the commission; in which the defendant might have been arrested and held to special bail. These defects were remedied by the above statute;(h) by which it was enacted, that "in all cases of commission of bankrupt thereafter to be issued, where, at the time of issuing the commission, any person should be *surety* for, or be liable for any debt of

the bankrupt, it should be lawful for such surety or *person [*207] liable, if he should have paid the debt, or any part thereof in discharge of the whole, (although he might have paid the same after the commission should have issued,) and the creditor should have proved his debt under the commission, to stand in the place of the creditor, as to the dividends upon such proof: and where the creditor should not have proved under the commission, it should be lawful for such surety, or person liable, to prove his demand, in respect of such payment, as a debt under the commission, not disturbing the former dividends, and to receive a dividend or dividends, proportionably with the other creditors, taking the benefit of such commission: And every person against whom any such commission of bankrupt should be awarded, and who should obtain his certificate should be discharged of all demands, at the suit of every such person having so paid, and being enabled to prove, or to stand in the place of such creditor as aforesaid, with regard to his debt in respect of such suretyship or liability, in like manner, to all intents and purposes, as if such person had been a creditor before the bankruptcy, for the whole of the debt in respect of which he was surety or liable as aforesaid."

This branch of the statute was extended to all cases of *sureties*, where relief could be had under the commission, though the money was not paid till after it issued.(a) And where, upon a dissolution of partnership between three partners, two of the three assigned to the other all their

(d) 2 Barn. & Cres. 762. 4 Dowl. & Ryl. 430, S. C.

(e) 4 Barn. & Cres. 880. 7 Dowl. & Ryl. 436, S. C.

(f) 3 Wils. 13. 2 Blac. Rep. 794, 839, and see Doug. 160.

(g) 2 Blac. Rep. 1106. Doug. 97, 393, 519. 9 Ves. jun. 110. 2 Rose, 416. 1 Barn. & Ald. 493, 4. 2 Barn. & Ald. 802.

(h) § 8, 17.

(a) 5 Barn. & Ald. 12.

shares in the partnership debts and effects, and the latter covenanted to pay all debts then due from the partnership, and to indemnify the two from the payment of the same, and from all actions, &c., by reason of the non-payment thereof, and afterwards became bankrupt, and a commission issued against him, under which he obtained his certificate, and afterwards the holder of a bill accepted by the three partners, and due before the dissolution of the partnership, sued the two, and they were obliged to pay the bill; the court held, that the certificate might be pleaded in discharge of an action brought by the two against the other, upon his covenant.(b) And the certificate was holden to be a bar, not only to an action, at the suit of a surety, for the recovery of money paid in discharge of the original debt, but to any action for consequential damages, accruing from the non-payment by the bankrupt of such debt when due: Therefore, where the acceptor of an accommodation bill brought an action against the drawer, who had become bankrupt *and obtained his certificate*, for not providing him with funds to pay the bill when due, whereby he had incurred the costs of an action, and was obliged to sell an estate in order to raise money to pay the bill, the certificate was holden to be a good bar to such action.(c) But the drawer of a bill of exchange, who has paid the amount to the holder, after a commission of bankruptcy issued against the acceptor, may, we have seen,(d) sue the latter, *before he has obtained his certificate*, and arrest *him upon the bill notwithstanding the holder has [*208] proved it under the commission.(aa) And where a surety in a warrant of attorney, in order to discharge himself from personal liability, paid part of the debt due to the creditor of a bankrupt who had proved under the commission, and thereupon satisfaction was entered on the record, the court held, that this did not fall within the statute 49 Geo. III. c. 121, § 8, as being a payment of part of a debt in discharge of the whole, and consequently that the bankrupt's certificate was no bar to an action by the surety, to recover the money so paid by him.(bb) So, a surety in an annuity deed, who had been compelled by the annuity creditor, after the bankruptcy and allowance of the certificate of the principal, to pay several sums for arrears due after the issuing of the commission, was holden not to be within the statute 49 Geo. III. c. 121, § 8; and therefore might have an action against the principal for such sums, and hold him to bail.(cc) And such surety was not entitled, by that statute, to prove the value of the annuity as a debt under the commission: and therefore, where such a surety had redeemed the annuity, subsequently to the bankruptcy, it was holden, that he was entitled to maintain an action for the value against the bankrupt, who had obtained his certificate, although the grantee had proved under the 17th section.(dd) And where one of the three co-sureties, for the payment of an annuity, paid money on account of it after the bankruptcy of the co-surety, the court held that the latter was liable to an action for contribution, although he had obtained his certificate; inasmuch as one surety could not prove the value of an annuity under the commission against his co-surety; but that he could not *at law*

(b) 2 Maule & Sel. 195.

(c) 2 Moore, 602. 8 Taunt. 550, S. C. 3 Barn. & Ald. 13, S. C. in Error.

(d) *Ante*, 202.

(aa) 3 Maule & Sel. 91, and see 3 Dowl. & Ry. 269.

(bb) 5 Barn. & Ald. 852. 1 Dowl. & Ry. 521, S. C., and see 2 Maule & Sel. 551.

(cc) 4 Maule & Sel. 333, and see 2 Moore, 644. 8 Taunt. 581, S. C.

(dd) 3 Barn. & Ald. 186. 8 Moore, 450. 1 Bing. 413, S. C. 13 Price, 24, S. C. in Error: but see stat. 6 Geo. IV. c. 16, § 55.

be compelled to pay more than one-third of the sum paid on account of the annuity, although the third surety had become insolvent at the time of such payment. 6 Barn. & Cres. 689. Bail to the sheriff, being only answerable for the defendant's appearance,^(e) or bail above, who might have discharged themselves by rendering the defendant,^(f) were also not considered as *sureties* for, or liable for the debt of a bankrupt, within the meaning of the above statute.

The statute 49 Geo. III. c. 121, was repealed by the statute 6 Geo. IV. c. 16,^(g) which came into operation on *September* 1st, 1825.^(h) And by the latter statute it is enacted, that "any person who, at the issuing of the commission, shall be *surety* or liable for any debt of the bankrupt, *or bail for the bankrupt, either to the sheriff, or to the action*, if he shall have paid the debt, or any part thereof in discharge of the whole debt, (although he may have paid the same after the commission issued,) if the creditor shall have proved his debt under the commission, shall be entitled to stand in the place of such creditor, as to the dividends, and all other rights under the said commission, which such creditor possessed, or would be entitled to, in respect of such proof; or if the creditor shall not have proved under the commission, such surety or person liable, *or bail*, shall be entitled to prove his demand, in respect of such payment, as a debt under the commission, not disturbing the former dividends, and may receive dividends with the other creditors, although he may have become surety, liable, *or bail* as aforesaid, after an act of bankruptcy committed by such bankrupt; provided that such person *had not, when he became surety *or bail* or so liable as [*209] aforesaid, notice of any act of bankruptcy, by such bankrupt committed."^(a) The decisions on this statute will of course be similar to those on the 49 Geo. III. c. 121, § 8, 17.

By the same statute,^(b) it is enacted that "any annuity creditor of any bankrupt, by whatever assurance the same be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity; which value the commissioners shall ascertain, regard being had to the original price given for the said annuity, deducting therefrom such diminution in the value thereof, as shall have been caused by the lapse of time since the grant thereof, to the date of the commission." In the construction of a similar clause, in the statute 49 Geo. III. c. 121,^(c) it was determined, that the bankruptcy and certificate of one of several grantors of an annuity, who had jointly and severally covenanted for its payment, as well as given a warrant of attorney to confess joint and several judgments, discharged the bankrupt;^(d) but did not affect the liability of the other grantors; and the act made no difference in this respect between principals and sureties.^(d)

And, by another clause in the same statute,^(ee) "it shall not be lawful for any person entitled to any annuity granted by any bankrupt, to sue any person who may be collateral surety for the payment of such annuity, until such annuitant shall have proved under the commission against such bankrupt, for the value of such annuity, and for the payment thereof; and if such

(e) 6 Taunt. 329, 30. 2 Marsh. 37. 192, S. C.

(f) 4 Barn. & Ald. 493.

(g) § 52.

(h) 4 Bing. 212.

(a) The words 'or that he was insolvent, or had stopped payment,' which were inserted in the stat. 49 Geo. III. c. 121, § 8, are here omitted.

(b) § 54, and see stat. 49 Geo. III. c. 121, § 17.

(c) § 17.

(d) 4 Taunt. 90, and see *id.* 460, 584. 16 East, 252.

(ee) § 55.

surety, after such proof, pay the amount proved as aforesaid, he shall be thereby discharged from all claims in respect to such annuity: and if such surety shall not (before any payment of the said annuity, subsequent to the bankruptcy, shall have become due,) pay the sum so proved as aforesaid, he may be sued for the accruing payments of such annuity, until such annuitant shall have paid or satisfied the amount so proved, with interest thereon at the rate of *four per cent. per annum*, from the time of notice of such proof, and of the amount thereof, being given to such surety; and after such payment or satisfaction, such surety shall stand in the place of such annuitant, in respect of such proof as aforesaid, to the amount so paid or satisfied as aforesaid, by such surety; and the certificate of the bankrupt shall be a discharge to him, from all claims of such annuitant, or of such surety, in respect of such annuity: Provided that such surety shall be entitled to credit in account with such annuitant, for any dividends received by such annuitant under the commission, before such surety shall have fully paid or satisfied the amount so proved as aforesaid."

Interest is proveable by the above statute,(f) though not reserved on bills of exchange or promissory notes, over-due at the time of issuing the *commission. And where an action is brought for the [*210] recovery of a debt due before the bankruptcy, the bankrupt is discharged by his certificate, from the payment of *interest*(aa) and *costs*,(bb) as well as the debt; and that, whether the action was brought before, or after(cc) the issuing of the commission; and if before, whether the bankruptcy happened before verdict,(d) or after verdict and before final judgment.(e) And a certificate will discharge a *cognovit*, given after a secret act of bankruptcy, for a debt previously due, with interest and costs.(ff) So where, on a commission of bankrupt being sued out against the plaintiff, he brought an action of *trespass* against the commissioners for false imprisonment, and was non-suited, and they entered up judgment accordingly, and the commission was afterwards superseded, on which another was sued out, founded on the same act of bankruptcy as the first, under which the plaintiff obtained his certificate, and the defendants afterwards charged him in execution for the costs of the non-suit, the court of Common Pleas held, that he was entitled to be discharged out of custody; as such costs were proveable under the second commission.(g) And, by the statute 6 Geo. IV. c. 16,(h) "if any plaintiff, in any action at law or suit in equity, or petition in bankruptcy or lunacy, shall have obtained any judgment, decree or order, against any person who shall thereafter become bankrupt, for any debt or demand, in respect of which such plaintiff or petitioner shall prove under the commission, such plaintiff or petitioner shall also be entitled to prove for the costs which he shall have incurred in obtaining the same, although such costs shall not have been taxed at the time of the bankruptcy." But where the plaintiff is non-suited,(i) or has a verdict against him,(k) and afterwards becomes

(f) § 57, and see Co. B. L. 7 Ed. 186.

(aa) Cowp. 138.

(bb) 2 Str. 1196. 1 Wils. 41, S. C. 6 Durnf. & East, 282. 3 Maule & Sel. 326, K. B. 2 Blac. Rep. 1317. 1 H. Blac. 29. 1 Bos. & Pul. 134, *in notis*. 2 New Rep. C. P. 190. 2 Barn. & Cres. 762, *in notis*.

(cc) 2 New Rep. C. P. 190, and see 4 Moore, 350. 2 Brod. & Bing. 8, S. C.

(d) 1 H. H. Blac. 29, but see 11 Ves. 646. 2 New Rep. C. P. 191, (a), *scmb. contra*.

(e) 2 Blac. Rep. 1317.

(ff) 1 Chit. Rep. 16, but see 2 Taunt. 68. 2 Rose, 112, S. C. *semb. contra*: and see 4 Bing. 37.

(g) 7 Moore, 614. 1 Bing. 189, S. C.

(h) § 58.

(i) *Ex parte Todd*, cited in 3 Wils. 270, but see 5 Durnf. & East, 365. 1 Bos. & Pul. 134,

(k) See next page.

bankrupt before judgment, the costs not being proveable under the commission, are not barred by his certificate. And where a bankrupt, sued as executor, pleaded a false plea, between the issuing of the commission and the obtaining of his certificate, he was holden to be liable to costs for such plea, *de bonis propriis*.(l) So, the costs of a suit in Chancery, directed to be paid by an award, made before the bankruptcy of the defendant, but which costs were not taxed till after he became bankrupt, cannot be proved under the commission; but the bankrupt remains liable to be [*211] attached for the non-payment of them.(m) *And in a late case it was holden, that a certificate is no bar to an attachment for the non-payment of costs, pursuant to a rule of court made before the bankruptcy, but which were not taxed until the day of issuing the commission.(a)

The bankrupt laws do not extend to debts contracted in foreign countries: And where the plaintiff resided here, the court would not order an *exoneretur* to be entered on the bail-piece, on the ground that the debt was contracted while the defendant was resident in a foreign country, and before he became a bankrupt by the laws of that country, though he might have obtained his certificate there.(b) But an insolvent's certificate, obtained in *Newfoundland*, under the statute 49 Geo. III. c. 27, § 8, may be pleaded in bar to an action brought in this country, for a debt contracted here prior to the insolvency.(c) And a debt contracted in *England*, by a trader residing in *Scotland*, is barred by a discharge under a sequestration issued in conformity to the statute 54 Geo. III. c. 137, in like manner as debts contracted in *Scotland*.(d) So a certificate, obtained under an *Irish* commission of bankruptcy, has been holden to be a bar to an action brought in this country for a demand arising upon a bill of exchange drawn in *Ireland*, and payable by the defendant who resided there.(e) But a bill of exchange drawn by the defendant in *Ireland*, and accepted and paid by the plaintiffs in *England*, is a debt contracted in *England*, and cannot therefore be discharged by a certificate under an *Irish* commission.(f)

Before the making of the statute 6 Geo. IV. c. 16, a bankrupt who had obtained his certificate, could not have been arrested, in the King's Bench, upon a *subsequent* promise, to pay a debt due before his bankruptcy;(g) though it was otherwise in the Exchequer.(h) And now, by that statute,(i) "no bankrupt, after his certificate of conformity shall have been allowed,

contra; which cases seem to have been overruled by *Ex parte Charles*, 14 East, 197, and see 11 Ves. 646. 7 Moore, 614. 1 Bing. 189, S. C. Ed. B. L. 127, 8, 9.

(k) 5 Taunt. 778. 1 Marsh. 346, S. C., and see 4 Bing. 57.

(l) 3 Bur. 1368. 1 Blac. Rep. 400, S. C.

(m) 9 East, 318, and see the case *Ex parte Sneaps*, Co. B. L. 7 Ed. 211, 12, but see 7 Price, 209.

(a) *Fisher v. Coates*, E. 8 Geo. IV. K. B.

(b) 8 Durnf. & East, 609, and see 2 H. Blac. 553. 1 East, 6. 2 Chit. Rep. 53, 55. 3 Moore, 244. 1 Brod. & Bing. 13, S. C., but see *Ballantine v. Golding*, M. 24 Geo. III. K. B. Co. B. L. 7 Ed. 464. 4 Durnf. & East, 185, 6. 5 East, 124.

(c) 3 Moore, 623. 1 Brod. & Bing. 294, S. C.

(d) 3 Barn. & Cres. 12. 4 Dowl. & Ryl. 658, S. C.

(e) *Ballantine v. Golding*, M. 24 Geo. III. K. B. Co. B. L. 7 Ed. 464. 4 Durnf. & East, 185, 6, S. C., and see 2 H. Blac. 553.

(f) 4 Barn. & Ald. 654.

(g) 6 Barn. & Ald. 116. 2 Dowl. & Ryl. 240, S. C., and see 2 Bur. 736. 2 Ken. 436, S. C. 3 Maule & Sel. 595, but see *Drew v. Jefferies*, H. 26 Geo. III. K. B. 8 Price, 531, *semb. contra*.

(h) 8 Price, 526, and see Cowp. 549. 2 H. Blac. 116. 5 Esp. Rep. 198. 6 Taunt. 563. 9 Price, 19, 20, 27. 1 Bing. 281.

(i) § 131.

under any commission of bankrupt already issued, or hereafter to be issued, shall be liable to pay or satisfy any debt, claim or demand, from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim or demand, upon any contract, promise or agreement, made or to be made after the suing out of the commission, unless such promise, contract, or agreement be made in writing, signed by the bankrupt, or by some person thereto lawfully authorized, in writing, by such bankrupt."

*When a bankrupt is clearly entitled to the benefit of his cer- [*212] tificate, he may be discharged in two ways: 1st, by pleading his certificate, if in time; and secondly, by applying to a judge, on an affidavit of the certificate,(a) under the statute 6 Geo. IV. c. 16,(b) by which it is enacted, that "any bankrupt who shall, after his certificate shall have been allowed, be arrested for any debt, claim or demand, thereby made proveable under the commission, against such bankrupt, shall be discharged upon common bail; And if any such bankrupt shall be taken in execution, or detained in prison for such debt, claim or demand, where judgment has been obtained before the allowance of his certificate, it shall be lawful for any judge of the court wherein judgment shall have been so obtained, on such bankrupt producing his certificate, to order any officer who shall have such bankrupt in custody by virtue of such execution, to discharge such bankrupt, without exacting any fee; and such officer shall be thereby indemnified for so doing." But where the commission,(cc) or certificate,(dd) appears to have been fraudulent, or unduly obtained, the court will not discharge the defendant upon common bail. And where the validity of the commission is disputed, the court it seems will in general direct it to be tried on a feigned issue, notwithstanding the certificate, before they discharge the defendant.(ee) But where the defendant in an action had become bankrupt, and obtained his certificate, after which proceedings were taken against the bail, the court of King's Bench relieved them on motion, without directing an issue to try the fact of the bankrupt's being a trader; the certificate, by the statute 5 Geo. II. c. 30, § 7 & 13,(f) being made sufficient evidence of the trading, &c.(g) The court of Common Pleas would not formerly have relieved a bankrupt, in a summary way, where his goods were taken in execution under a *fieri facias*, after he had obtained his certificate; and therefore if he had not obtained his certificate in time, so as to plead it, he must have brought an *audita querela*:(h)[1] But in a modern case, where a *fieri facias* issued against the goods of a bankrupt, before he had obtained his certificate, and was not executed till after, the court ordered the goods to be restored; for it is now the practice to give that relief in a summary way, which might be obtained by *audita querela*.(i)

(a) Doug. 676, and see 1 Wils. 41. Barnes, 386. 1 H. Blac. 29.

(b) § 126, and see stat. 5 Geo. II. c. 30, § 7, 13.

(cc) 2 Blac. Rep. 725. Cowp. 824, but see 5 Moore, 21.

(dd) Doug. 228. 2 H. Blac. 1. 2 Bos. & Pul. 390. 6 Taunt. 75.

(ee) *Yeo v. Allen*, H. 28 Geo. III. K. B. 6 Taunt. 75.

(f) And see stat. 6 Geo. IV. c. 16, § 126.

(g) 1 Barn. & Ald. 332, and see Ed. B. L. 415.

(h) Barnes, 204, 206, and see 1 Durnf. & East, 361.

(i) 1 Bos. & Pul. 427, but see 1 Moore & P. 261. 4 Bing. 493, S. C.

[1] In a late case, the court of Common Pleas, adhered to this doctrine. 1 Moore & P. 261. 4 Bing. 493, S. C.

Insolvent debtors and *fugitives*, discharged under occasional insolvent acts, *(k)* were not liable to be arrested for debts contracted *prior* to the times prescribed by the acts. And, in the Common Pleas, an [*213] insolvent *discharged under the 41 Geo. III. c. 70, could not have been holden to bail, on a bill drawn and indorsed over by him, previous to the 1st *March*, 1803, though not due till after that period. *(a)* But insolvent debtors and fugitives, discharged under occasional insolvent acts, were formerly liable to be arrested, for debts contracted after the time prescribed in the acts, and before they were actually discharged. *(b)* And the clauses respecting *fugitives*, in those acts, did not extend to persons who had constantly resided abroad; *(c)* or who had been abroad merely in the course of their trade, and not for the purpose of avoiding their creditors. *(d)* A debt depending upon a contingency, at the time of a party's discharge under the insolvent act, 18 Geo. III. c. 52, was not thereby discharged. *(e)* So, a party discharged under the 51 Geo. III. c. 125, was holden to be liable to his surety for the arrears of an annuity, due since his discharge, which the surety had been obliged to pay. *(ff)* And the obligors in a bastardy bond, discharged under the general insolvent act, 1 Geo. IV. c. 119, subsequently to a judgment on the bond, were deemed liable for expenses incurred, in respect of the bastard, subsequently to their discharge. *(gg)* But where a party had joined in a bond with the grantor of an annuity, to secure the payment of it, and afterwards obtained his discharge under the insolvent act, having duly inserted the bond in his schedule, the court held, that he could not be arrested upon the bond, for arrears of the annuity afterwards becoming due. *(hh)* In the King's Bench, it has been determined, that an insolvent who has taken the benefit of the 54 Geo. III. c. 28, is not liable to be arrested, upon a *subsequent* promise, to pay a debt contracted prior to the day mentioned in the act; *(i)* though it has been otherwise ruled in the Common Pleas. *(kk)* And, in the latter court, a *cognovit* given by an insolvent after his discharge, upon proceedings commenced before, has been deemed to constitute a new promise, upon which he becomes liable, notwithstanding his discharge. *(l)*

By the last general insolvent act, *(m)* the court, commissioner, or justices therein mentioned, are authorized, "upon the prisoner's swearing to the truth of his or her petition and schedule, and executing such warrant of attorney as is thereafter directed, to a judge that such prisoner shall be discharged from custody, and entitled to the benefit of that act, at such [*214] time as the said court, commissioner, or justices, shall direct, *in

(k) See the statutes 37 Geo. III. c. 112. 41 Geo. III. c. 70. 44 Geo. III. c. 108. 45 Geo. III. c. 3. 46 Geo. III. c. 108. 49 Geo. III. c. 115. 51 Geo. III. c. 125. 52 Geo. III. c. 165. 53 Geo. III. c. 6. 54 Geo. III. c. 28.

(a) 3 Bos. & Pul. 394.

(b) Cowp. 527, and see stat. 53 Geo. III. c. 102, § 30.

(c) 1 Wils. 85.

(d) 1 Ken. 380. Say. Rep. 308, S. C.

(e) 2 Chit. Rep. 448, and see 2 Blac. Rep. 1217.

(ff) 2 Maule & Sel. 551, and see 2 Black Rep. 1217. 4 Taunt. 460.

(gg) 3 Bing. 154.

(hh) 5 Barn. & Cres. 581. 8 Dowl. & Ryl. 339, S. C.

(i) 3 Maule & Sel. 595. 4 Dowl. & Ryl. 154, and see 2 Str. 1233. 2 Blac. Rep. 724, 798. 6 Barn. & Ald. 116, 17, *accord.*, but see *Best v. Barber*, or *Barker*, M. 23 Geo. III. K. B. 8 Price, 533, *semb. contra.*

(kk) 6 Taunt. 563, and see 1 New Rep. C. P. 134. 8 Price, 526, 531. *Ante*, 211.

(l) 4 Bing. 37.

(m) 7 Geo. IV. c. 57, § 46, and see stat. 53 Geo. III. c. 102, § 29. 56 Geo. III. c. 102. 1 Geo. IV. c. 119, § 26. 3 Geo. IV. c. 123. 5 Geo. IV. c. 61. 7 Geo. IV. c. 57, § 10, 50, 51, 63.

pursuance of the provisions thereafter contained in that behalf, as to the several debts and sums of money due, or claimed to be due, at the time of filing such prisoner's petition, from such prisoner, to the several persons named in his or her schedule as creditors, or claiming to be creditors for the same respectively; or for which such persons shall have given credit to such prisoner, before the time of filing such petition, and which were not then payable; and as to the claims of all other persons, not known to such prisoner, at the time of such adjudication, who may be indorsees or holders of any negotiable security set forth in such schedule."

But by a subsequent clause of that act, (a) "in all cases where it shall have been adjudged, that any such prisoner shall be so discharged, and so entitled as aforesaid, at some future period, such prisoner shall be subject and liable to be detained in prison, and to be arrested and charged in custody, at the suit of any one or more of his or her creditors, with respect to whom it shall have been so adjudged, at any time before such period shall have arrived, in the same manner as he or she would have been subject and liable thereto, if that act had not passed. Provided nevertheless, that when such period shall have arrived, such prisoner shall be entitled to the benefit and protection of that act, notwithstanding that he or she might have been out of actual custody, during all or any part of the time subsequent to such adjudication, by reason of such prisoner not having been arrested or detained during such time, or any part thereof." Previously to the above act, where a defendant was ordered by the insolvent debtors' court to remain in custody, at the suit of certain creditors by name, until *sixteen* months had expired, and was found at large within *six* months; the court held, under the statute 3 Geo. IV. c. 123, that any of his scheduled creditors, though not named in the order, might arrest him, and cause him to be confined, until the *sixteen* months were expired. (b)

The effect of the discharge of an insolvent debtor is declared, and mode of relieving him when arrested pointed out, by the statute 7 Geo. IV. c. 57, (c) by which it is enacted, that "no person who shall have become entitled to the benefit of that act, by any such adjudication as aforesaid, shall, at any time thereafter be imprisoned, by reason of the judgment so as aforesaid entered up against him or her, according to that act, or for or by reason of any debt or sum of money, or costs, with respect to which such person shall have become so entitled, or for or by reason of any judgment, decree or order for payment of the same; but that upon every arrest or detainer in prison, upon any such judgment so entered up as aforesaid, or for or by reason of any such debt or sum of money, or costs, or judgment decree or order for payment of the same, it shall and may be lawful for any judge of the court from which any process shall have issued in respect thereof, and such judge is thereby required, upon proof made to his satisfaction, that the cause of such arrest or *detainer is such as thereinbefore men- [*215] tioned, to release such prisoner from custody, unless it shall appear to such judge, upon inquiry, that such adjudication as aforesaid was made without due notice, where notice is by that act required, being given to or acknowledged by the plaintiff, or such process, or being by him or her dispensed with, by the acceptance of a dividend under that act, or otherwise; and at the same time, if such judge shall in his discretion think fit, it shall

(a) § 55.

(b) 4 Dowl. & Ry. 347, and see *id.* 216.

(c) § 60, and see stat. 1 Geo. IV. c. 119, § 26.

and may be lawful for him to order such plaintiff, or any person or persons suing out such process, to pay such prisoner the costs which he or she shall have incurred on such occasion, or so much thereof as to such judge shall seem just and reasonable, such prisoner causing a common appearance to be entered for him or her in such action or suit." Where a party is arrested for a debt for which he has been discharged under the insolvent act, and gives bail, the court will order the bail bond to be delivered up to be cancelled.^(a) But though certificated bankrupts, or persons discharged under insolvent acts, are privileged from arrest, yet the sheriff, or his officer, is not liable to an action of false imprisonment for arresting them.^(b)

Aliens have, in general, no privilege from arrest: But, in order to protect foreigners, residing in this kingdom, who had quitted their own country in consequence of the *French* Revolution, it was enacted by the statute 38 Geo. III. c. 50, § 9,^(c) that "*aliens* abiding in this kingdom, having quitted their respective countries by reason of any revolution or troubles in *France*, or in countries conquered by the arms of *France*, should not be liable to be arrested, imprisoned, or held to bail, or to find any caution for their forthcoming or paying any debt, nor to be taken in execution on any judgment, nor by any caption, for or by reason of any debt or other cause of action, contracted or arising in any parts beyond the seas, other than the dominions of his majesty, while such aliens were not within the said dominions of his majesty; and in case any such alien should be arrested, imprisoned, or held to bail, or taken in execution on a judgment, or by any caption, contrary to the intent of that act, such alien should be discharged therefrom, by order of any of his majesty's courts in *Westminster Hall*, or of the court of Session in *Scotland*, or of any judge of such courts in vacation time." This statute seems to have been occasioned by the case of *Melan v.*

[*216] *Duke de Fitz-James*:^(d) And it was extended by *the statute 41 Geo. III. c. 106, to all such persons as were born in any of the countries subject to the late king of *France*, or who, having been born within this kingdom, passed into the dominions of the said late king, under the age of fifteen years, and who had *bonâ fide* resided in such countries as subjects of the said late king, although born of parents subjects of his majesty, or his predecessors. Also, by the statute 43 Geo. III. c. § 28, this provision was extended to his majesty's four courts in *Ireland*. But its further continuance being no longer necessary, the acts by which it was created have been suffered to expire.

In some of the preceding cases, the process is declared to be void; as

(a) 6 Barn. & Cres. 106. 9 Dowl. & Ryl. 107, S. C., but see 3 Dowl. & Ryl. 600, *contra*.

(b) Doug. 671, and see 4 Taunt. 631.

(c) This statute was made perpetual by 42 Geo. III. c. 92, § 23, which, however, was repealed by 43 Geo. III. c. 155, § 1; and this latter statute was also repealed by 54 Geo. III. c. 155, § 1, which was repealed by 55 Geo. III. c. 104, § 1; but the same provisions are to be found in each of these statutes, and were finally re-enacted by 56 Geo. III. c. 86, § 19; which statute was continued by 58 Geo. III. c. 96. 1 Geo. IV. c. 105. 3 Geo. IV. c. 97, and 5 Geo. IV. c. 37, but is now expired.

(d) 1 Bos. & Pul. 138. In that case it was decided, by two judges of the Common Pleas, that a defendant could not be held to bail in this country, on an instrument entered into in *France*, by which his property only, and not his person, was, according to the law of *France*, made liable to the payment of the debt sued for: but *Heath*, Justice, was of a different opinion; and it is observable, that in *Imley v. Ellefsen*, 2 East, 453. Lord *Ellenborough* expressed his dissent from the decision of the court of Common Pleas in the above case. See also *Barnes*, 73.

against *Ambassadors*, &c. In others, the court is expressly required to discharge the defendant.^(a) And it may be remarked, in general, that where the defendant is clearly entitled to privilege, as the arrest is irregular and unlawful, the court will discharge him upon motion; and not put him to the necessity of suing out a writ of privilege,^(b) or of filing common bail,^(c) but where the question of privilege from arrest is doubtful, the court will not, upon motion, discharge the party out of custody, but leave him to his writ of privilege.^(d) And they will not discharge a defendant out of custody on common bail, on the ground of *infancy*;^(e) or that he was *insane* at the time of the arrest,^(f) or afterwards became so;^(g) nor will they discharge his bail, on the ground of the insanity of their principal, although a commission of *lunacy* may have issued against him, under which he has been found a lunatic.^(h) The bail, however, may have a *habeas corpus*, to bring up their principal, notwithstanding his lunacy, in order to surrender him in their discharge.⁽ⁱ⁾ And where the return to a writ of *latitat* stated that the defendant was insane, and could not be removed without great danger, and continued so till the return of the writ, the court of King's Bench refused an attachment against the sheriff.^(k)

An *arrest*, when allowed, is made by the sheriff or his officers; or by the bailiff of a liberty of franchise.^[A] The sheriff's authority is derived *immediately* from the court, except in counties palatine, where he acts by virtue of a *mandate* from the officer to whom the writ is directed: And even there, if the writ be directed immediately to the sheriff, he is bound to execute it; and a bail-bond taken on the arrest is legal.^(l) The officers of the sheriff are of three kinds, first, bailiffs *in fee*, or *perpetual* bailiffs, who have, by charter of prescription, the execution of writs within the **guildable*;^(aa) secondly, *common* bailiffs, (called [*217] in the old books, bailiffs *errant*),^(bb) who are usually bound with sureties in an obligation for the due execution of their office, and thence are called *bound* bailiffs;^(cc) thirdly, *special* bailiffs, nominated by the plaintiff or his attorney, and appointed by the sheriff *pro hac vice*.^(dd)

The sheriff's *warrant*^(ee) to any of these officers ought not to be made out,

(a) *Ante*, 199, 201, 212, 214, 15.

(b) 2 Str. 989. Fort. 159. Com. Rep. 444, S. C. 1 Ken. 125. 5 Durnf. & East, 689, but see 1 Wils. 278. 2 Blac. Rep. 788.

(c) *Walpole v. Alexander*, H. 22. Geo. III. K. B.

(d) 2 Barn. & Ald. 234.

(e) 1 Bos. & Pul. 480.

(f) 4 Durnf. & East, 121.

(g) 2 Durnf. & East, 390.

(h) 6 Durnf. & East, 133. 2 Bos. & Pul. 362. 13 East, 355. 2 Chit. Rep. 104.

(i) 3 Bos. & Pul. 550, and see Highmore on *Lunacy*, 123.

(k) 4 Barn. & Ald. 279, but see 8 Dowl. & Ryl. 606.

(l) 6 Durnf. & East, 71.

(aa) For an account of the *guildable*, and how it differs from a *franchise*, see 8 Co. 125, a, Dalt. Sher. 185, and for the nature of the office of a bailiff *in fee*, see Dalt. Sher. 187. Gilb. C. P. 30.

(bb) 3 East, 130.

(cc) 1 Blac. Com. 346.

(dd) 2 Blac. Rep. 952. 4 Durnf. & East, 119. 1 Chit. Rep. 613, 14, (a).

(ee) Append. Chap. X. § 104, 5, 6.

[A] Where one not generally known as an officer makes an arrest, his authority if demanded must be shown. *The State v. Curtis*, 1 Hayw. 471. *Arnold v. Stevens*, 10 Wend. 514. *Com. v. Field*, 13 Mass. 321. *The State v. Kirby*, 2 Ired. 201.

until the sheriff have the writ in his actual custody; (f) And therefore, where the defendant was arrested before the officer had any warrant, and before the writ was delivered to the sheriff, the bail-bond was ordered to be delivered up to be cancelled. (g) So, where an attorney fills up the sheriff's warrant on a *capias ad respondendum*, after it is signed, sealed, and sent to him with a blank, this is bad. (h) And where the sheriff having directed a warrant to A. and all his other officers, to arrest B., and A. afterwards inserted therein the name of C; it was holden that the warrant was illegal, and the arrest by C. consequently void. (i) [A] But where the sheriff made a warrant to four *jointly, and not severally*, and one of them arrested the defendant, the court of Common Pleas, though they were of opinion that the arrest was not authorized by the warrant, would not interfere to discharge the defendant out of the custody of the sheriff, on entering a common appearance. (k) And a defendant is not entitled to be discharged out of custody, on the ground of his having been arrested upon a warrant, in which the names of the plaintiffs are not inserted conformable to the writ, if the defendant be not misled by the mistake; therefore, where the arrest took place on a warrant at the suit of *three* plaintiffs, which required the defendant to answer *A. B. and two others*, without naming them, the court of King's Bench held, that he was not entitled to be discharged. (l)

If the defendant reside within a *liberty*, the bailiff of which has the execution and return of writs, there should regularly be a *non omittas*; or if there be not, the sheriff for having execution of the writ, should make out his *mandate*, directed to the bailiff of the liberty. (m) And if there be two liberties in a county, and the sheriff make his mandate to the bailiff of one of them, who gives him no answer, he may, upon a *non omittas*, arrest the defendant in either liberty; (n) and even if the sheriff enter, and arrest the defendant in a liberty, without a *non omittas*, the arrest is good, though the sheriff may be liable to an action. (o)

[*218] *The arrest may be made at any *time* (except on *Sunday*), before, or on the day of the return of the writ; and at any *place*

(f) R. M. 1654, § 2. R. E. 15 *Cur. II. reg.* 4, K. B. R. M. 1654, § 2. R. H. 14 & 15 *Cur. II. reg.* 1, C. P. Stat. 6 Geo. I. c. 21, § 53.

(g) 8 Durnf. & East, 187.

(h) 2 Wils. 47.

(i) 6 Durnf. & East, 122.

(k) 2 Taunt. 161.

(l) 1 Chit. Rep. 611.

(m) Gilb. C. P. 25, &c.

(n) 5 Co. 92, a, Gilb. C. P. 29. 9 East, 335, 340.

(o) Gilb. C. P. 27. *Fitzpatrick v. Kelly*, M. 22 Geo. III. K. B. cited in 3 Durnf. & East, 740, and see 5 Durnf. & East, 687. 9 East, 341, 2. 7 Taunt. 311. 1 Chit. Rep. 375, *in notis.* 3 Barn. & Ald. 502. 1 Moore & P. 309. 4 Bing. 523, S. C.

[A] If the process is void the arrest is illegal. *Tracy v. Williams*, 4 Conn. 107. *State v. Leach*, 7 Id. 456. *State v. Curtis*, 1 Hayw. 471. And when the illegality is apparent on the face of the process the officer who executes it is a trespasser. *Lampson v. Laudon*, 5 Day, 508. *Grunon v. Raymond*, 1 Conn. 40. *Reynolds v. Corp.*, 3 Caines, 269. *Griswold v. Sedgwick*, 6 Cow. 456. *Sanford v. Nichols*, 13 Mass. 280. *Pearce v. Atwood*, 13 Id. 324. *Wood v. Ross*, 11 Id. 277. *Com. v. Foster*, 1 Id. 488. *Wells v. Jackson*, 3 Munf. 458.

So an arrest of one named by a wrong name in the process, though he be the person intended, subjects the officer making it to an action for false imprisonment, unless the party arrested was known by both names. *Griswold v. Sedgwick*, *supra*. *Mead v. Haus*, 7 Cow. 332. *Gurnsey v. Lovell*, 9 Wend. 319; or of the wrong person; *The Bank v. Howard*, 14 Mass. 184. *Smith v. Boucher*, 1 Id. 76; or when made after the return day of the writ; *Stoyel v. Lawrence*, 3 Day, 1. *Prescott v. Wright*, 6 Mass. 22; but it seems the arrest may be made on the return day. *Adams v. Freeman*, 9 Johns. 117.

within the county, except where the defendant is privileged. But it cannot be made, between the day of the return and *quarto die post*, by original.(a) And, by the statute 29 *Car.* II. c. 7, § 6, "no person or persons, upon the *Lord's* day, shall serve or execute, or cause to be served or executed, any writ, process, warrant, order, judgment, or decree, except in cases of treason, felony, or breach of the peace: but the service of every such writ, &c. shall be void to all intents and purposes;(b) and the person or persons so serving or executing the same, shall be as liable to the suit of the party grieved, and to answer damages to him for doing thereof, as if he or they had done the same without any writ, &c."

In construing this statute, it has been holden, that an arrest cannot be made on a *Sunday*, upon a *capias utlagatum*;(c) or for non-payment of a *penalty* upon conviction.(d) And the statute extends not only to process properly so called, but also to all notices on which rules are made: and hence it has been holden, that service of notice of plea filed on a *Sunday* is void, by construction of the statute.(e) Where A. was arrested at the suit of B. and discharged, the sheriff not knowing that there was also a detainer in his office at the suit of C. and on the *Sunday* following he was arrested at C.'s suit, the court discharged him out of custody;(f) considering the arrest on the *Sunday*, as an original taking, or a retaking after a *voluntary* escape;(g) and in either case it was prohibited by the statute. But after a *negligent* escape, the defendant may be retaken on a *Sunday*; and that either by the officer upon fresh pursuit, or by virtue of an escape warrant;(h) for this is not an original undertaking, but the party is still in custody upon the old commitment. Also it is holden, that bail may take their principal on a *Sunday*, in order to surrender him;(i) for this is not by virtue of any process at all. And it should seem that process of contempt being of a criminal nature, may be served upon that day.(k) But a rule *nisi* for an attachment for non-payment of money pursuant to the master's *allocatur*, cannot be so served.(l)

The arrest must be made in the county into which the process issues; Therefore, an arrest in the city of *London* on a bill of *Middlesex*, is irregular, even though it took place on the verge of the county of *Middlesex*, *if there be no dispute as to the boundaries.(aa) [*219] And it is a rule, that no man can be arrested in his own house, provided the outer door be shut;(bb)[A] or in the king's presence;(cc) or

(a) 1 Sid. 229. 2 Esp. Rep. 585.

(b) 1 Salk. 78. The service of process on a *Sunday*, being absolutely void by the statute, cannot be made good by any subsequent waiver of the defendant, as by his not objecting until after a rule to plead given. 3 East, 155. 8 East, 547, (b).

(c) Barnes, 319.

(d) 1 Durnf. & East, 265.

(e) 8 East, 547. And see 5 Barn. & Cres. 406. 8 Dowl. & RyL. 204, S. C. 4 Bing. 84, as to the validity of contracts entered into on *Sunday*.

(f) 5 Durnf. & East, 25.

(g) Barnes, 373.

(h) 2 Ld. Raym. 1028. 2 Salk. 626. 6 Mod. 95, S. C.

(i) 6 Mod. 231. 1 Atk. 239, but see 2 Blac. Rep. 1273.

(k) 12 Mod. 348. 1 Atk. 55. Willes, 459.

(l) 8 Durnf. & East, 86.

(aa) 3 Barn. & Ald. 408.

(bb) 5 Co. 91, but see Cowp. 1. 2 Moore, 207. 8 Taunt, 250, S. C.

(cc) 3 Blac. Com. 289.

[A] In order to make an arrest in a civil case, an *outer* cannot be broken open, but an *inner* may. *Oysted v. Shed*, 13 Mass. 520. *Allen v. Martin*, 10 Wend. 300. *Williams v. Spencer*, 5 Johns. 352. *Fitch v. Lovland*, Kirby, 386. *Hibbard v. Muck*, 17 Johns. 127. And if the debtor resist and commit an assault where the sheriff has broken open the outer door

within the verge of his royal palace, *(dd)* (except by an order of the board of green cloth, or unless the process issue out of the palace court; *(e)* or in any place where the king's justices are actually sitting, *(f)*). So it has been decided, that process cannot be lawfully executed in *Kensington* palace, which is privileged for this purpose as a royal residence. *(g)* And an arrest within the tower of *London*, would it seems be bad, without leave obtained from the governor. *(h)* But an arrest, within the verge of the king's palace, has been holden, in the Common Pleas, to be no ground for discharging the defendant out of custody. *(i)* The privilege of the parties to a suit, and their witnesses, of which we have before spoken, *(k)* may also in some measure be considered as of a *local* nature: And of the same kind as that of *clergymen*, who, by several ancient statutes, *(l)* are privileged from arrest, in going to and returning from church, or performing divine service; but not if they stay in church, with a fraudulent design of eluding the process of the law. And it is said, that the party grieved may have an action upon these statutes. *(m)*

In making the arrest, the sheriff or his officer, it has been said, must actually seize or touch the defendant's body: *(n)* but this does not seem to be absolutely necessary; for if a bailiff come into a room, and tell the defendant he arrests him, and lock the door, that is held to be an arrest; for he is in custody of the officer. *(o)* [A] And it is not necessary that the officer who has the authority, should be the hand that arrests, nor in the presence of the person arrested, nor actually in sight, nor is any exact distance prescribed: it is sufficient if he be near, and acting in the arrest. *(p)* If the defendant be wrongfully taken, without process, *(q)* or

(dd) Stat. 28 Hen. VIII. c. 12. 3 Inst. 141. 2 Ld. Raym. 978. 3 Salk. 91, 284. 6 Mod. 73. Holt, 590, S. C. 1 Man. & Ry. 452. *Id.* 457, *(a)*.

(e) 3 Durnf. & East, 735.

(f) 3 Inst. 140, 41. 2 Mod. 181, but see 1 Lev. 106.

(g) 10 East, 578. 1 Campb. 475.

(h) 2 Chit. Rep. 48, 51. But see 1 Moore & P. 309. 4 Bing. 523, S. C.

(i) 7 Taunt. 311, and see 1 Chit. Rep. 375, *in notis.* 3 Barn. & Ald. 502.

(k) *Ante*, 195, &c.

(l) 50 Edw. III. c. 5. 1 R. II. c. 15, and see 1 Mar. sess. 2, c. 3.

(m) 12 Co. 100. In 5 Bac. Abr. 565, it is said, that the arrest of a clergyman under civil process, either in going to church, to perform divine service, or in returning from thence, on any day, is a false imprisonment. But from several later decisions it may be collected, that if any action would lie, which is doubtful, it should be an action on the *case*, and not an action of *trespass*, against the sheriff or his officers. 3 Wils. 341. 2 Blac. Rep. 1087, 1190. Doug. 671.

(n) 1 Salk. 79, and see 1 Ry. & Mo. 26. 1 Car. & P. 153, S. C. 6 Barn. & Cres. 528.

(o) Cas. temp. Hardw. 301, and see 2 New Rep. C. P. 211, 12. 1 Man. & Ry. 211. *Id.* 215, *(a)*.

(p) Cowp. 65.

(q) 2 Austr. 461, and see 1 New Rep. C. P. 135. 11 Price, 156, 345.

of the dwelling house, an indictment will not lie against him for so doing. *The State v. Rooker*, 17 Verm. 658.

But the law will not permit a dwelling-house to be used fraudulently to cover a man's goods. *Stitt v. Wilson*, Wright, 505. But if an arrest has been made and the prisoner escapes and takes refuge in a dwelling, the officer while in fresh pursuit of him may break the outer door. *Oysted v. Shed*, *supra*. *Allen v. Martin*, *supra*.

[A] It is an arrest if the party is within the power of the officer. *Gold v. Bissell*, 1 Wend. 215. *Strout v. Gooch*, 8 Greenl. 127. *Cooper v. Adams*, 2 Blackf. 294. *Field v. Ireland*, 21 Ala. 240. *Jones v. Jones*, 13 Ired. 448. But if the defendant resists, some touching of the body is necessary, but if he submits, it can be dispensed with. *McCracken v. Ansley*, 4 Srobh. 1.

after it is returnable,(r) &c. he cannot be lawfully detained in custody under subsequent process at the suit of the same plaintiff, though regularly issued: But *third persons, who find a defendant in custody, have a right to consider him as being lawfully in the custody in which he is found, and to proceed against him accordingly; for otherwise a person under an illegal arrest, at the suit of one party, would be completely protected, during his imprisonment, from all other process, which would be productive of great inconvenience and suspension of justice.(a)

*CHAPTER XI.

[*221]

Of the BAIL BOND; and DUTY of SHERIFFS, &c., on the ARREST.[A]

WHEN the defendant is arrested, he is either let out of custody, upon giving bail to the sheriff, or an attorney's undertaking for his appearance; or depositing in the sheriff's hands, the sum indorsed on the writ, with *ten* pounds in addition to answer costs, &c.; or he remains in custody, or escapes or is rescued, &c.

Bail in personal actions came in with the *capias*:(a) and it is either to the sheriff, for the appearance of the defendant at the return of the writ, or to abide the event of the suit: The former is called bail to the *sheriff*, or bail *below*; the latter bail to the *action*, or, when special, bail *above*. Before the statute 23 Hen. VI. c. 9, the sheriff was not obliged to bail a defendant, arrested upon mesne process, unless he sued out a writ of *mainprize*; though he might have taken bail of his own accord.(b) This arbitrary power produced great extortion and oppression of the subject: to remedy which, it was enacted by the above statute, that "sheriffs, &c., shall let out of prison all manner of persons arrested, or being in their custody, by force of any writ, bill or warrant, in any action personal, or by cause of indictment of trespass, upon reasonable sureties of sufficient persons, having sufficient within the counties where such persons be so let to bail or mainprize, to keep their days in such place as the said writs, bills or warrants shall require; persons being in their ward by condemnation, execution, *capias utlagatum* or *excommunicatum*, surety of the peace, or by special commandment of any justice, and vagabonds refusing to serve according to the statute of labourers, only excepted.

And that "no sheriffs, &c., shall take, or cause to be taken, any obligation, for any cause aforesaid, or by colour of their office, but only to themselves, of any person, nor by any person, which shall be in their ward by cause of law, but by the name of their office; and upon condition

(r) 2 H. Blac. 29, and see 3 East, 89. 1 Rose, 261, 2.

(a) 2 Barn. & Ald. 743. 1 Chit. Rep. 579, S. C., and see *id.* 579, 80, 81, *in notis*.

(a) Gilb. C. P. 33. And for the origin, progress, and general nature of the law of bail, see Petersd. Part I. Chap. I.

(b) Gilb. C. P. 20, 21. 4 Bac. Abr. 461. F. N. B. 251. Plowd. 67. Dalt. Sher. 56, and see 1 Vent. 55, 85. 2 Wms. Saund. 5 Ed. 60, 61, g. 1 H. Blac. 233. 15 East, 321.

[A] See 1 Archb. Pract. Pt. II., p. 632, 8 Ed.

written, that the prisoners shall appear at the day and place contained in the writ, bill or warrant. And if any sheriffs, &c., take any obligation in other form, by colour of their office, it shall be void."

*This is a public act, of which the courts will judicially take [*222] notice, without its being specially pleaded.(aa) And it hath two branches: first, as to the *persons* to be let to bail; and, secondly, as to the *form* of the security.(bb) Upon the first branch of the statute, it has been determined, that the sheriff has no authority to take a bond for the appearance of persons arrested by him, under process issuing upon an indictment at the quarter sessions, for a misdemeanour; but can only take a recognizance for their appearance:(c) And it has been doubted, whether the sheriff can take bail on an attachment for a contempt, issuing out of a court of law.(d) But it is holden, that bail may be taken on attachment out of Chancery, on *mesne* process:(e) though not after a decree.(f) The practice upon *mesne* process is, for the sheriff to take a bond in the penalty of 40*l.* for the defendant to appear and answer;(g) and an action may be brought on the bond, in the name of the sheriff.(h) But though the sheriff may, yet he is not compellable to take bail, on an attachment out of Chancery; it having been determined, that an action will not lie against him for refusing to take it:(i) and therefore, if he will not take bail, the defendant must remain in *custody, and can [*223] only be relieved by applying to the chancellor, or a judge of the court out of which the process issued.(a) If the sheriff take bail, it seems from the case of the *King v. Dawes*,(b) that he may be amerced,

(aa) 2 Durnf. & East, 569. 15 East, 323.

(bb) For the determinations on both these branches of the statute, see 2 Wms. Saund. 5 Ed. 59, (3), &c.

(c) 4 Durnf. & East, 505. 2 H. Blac. 418.

(d) In an *anonymous* case, reported in 1 Str. 479, the Chief Justice, on a motion for an attachment, declared, that all the judges on consideration had resolved, that the sheriff could not take bail on an attachment, but a judge at his chamber might. And accordingly, in a late case of *Phelps v. Barrett*, 4 Price, 23, it was determined by the court of Exchequer, that the sheriff cannot let out of custody on bail, a defendant taken under an attachment, issuing out of courts of law, for non-payment of costs; such process being in nature of, and in effect an execution: and see Com. Rep. 264. Barnes, 64. *Per* Ld. Mansfield, M. 23 Geo. III. K. B. *accord.*: but see 1 Ld. Raym. 722. 2 Salk. 608, S. C. *contra*. The case of *Morris v. Hayward*, however, 6 Taunt. 569. 2 Marsh. 280, S. C., is an authority to show, that although the sheriff is not bound to take bail upon an attachment, yet if he do, he may recover upon the bail bond: and see the case of *Rex v. Dawes*, 1 Ld. Raym. 722. 2 Salk. 608, S. C., *accord*. That indeed was the case of an attachment out of Chancery, to enforce an appearance; but process issuing out of courts of law and equity is said to stand on the same foundation: though it is observable, that process out of Chancery is not within the statute 23 Hen. VI. c. 9, as appears by that case, and *Studd v. Acton*, 1 H. Blac. 474. The case of *Morris v. Hayward* was decided upon great consideration, and is at variance with the subsequent case of *Phelps v. Barrett*: the foundation of which was, that an attachment is a process in nature of an execution. *Per* Bayley, J. in the case of *Lewis v. Morland*, 2 Barn. & Ald. 63. And as it was determined, in the latter case, that an attachment issuing out of the court of King's Bench, for non-payment of money, is in nature of *mesne* process, the principle on which the case of *Phelps v. Barrett* was decided, cannot it seems be supported. In the case of *Rex v. Aylett*, T. 25 Geo. III. K. B. a distinction was taken by the counsel in argument, which seems to be reasonable, between an attachment for non-payment of money, and for not delivering papers, or other cause; and it was said, that on the former, the sheriff might take bail, but the latter was bailable only before a judge.

(e) Sty. Rep. 212, 234. 2 Vent. 237. Com. Rep. 264. Barnes, 64. 2 Blac. Rep. 955. 6 Taunt. 569. 2 Marsh. 280, S. C., but see 3 Leon. 208, *contra*.

(f) Gilb. Rep. 84. Prec. Chan. 331, S. C.

(g) 1 Eq. Cas. Abr. 351. 4 Bac. Abr. tit. *Sheriff*, O. 4 V. 463.

(h) Taunt. 569. 2 Marsh. 280, S. C.; and see Price, 224.

(i) 1 H. Blac. 468. 6 Taunt. 571, &c. 2 Marsh. 283, 286, S. C.

(a) 1 Str. 479.

(b) 2 Salk. 608. 1 Ld. Raym. 722, S. C.

if the party do not appear and answer; but in a subsequent case,^(e) a messenger was sent, upon the sheriff's return of *cepi corpus*, to bring him in; which seems to be now the practice in Chancery, instead of making an order on the sheriff to bring in the body. So, in the Exchequer, if the condition of the bond be broken, the course is said to be, to get an order, on the return by the sheriff of *cepi corpus*, for a messenger to bring in the defendant.^(dd) But where a defendant had been arrested on an attachment for contempt, in not appearing to a *subpoena ad respondendum*, the court would not grant a motion for the messenger to bring up the body, after the defendant had given a bail bond to the sheriff, although the penalty was inadequate.^(ee)

When the defendant is arrested, and in actual custody, it is the duty of the sheriff to take bail, if required; [A] and therefore if a bail bond be tendered, with sufficient sureties, and the sheriff refuse to accept it, and liberate the defendant, he is liable to a special action on the case.^(f) But in order to maintain such an action, it must appear that the parties who were offered as bail, had sufficient within the county where the arrest was made.^(g) A bond, however, with *five* sureties, *three* of whom are respectively worth more than the penalty of the bond, is sufficient, though the other *two* are worth less than the penalty.^(h) The clause which requires reasonable sureties was introduced for the benefit of the sheriff; and therefore, though he may insist upon *two* sureties, yet he may take a bond with *one* only.⁽ⁱ⁾ [B] And for the same reason, the plaintiff cannot maintain an action against him, for taking sureties that are insufficient, or do not inhabit within his county.^(k) And though the words of the statute seem to be confined to persons arrested and in actual custody, yet it has been holden, that the arrest need not be stated in an action upon the bail bond;^(l) and if stated, it is not traversable:^(m) for it would be of mischievous consequence, if a bail bond, taken civilly, without exposing the party by an arrest, were not as effectual as if he had been actually arrested.

(e) Prec. Chan. 331.

(dd) 3 Price, 223.

(ee) 6 Price, 32.

(f) Gilb. C. P. 20. Cro. Car. 196. W. Jon. 226, S. C. 1 Sid. 22. 2 Mod. 31, 84, 180. 2 Vent. 96. 6 Durnf. & East, 355, and see 2 Wms. Saund. 5 Ed. 61, b. c. (5.)

(g) 15 East, 320.

(h) 5 Maule & Sel. 223.

(i) 10 Co. 100, b. Cro. Eliz. 624, 808, 852, 862. 9 Moore, 422. 2 Bing. 227, S. C. So, though a replevin bond be executed by one of the sureties only, it is nevertheless available by the sheriff, against such surety. 7 Taunt. 28. 2 Marsh. 352, S. C.; and see 7 Taunt. 327. 1 Moore, 68, S. C.

(k) Cro. Eliz. 808, 852, 862. Noy. 39. 1 Sid. 96. 2 Wms. Saund. 5 Ed. 59. 1 Mod. 227, 239. 2 Mod. 83, 177; but see 1 Ld. Raym. 425. 1 Salk. 99, S. C. 6 Mod. 122, *semb. contra*.

(l) 1 Str. 643.

(m) *Id.* 444; but see Noy. 43, *semb. contra*. See also Say. Rep. 116, by which it appears, that the issuing of the process may be traversed.

[A] The bond should be given to the sheriff and his successor. *Loker v. Antonio*, M'Cord, 175. *Hunter v. Gilham*, 1 Breese, 51. *Ralston v. Love*, Hardin, 501. *Glezen v. Rood*, 2 Metef. 490. And bond taken to the plaintiff instead of the sheriff is void. *Handley v. Ewings*, 4 Bibb, 505; or with a blank condition; *Perry v. Dobbins*, 2 Bailey, 343; or without a seal; *Walker v. Lewis*, 2 Hayw. 16. *Peyton v. Mosely*, 3 Monr. 80. *Smalley v. Vanorden*, 2 South, 811; or if it be not executed by the principal as well as the sureties; *Bea v. Parker*, 17 Mass. 591; or if it specify no sum to be paid by the obligors; *Harrison v. Tiernans*, 4 Rand. 177; or if it be not delivered. *Harrison v. Tiernans*, 4 Rand. 177.

[B] Statutory directions as to the number of sureties on the bond are merely directory and the sheriff may take a smaller number without affecting the validity of the bond. *Johnson v. Williams*, 2 Overt. 178. *Rice v. Hosmer*, 12 Mass. 129. *Long v. Billings*, 9 Ib. 482. *Lane v. Smith*, 2 Pick. 284. *Arrenton v. Jordan*, 4 Hawks, 98. *Glezen v. Rood*, 2 Metef. 490. *Bennett v. Brown*, 5 Rich. 347.

[*224] *The second branch of the statute requires a security by *bond* or obligation : (a) and therefore an agreement in writing, made by a third person with a sheriff's officer, to put in good bail for the defendant at the return of the writ, or surrender his body to the officer, or pay the debt and costs ; (b) or an attorney's undertaking to the officer, for the appearance of the defendant, (c) or to give a bail bond to the sheriff in due time, (d) has been holden to be void, by the statute 23 Hen. VI. c. 9 ; and an action will not lie upon such an agreement or undertaking. (e) In these cases, if bail above be not duly put in, the sheriff is liable to an action for an escape ; and the court will not relieve him, by permitting him afterwards to put in and justify bail : (ff) nor, after the plaintiff has recovered against the sheriff for the escape, will the court proceed summarily against the attorney, to make him pay the debt and costs, for his breach of faith. (gg) It is also settled, that the sheriff or his officer cannot maintain an action against the defendant for money paid, when he has discharged him out of custody on mesne process, without taking a bail bond, and has in consequence of his non-appearance, been obliged to pay the debts and costs. (hh)

The bail bond is usually taken in a penalty, being double the amount of the sum sworn to and indorsed on the writ, notwithstanding the statute 12 Geo. I. c. 29, which directs the sheriff to take bail for that sum, and no more ; (ii) and the sheriff's bail are liable thereon to the full extent of the debt and costs, and not exceeding the penalty of the bond. (k) Respecting the *form* of the bond, there are three things to be observed ; first, that it may be made to the sheriff himself ; secondly, that it be made to him, by his name of office ; and thirdly, that it be conditioned for the defendant's appearance at the return of the writ, and for that only. (l) Therefore, if the bond be not made to the sheriff, (m) or be not made to him by his name of office, (m) or if it be single, without any condition at all, (n) or with an impossible condition, (n) or the condition be not for the defendant's appearance, (m) or be for that and something else, (m) it is void by the statute. So it is void, if executed before the condition is filled up. (o) [A]

(a) 2 Wms. Saund. 5 Ed. 59, a. b. Append. Chap. XI. § 1, 2, 3.

(b) 1 Durnf. & East, 418.

(c) 7 Durnf. & East, 109. *Parker v. England*, M. 45 Geo. III. K. B. 2 Smith, R. 52, S. C.

(d) 4 East, 568. (e) 1 Durnf. & East, 418.

(ff) 7 Durnf. & East, 109.

(gg) 4 East, 568. *Parker v. England*, M. 45 Geo. III. K. B. 2 Smith R. 52, S. C.

(hh) 8 East, 171 ; and see *Eyles v. Faikney*, E. 32 Geo. III. K. B. Peake's Cas. Ni. Pri. 3 Ed. 195, (a). 1 Esp. Rep. 383.

(ii) Cas. Pr. C. P. 43. Fort, 363. Prac. Reg. C. P. 67 ; but see 3 Blac. Com. 290, *semb. contra*.

(k) 2 Blac. Rep. 816. 1 H. Blac. 76.

(l) Cro. Eliz. 862. 4 Bac. Abr. 462.

(m) Dyer, 119, 20. 10 Co. 100, a. b. Cro. Eliz. 800. W. Jon. 138. Palm. 378. 2 Lev. 123. Fort. 371.

(n) 3 Lev. 74. 1 Str. 399. Fort, 363, S. C. 2 Durnf. & East, 569.

(o) 3 Campb. 181.

[A] A bond varying slightly from the statute will be good, if it include all the obligations imposed, and allow every defence given by the statute. *Rhodes v. Vaughan*, 2 Hawks. 167. *Saunders v. Hughes*, 2 Bailey, 504. *Payne v. Britton*, 6 Rand. 101. But the condition of the bond must pursue, and not be contrary to the statute. *Basket v. Scott*, 5 Litt. 208. *Barnard v. Fiele*, 21 Wend. 89. Though a bail bond which omitted the nature of the action and the amount of the debt, has been held sufficient in Kentucky. *Palmer v. McGinnis*, Hard. 505. But regularly it should show substantially at whose suit the arrest was made, the amount of damages demanded, and when and where the process is returnable. *Churchill v. Perkins*, 5 Mass. 542. *Stevens v. Clancy*, 1 Johns. 521. *McLean v. Lillard*, 1 Bibb. 146. *Robeson v. Thompson*, 4 Halst. 97. *Carter v. Cockrill*, 2 Munf. 448. See note [A], p. 223, ante.

And in an action on a bail bond, the return of the writ, on which the defendant in the original action was arrested, must be stated with certainty.(p) If the objection to the bail bond appear on the face of the declaration, or upon *oyer*, the *defendant may demur; [*225] but otherwise he should plead it: and when, by pleading or otherwise, it appears in any part of the record, he may move in arrest of judgment.(a)

If the bond be substantially good, it cannot be avoided for any trifling informality, or variance of the condition from the writ, in the description of the plea, or of the time or place of appearance.[A] Thus, where the writ was to answer the plaintiff in a plea of debt for *three hundred and twenty pounds*, or in a plea of trespass within an *ac etiam*, and the condition was to answer the plaintiff in a plea of debt or trespass *generally*, or without mentioning the plea at all, the variances were holden to be immaterial;(b) for the statute only requires a bond conditioned for the defendant's appearance, and the description of the plea is merely surplusage. And accordingly, where the sheriff, upon an original writ in a plea of trespass *on the case on promises*, took a bail bond conditioned for the defendant's appearance, to answer the plaintiff in a plea of *trespass*, the court held it to be valid.(c) So, where the writ, in *trespass*, was to appear before the *lord the king at Westminster*, and the condition was to appear before the *justices of the King's Bench at Westminster*,(d) the bond was holden good. And where the writ, by *original*, was returnable before the lord the king, *wheresoever he shall then be in England*, and the condition was without the words *wheresoever*, &c., the court gave judgment for the plaintiff, in an action upon the bond; saying, they would understand, that by appearing before the king was meant, before the king in his *court*, and not before the king in *person*.(e) So, where the condition of the bond, in an action by *original*, was to appear before the king at *Westminster*, it was deemed sufficient.(f) And where a declaration on a bail bond, in setting out the condition, stated that if the defendant should appear, &c., to answer the plaintiff "according to the custom of his majesty's court of Common Bench here," the obligation should be void; and on the production of the bond, the latter words were omitted; the court of Common Pleas held, that this was no variance, as it was only necessary to set out the condition according to its legal effect.(g) It has also

(p) 2 Chit. Rep. 624.

(a) 2 Durnf. & East, 569.

(b) Cro. Jac. 286. 2 Lev. 123. 2 Show. 51. T. Jon. 137, 8. 6 Mod. 122. 10 Mod. 327. *Atkinson v. Saunderson*, E. 25 Geo. III. K. B.; but see 2 Lev. 177, *semb. contra*.

(c) 6 Durnf. & East, 702; and see 5 Moore, 538. 2 Brod. & Bing. 659, S. C.

(d) 2 Lev. 180. T. Jon. 46, S. C. 2 Vent. 237, 8.

(e) 2 Str. 1155, 6.

(f) 9 East, 55; but see 1 Chit. Rep. 323. *Ante*, 129, 30.

(g) 3 Moore, 214; and see 3 Sturk. Ni. Pri. 76.

[A] Misnomer of the plaintiff in the recital will not of itself render the bond void. *Colburn v. Downes*, 10 Mass. 20. Even where a bail bond was executed by the principal and the bail, but the name of the bail was not inserted in the body of the bond, though a blank was left for it, and the plaintiff recovered a judgment upon it against both the principal and the bail, which judgment stood unreversed, the court held the bond valid, and would not allow the plaintiff to maintain an action against the sheriff for returning a defective bail bond. *Reynolds v. Gore*, 4 Leigh. 276. A substantial compliance with the act is all that is required. *Mustin v. Mustin*, 13 Geo. 357. *Sugar v. Daves*, *Id.* 462. Thus, where the names of the sureties are inserted in the first part of the bond and signed by them, but omitted in the condition of the bond, the legal effect of the instrument was not altered. *Davidson v. Carter*, 9 Geo. 591.

been holden, that the statute for preventing frivolous and vexatious arrests(*h*) is merely *directory* to the sheriff; and does not avoid the bail bond, where there is no affidavit of the cause of action,*(i)* or the sum sworn to is not indorsed on the writ,*(j)* or even where the bond is taken in a penalty, being more than double the amount of the sum sworn to.*(k)* But an allegation, that an action was *depending in his majesty's court of the *Bench at Westminster*, is not sustained by proof of a *pluries* bill of *Middlesex*: for by such allegation the *Common Bench* must be intended.*(a)* So, where a *capias ad respondendum* was made returnable before his majesty's justices of the *Bench at Westminster*, by virtue of which the sheriff issued his mandate to the bailiff of a liberty, commanding him to take the defenant, so that the sheriff might have his body before his said majesty at *Westminster*; and the bailiff took a bail bond, conditioned for the defendant's appearance before his said majesty at *Westminster*; the court of Common Pleas held, that the variance between the bail bond and the writ was fatal, and therefore that the bond was void, by the statute 23 Hen. VI. c. 9.*(b)* And in an action on a bail bond, where the condition set out on the record was, "to answer the plaintiff in a plea of trespass, and also to a bill to be exhibited against the defendant for 60*l.* upon promises," and the bond, when produced, did not contain the words "upon promises," the variance was holden to be fatal.*(c)*

The defendant having given a bail bond, could not formerly have discharged his bail to the sheriff, by *surrendering* himself before the return of the writ; for it was considered as a settled point, that nothing could be a performance of the condition of the bail bond, but putting in and perfecting bail above.*(d)* But it has since been determined, that if the defendant surrender himself to the sheriff, before or on the return-day of the writ, the bail bond may be given up to be cancelled: after which, the plaintiff cannot take an assignment of it;*(e)* nor can he rule the sheriff, or maintain an action against him, for not assigning it.*(f)* And where the defendant surrendered to the gaoler, at the county gaol, in discharge of his bail to the sheriff, before *twelve* o'clock on the first day of term, being the return day of the writ, and the under-sheriff, who lived at a distance, signified his assent to the surrender by return of post the next day, it was held sufficient to discharge the bail bond, of which the plaintiff had taken an assignment afterwards, with notice of such surrender.*(gg)* But it is optional in the sheriff, whether he will accept the surrender of the party, in discharge of the bail bond: and therefore, where notice of such surrender was given to the sheriff, and to the gaoler in whose custody the party then was, at the suit of another, after which the gaoler let the party out of custody, the court held that the gaoler was not liable upon his

(*h*) 12 Geo. I. c. 29.

(*i*) 1 Bur. 330; but see 2 New Rep. C. P. 202, *semb. contra*.

(*j*) 2 Wils. 69. 1 Bur. 331. 1 H. Blac. 76. 2 Bos. & Pul. 109.

(*k*) 3 Maule & Sel. 166; and see 7 Taunt. 271. 1 Moore, 19, S. C.

(*b*) 6 Taunt. 551. 2 Marsh. 258, S. C.

(*c*) 1 Ry. & Mo. 93. And see further, as to the nature and form of the bail bond, Petersd. Part I. Chap. VI.

(*d*) 5 Bur. 2683; and see Dalt. Sher. 356. 1 Price, 262.

(*e*) *Callaway v. Seymour*, E. 42 Geo. III. K. B.

(*f*) 6 Durnf. & East, 753. 7 Durnf. & East, 122. 8 Durnf. & East, 456, 505; and see 1 Bos. & Pul. 325.

(*gg*) 10 East, 100; and see 8 Moore, 518. 1 Bing. 423, S. C.

bond of indemnity to the sheriff, as for an escape in the former suit; for the party was not legally in the custody of the sheriff or his gaoler, merely by virtue of such surrender. *(h)* And it seems, that rendering the *defendant to the King's Bench prison, before the return of [*227] the writ, will not discharge his bail to the sheriff. *(a)*

The provisions of the statute of Hen. VI. are not applicable to securities taken by, or for the benefit of the plaintiff: *(b)* And hence, an attorney's undertaking to appear for the defendant is binding, if given to the *plaintiff* in the cause, though it be not exactly in the form prescribed. And an undertaking, by a third person, to sign a bail bond for the defendant, is not considered as an undertaking, within the statute of frauds, *(c)* to answer for the debt, default, or miscarriage of another. *(d)* By an old rule of court, *(e)* "a prisoner taken upon a *capias* shall not be discharged, till he hath given bond to appear; unless the plaintiff or his attorney shall consent to take an appearance, without bail:" But it is now the common practice to take an attorney's undertaking to the plaintiff, where special bail is required; and the courts will enforce it by attachment. *(f)*

It sometimes happens, that persons arrested upon mesne process may not be able to find sufficient sureties for their appearance at the return of the writ, and yet may be able to make a deposit of the money for which they are so arrested, together with a competent sum for costs: and therefore, by the statute 43 Geo. III. c. 46, § 2, reciting that it is expedient that persons arrested should, upon making such deposit, be permitted to go at large until the return of the writ, without finding bail to the sheriff for their appearance at the return thereof; it is enacted, that "all persons who shall be arrested upon mesne process, within those parts of the united kingdom of *Great Britain* and *Ireland*, called *England* and *Ireland*, shall be allowed, in lieu of giving bail to the sheriff, to deposit in the hands of the sheriff, by delivering to him or to his under-sheriff, or other officers to be by him appointed for that purpose, the sum indorsed upon the writ, by virtue of the affidavit for holding to bail in that action, together with *ten* pounds in addition to such sum, to answer the costs which may accrue or be incurred in such action, up to and at the time of the return of the writ, and also such further sum of money, if any, as shall have been paid for the king's fine upon any original writ; and shall thereupon be discharged from such arrest, as to the action in which he, she, or they shall so deposit the sum indorsed on the writ." And that "the sheriff shall, in every such case, at or before the return of the said writ, pay into the court in which such writ shall be returnable, the sum of money so deposited with him as aforesaid; and thereupon, in case the defendant or defendants shall afterwards duly put in and perfect bail in such action, according to the course and practice of such court, the sum of money so deposited and paid into court *as aforesaid [*228] shall, by order of the court, upon motion to be made for that purpose, be repaid to such defendant or defendants. *(aa)* But in case the

(h) 1 East, 383.

(a) *Foster v. Hyde*, M. 41 Geo. III. K. B.; and see 1 Price, 262; but see 3 Bos. & Pul. 232. *(b)* Cro. Eliz. 190. 1 Sid. 132. 1 Lev. 98, S. C. 2 Mod. 305. 1 Durnf. & East, 421. 4 East, 569. 2 Smith R. 53.

(c) 29 Car. II. c. 3, § 4.

(d) 1 Ry. & Mo. 348.

(e) R. M. 1654, § 6, K. B. R. M. 1654, § 9, C. P.

(f) 1 Durnf. & East, 422. 4 East, 569. 2 Smith, R. 53.

(aa) For the form of an affidavit for this purpose, see Append. Chap. XI. § 4.

defendant or defendants shall not duly put in and perfect bail in such action, then and in such case the said sum of money so deposited and paid into court as aforesaid shall, by order of the court, upon a like motion to be made for that purpose, be paid out to the plaintiff or plaintiffs in such action, who shall be thereupon authorized to enter a common appearance, or file common bail for such defendant or defendants, if the said plaintiff or plaintiffs shall so think fit; such payment to the plaintiff or plaintiffs to be made subject to such deductions, if any, from the sum of *ten* pounds deposited and paid to answer the costs as aforesaid, as upon the taxation of the plaintiff's costs, as well of the suit as of his application to the court in that behalf, may be found reasonable."

In the construction of the above act of parliament, (which has been sometimes, though erroneously, called Lord *Ellenborough's* act,)(*b*) it has been holden, that where money is paid to the sheriff upon an arrest, it shall be presumed to have been paid as a deposit in lieu of bail, unless a discharge or some acknowledgement in writing be given to the defendant for the debt and costs.(*c*) This act was made in ease of defendants, and not for the benefit of plaintiffs: And therefore, where the defendant puts in bail above, who, on being excepted to, render him, instead of justifying, the plaintiff is not entitled to receive the money out of court; but the defendant, if he made the deposit, may in such case receive it back :(*d*) or if the deposit was made by any other person than the defendant, the court will, upon bail above being put in and perfected, or the defendant surrendered, order it to be repaid in the bail, or other person by whom it was actually deposited, and not to the defendant(*e*) The above act does not controul the discretion of the court, with respect to the time for putting in bail: therefore, where money is paid into court in lieu of bail, which is not put in and perfected in due time, the court, on an affidavit of merits, will grant further time to the defendant.(*f*) And where the plaintiff had made application for the money to be paid out of court to him, and that rule was discharged on showing cause, and it appeared, on fully discussing the merits of the case, that the defendant was entitled to the money, the court of Common Pleas granted a rule, absolute in the first instance, for the money to be paid over to him.(*g*) If a defendant, being arrested by a wrong name, pay the amount of the sum sworn to, and 10*l.* for costs to the sheriff, without prejudice, the plaintiff will not be permitted to take it out of court, on the defendant's [*229] omitting to perfect bail:(*h*) And neither the *sheriff, nor officer of the court, is entitled to poundage, on the money being taken out of court.(*a*)

When bail above is not put in and perfected in due time, the plaintiff is entitled, by the express words of the statute, to have the money paid him, by order of the court, upon motion made for that purpose.(*bb*) And, in the King's Bench, where a defendant cannot be found, so as to serve him personally with a rule for taking out the money deposited in the hands of the sheriff, the court will allow the service to be good, by leaving a copy of the

(*b*) 1 Smith, R. 128.

(*c*) *Id.* 127.

(*d*) 4 Taunt. 669. 3 Maule & Sel. 283. 2 Moore, 610. 8 Taunt. 557, S. C. 1 Chit. Rep. 145, S. P. 2 Chit. Rep. 71; and see 7 Moore, 432. 1 Bing. 103, S. C.

(*e*) 1 Smith, R. 13; but see 2 Moore, 610.

(*f*) 2 Chit. Rep. 71.

(*g*) 4 Taunt. 670.

(*h*) 5 Taunt. 623.

(*a*) 2 Barn. & Ald. 770. 1 Chit. Rep. 529, S. C. 6 Moore, 124.

(*bb*) For the form of an affidavit for this purpose, see Append. Chap. XI. § 5, and for the rule of court thereon, *id.* § 6.

rule at the defendant's last place of abode, and sticking it up in the office. (cc) In the Common Pleas, where the defendant, on being arrested, paid the debt and *ten* pounds in addition for costs, which sum was more than sufficient to cover them, and informed the plaintiff's attorney, that he should reclaim only the surplus which might remain after payment of debt and costs, and the plaintiff's attorney, on the sheriff's omitting after request to remit the money, proceeded in the action; the court held, that the defendant was not liable to pay the costs so incurred after the arrest. (d) The cases in which the plaintiff may think fit to enter a common appearance, or file common bail for the defendant, are where he claims and means to proceed for more than the sum indorsed on the writ: but in these cases, there is no provision made by the act, with regard to costs, if he should not eventually recover more than that sum; nor for his refunding any part of it, if he should recover less. In an action for a malicious arrest, an allegation that the plaintiff gave bail to the sheriff for his appearance at the return of the writ, is not supported by evidence that he paid the debt and 10*l.* for costs into the hands of the sheriff; but he may still maintain the action, although he cannot recover for the consequential damages. (e)

If the defendant, upon being arrested, remain in custody, he is either confined in a private house, or carried to the county gaol. And where a person was arrested, by virtue of a warrant directed to a sheriff's officer, but on account of illness was permitted to remain a few days in his own house, in the custody of the officer's follower, who was not named in the warrant, but who kept the key of the house in his possession, and was then removed to gaol, where he continued for the remainder of two months, the court of Common Pleas held, that this was a legal imprisonment, so as to constitute an act of bankruptcy. (f) For preventing the oppression of inferior officers, in the execution of process for debt, it is enacted by the statute 32 Geo. II. c. 28, (g) commonly called the *Lords' Act*, that "no sheriff, under-sheriff, bailiff, serjeant at mace, or other officer or minister, shall convey or carry, or cause to be conveyed or carried, any person or persons by him or them arrested, or being in his or their custody, by *virtue or [*230] colour of any action, writ, process, or attachment, to any tavern, alehouse, or other public victualling or drinking house, or to the private house of any such officer or minister, or of any tenant or relation of his, without the free and voluntary consent of the person or persons so arrested or in custody; nor charge any such person or persons with any sum of money, for any wine, beer, ale, victuals, tobacco, or any other liquor or things whatsoever, save what he, she, or they shall call for, of his, her, or their own free accord: nor shall cause or procure him, her, or them, to call or pay for any such liquor or things, except what he, she, or they shall particularly and freely ask for; nor shall demand, take, or receive, or cause to be demanded, taken, or received, directly or indirectly, any other or greater sum or sums of money, than is or shall be by law allowed to be taken or demanded for any arrest or taking, or for detaining, or waiting till the person or persons so arrested or in custody shall have given an appearance or bail, as the case shall require, or agreed with the person or persons at whose suit or prosecution he, she, or they shall be taken or arrested, or until he, she, or they shall be sent to the proper gaol belong-

(cc) 1 Chit. Rep. 675. (d) Brod. & Bing. 273. 7 Moore, 33, S. C.; but see 7 Moore, 557.

(e) 4 Campb. 213. 1 Stark. Ni. Pri. 48, S. C.

(f) 6 Taunt. 106. 1 Marsh. 469, S. C.

(g) § 1.

ing to the county, riding, division, city, town, or place, where such arrest or taking shall be; nor shall exact or take any reward, gratuity or money, for keeping the person or persons so arrested or in custody, out of gaol or prison."

And that "no sheriff, &c. shall carry any such person to any gaol or prison, within *four* and *twenty* hours from the time of such arrest, unless such person or persons so arrested shall refuse to be carried to some safe and convenient dwelling-house, of his, her, or their own nomination or appointment, within a city, borough, corporation, or market town, in case such person or persons shall be there arrested, or within *three* miles from the place where such arrest shall be made, if the same shall be made out of any city, borough, corporation, or market town, so as such dwelling-house be not the house of the person arrested, and be within the county, riding, division, or liberty in which the person under arrest was arrested; and then and in any such case, it shall be lawful to and for any such sheriff, or other officer or minister, to convey or carry the person or persons so arrested, and refusing to be carried to such safe and convenient dwelling-house as aforesaid, to such gaol or prison as he, she, or they may be sent to, by virtue of the action, writ or process against him, her, or them: And that no sheriff, &c., shall take or receive any other or greater sum or sums, for one or more night's lodging, or for a day's diet, or other expenses of any person or persons under arrest, on any writ, action, attachment or process, other than what shall be allowed as reasonable in such cases, by some order or orders made by justices of the peace, in pursuance of the said act." (a)

These provisions are not confined to persons arrested on *mesne* process; the intent of them being, that such persons may have an opportunity of procuring bail, or of agreeing with the plaintiffs: and it has accordingly been determined, that a sheriff's officer is not liable to the penal-
[*231] ties of the *statute, for carrying a defendant taken in *execution* to prison, within twenty-four hours after the arrest. (aa) Neither is the sheriff liable to an action of escape, for taking a prisoner in execution to a lock-up house, and keeping him there *fourteen* days before the return of the writ. (b) No time is limited by the above act, within which a defendant, arrested on *mesne* process, should be carried to the county gaol: And where, to an action for an escape on *mesne* process, the sheriff pleaded, that the debtor was rescued out of his custody, as he was carrying him to *Newgate*, to which the plaintiff replied, that the debtor ought to have been carried to prison within a *convenient* time after the arrest, and that he was rescued, because the defendant neglected, &c. the court thought the replication bad, and gave judgment for the defendant. (c) But it seems to be the duty of the sheriff, if possible, to carry the defendant to the county gaol, by the return of the writ on which he was arrested; (d) and that afterwards the sheriff keeps him at his peril, in case the creditor is delayed. Where the defendant, however, is arrested on the return day, he cannot be carried to the county gaol, till the expiration of twenty-four hours after the arrest. (e) And where the sheriff, having arrested a defendant on *mesne* process, keeps him in his custody, after the return of the

(a) § 2.

(b) 4 Taunt. 608.

(d) *Per Buller*, J. 5 Durnf. & East, 41, and see 2 Bing. 317.

(e) 5 Durnf. & East, 40.

(aa) 4 Durnf. & East, 555.

(c) 1 Lutw. 128.

writ, and then carries him to prison, he is not liable to an action on the case, as for an escape, if the jury find that the plaintiff has not been delayed, or prejudiced in his suit. (f)

For the further protection of persons arrested, against the *oppression* of inferior officers, and the *exaction* of gaolers, to whose custody they may be committed, it is by the same statute (g) enacted, that “every sheriff, under-sheriff, bailiff of any liberty, gaoler and keeper of any prison or gaol, and other person and persons, by whom, or to whose custody or keeping, any one shall be arrested, taken, committed, or charged in execution, by virtue of any writ, process, action, or attachment, shall at all times permit and suffer every such person and persons, during his, her, and their respective continuance under arrest or in custody, or in execution, for any debt, damages, costs, or contempt, at his, her, and their free will and pleasure, to send for, and have brought to him, her, or them, at seasonable times in the day time any beer, ale, victuals, or other necessary food, from what place he, she, or they shall think fit, or can have the same; and also to have and use such bedding, linen, or other necessary things, as he, she, or they shall have occasion for, and think fit, or shall be supplied with, during his, her, or their continuance under any such arrest or commitment, without purloining or detaining the same, or any part thereof, or enforcing or requiring him, her, or them to pay for the having or using thereof, or putting any manner of restraint or difficulty upon him, her, or them, in the using thereof, or *relating thereto; and no such prisoner or prisoners shall pay [*232] any thing in respect thereof, to any such sheriff, &c. And that no gaoler or keeper of any gaol or prison, or other person thereto belonging, shall demand, take, or receive, directly or indirectly, of any prisoner or prisoners for debt, damages, costs, or contempt, any other or greater fee or fees whatsoever, for his, her, or their commitment, or coming into gaol, chamber rent there, release or discharge, than what shall be mentioned or allowed in the list or table of fees, settled, inrolled and registered, according to the directions of the said act.” (a)

And for the more speedy punishing gaolers, bailiffs, and others employed in the execution of process, for *extortion*, or other abuses in their respective offices and places, it is further enacted, that “upon the petition in *term* time, of any prisoner or person being, or having been under arrest or in custody, complaining of any exaction or extortion by any gaoler, bailiff, or other officer or person, in or employed in the keeping or taking care of any goal or prison, or other place, where any such prisoner or person under, or having been made under arrest or in custody, by any process or action, is or shall have been carried, or in respect of the arresting or apprehending any person or persons, by virtue of any process, action, or warrant, or of any other abuse whatsoever, committed or done in their respective offices or places, unto any of his majesty’s courts of record at *Westminster*, from whence the process issued, by which any person who shall so petition was arrested, or under whose power or jurisdiction any such gaol, prison, or place is; or, in *vacation* time, to any judge of any such courts at *Westminster*, from whence any such process so issued; or to the judges of assize, &c.: every such court, judges of assize, &c. are by the said act authorized and required to hear and determine the same, in a summary way, and to make such order thereupon, for redressing the abuses which shall by any

(f) *Id.* 37, but see 9 Moore, 584. 2 Bing. 317, S. C.

(g) § 4.

(a) § 12.

such petition be complained of, and for punishing such officer or person complained against, and for making reparation to the party or parties injured, as they shall think just, together with the costs of every such complaint: and all orders and determinations which shall be thereupon made, by any of the said courts, &c. shall have the same effect, force and virtue, as other orders of the same courts, &c; and obedience thereto may be enforced in like manner, by attachment or otherwise.”(b) And that every sheriff, under-sheriff, bailiff of any liberty, bailiff, serjeant at mace, gaoler, and other officer and person as aforesaid, who shall in anywise offend against the said act, shall, for every such offence, (over and above such other penalties and punishments as he may be liable unto,) forfeit and pay to the party thereby aggrieved, the sum of *fifty* pounds, to be recovered, with *treble* costs of suit, by action of *debt*, bill, plaint, or information in any of his majesty’s courts of record at *Westminster*.(c)

*At common law, a sheriff has no right to take fees for the [*233] execution of process:(a) And, by the statute 23 Hen. VI. c. 9, he is only entitled to the fee of *four* pence, for issuing his warrant on mesne process, to arrest the defendant;(a) although, when the plaintiff has paid the sum of one guinea to the plaintiff for an arrest, he has been allowed it by the master or prothonotary, in the taxation of costs.(bb) And where a sheriff’s officer, who had arrested a defendant, demanded and received from him, a larger sum than he was liable to pay as a caption fee, and for the expense of a bail-bond, &c. the court of Exchequer, on motion, ordered it to be referred to the master, to ascertain what the officer was entitled to on that account, and ordered him to restore the surplus to the defendant, and to pay the costs of the application.(cc) But if, by the abuse of the process of one of the courts at *Westminster*, a sheriff’s officer extort a promissory note from a suitor, and then declare upon that note, in another of the courts at *Westminster*, the latter court cannot interfere summarily to punish the officer, under the statute 32 Geo. II. c. 28, § 12.(d) And in order to recover a penalty on this statute, against a sheriff’s officer, for taking a larger fee than is allowed by law upon arrest, the plaintiff must prove what sum is allowed by law, either by a table of fees, or some regulation respecting it, by the officers of the court out of which the process issued.(e) The justices in sessions have no authority to fix the bailiff’s fees for an arrest:(f) And an action will not lie against the sheriff, where more than the sum allowed has been taken for a bail-bond, by one of his officers, to whom the warrant was not directed, but to whose lock-up house the defendant was brought, after being arrested.(g)

When a defendant escapes out of legal custody, he may be either retaken by the sheriff or other officer on fresh pursuit, or by virtue of an escape

(b) § 11.

(c) § 12. And see stat. 3 Geo. I. c. 15, § 13, and 5 Geo. IV. c. 106, § 16, by which latter act, the judges of the courts of Great Sessions in *Wales* are authorized to remove any officer of the said courts, (not nominated and appointed by the crown,) or his deputy, for peculation, extortion, or other misconduct, and appoint a new officer or deputy, in the room of the person so removed.

(a) 2 Barn. & Ald. 562. 1 Chit. Rep. 295, S. C.; and see 2 Barn. & Ald. 770. 1 Chit. Rep. 529, S. C. 5 Barn. & Cres. 328. 8 Dowl. & Ryl. 48, S. C. 6 Moore, 124.

(bb) 1 Chit. Rep. 302, *per Holroyd, J.*; and see 2 Blac. Rep. 1101. 3 Durnf. & East, 417. 2 New Rep. C. P. 59. 1 Stark. Ni. Pri. 417. 1 Ry. & Mo. 314.

(cc) 4 Price, 309.

(c) 1 Esp. Rep. 361. 2 New Rep. C. P. 59.

(g) 4 Esp. Rep. 63.

(d) 2 Bos. & Pul. 88.

(f) 3 Durnf. & East, 417.

warrant, (if he escaped out of the custody of the marshal of the King's Bench, or warden of the *Fleet* prison,) on the statute 1 Ann. stat. 2, c. 6. And though in general a defendant cannot be retaken on fresh pursuit, after a *voluntary* escape,^(h) yet it has been determined, that a bailiff who has arrested a prisoner on mesne process, may retake him before the return of the writ, though he voluntarily permitted the prisoner to escape immediately after the arrest.⁽ⁱ⁾ By the above statute^(k) it is enacted, that "if any person or persons committed or rendered to, or charged in custody of the marshal of the King's Bench, or prison of the Fleet, either in execution or upon mesne process, or upon any contempt in not performing the order or decree of a Court of Equity, by any of 'his majesty's ['234] courts at *Westminster*, shall escape from the custody of the marshal or prison of the King's Bench, or from the prison of the *Fleet*, or shall go at large, it shall and may be lawful, upon oath thereof in writing, to be made by one or more credible person or persons, before any one of the judges of that court where such action was entered, or judgment and execution were obtained, or where the party were so committed or charged as aforesaid, to and for such judge, before whom such oath shall be made as abovesaid, and such judge is thereby authorized and required, from time to time, to grant unto any person whatsoever, who shall demand the same, one or more warrant or warrants under his hand and seal, therein reciting the action or actions, execution or executions, contempt or contempts, with which such person or persons, so escaping or going at large, stood charged, or were committed, at the suit of any person or persons, on whose behalf such warrant or warrants shall be demanded, at the time of such escape or going at large, (which said warrant or warrants shall be in force in all places whatsoever, within the kingdom of *England*, dominion of *Wales*, and town of *Berwick upon Tweed*,) directed to all sheriffs, mayors, bailiffs, constables, head-boroughs, and tithing men, therein and thereby commanding them, and every of them, in their respective counties, cities, towns, and precincts, to seize and retake such person or persons, so escaped or going at large; and such person or persons, so retaken upon such warrant, forthwith to convey and commit to the common gaol of such county, where such person or persons, so escaped or going at large, shall be retaken, there to remain without bail or mainprize, or being thence upon any account whatsoever delivered or removed, until he, she, or they shall have made full payment or satisfaction to the respective plaintiff or plaintiffs, creditor or creditors, in such action or actions, execution or executions named, or until the judgment or judgments, on which such execution or executions was or were sued out against such person or persons, shall be reversed or discharged by due course of law, or until judgment in such action or actions be given for such person or persons so committed as aforesaid, or until the said contempt or contempts, for which such person or persons were or shall be committed, be cleared and discharged; except such person or persons be charged with treason or felony, or any other crime, matter, or cause, for and on the behalf of the queen's majesty, her heirs and successors; and if he or she, for any such cause be removed to any other gaol or prison, he or she shall be, in the custody of such gaol, charged with all the causes with which he or she is or shall be charged, in the gaol from whence he or she shall be removed." Upon this statute it has been determined, that if a person charged in execu-

(h) Carter, 212. 2 Bac. Abr. tit. *Escape*, C.

(i) 2 Durnf. & East, 172.

(k) § 1.

tion in the King's Bench, he turned over to the *Fleet* and escape, either a judge of the King's Bench or Common Pleas may grant an escape warrant.(a) And after a *negligent* escape, the defendant, we have seen(b) may be retaken on a *Sunday*, by virtue of such warrant. But if one [*235] who is no officer, by virtue of the warrant, seize a person *escaping, and bring him before the sheriff, he cannot detain him; for, being illegally executed, it is the same thing as if there had been no warrant at all.(aa) It has also been determined, that a person who has a day rule, cannot be taken by virtue of an escape warrant:(bb) and if a person be taken thereon at *eight* in the morning, and the same day obtain a day rule, pursuant to a petition which was not read in court till after *eight*, yet he shall be discharged; for as to this purpose, there shall be no fraction of a day.(c)

The plaintiff's remedies, when the defendant escapes, are first, by taking out fresh process against him; secondly, by obtaining an escape warrant for retaking him, if the escape was from the custody of the marshal of the King's Bench, or warden of the fleet; and thirdly, by action or attachment against the sheriff or officer, for an escape: which remedies may be pursued, as well where the escape was *voluntary*, as where it was only *negligent*.(d)[A] But where the sheriff, having arrested the defendant, suffers him to go at large, upon giving bail for his appearance at the return of the writ, he is not liable to an action of *escape*: for he was obliged to take bail, by the statute 23 Hen. VI. c. 9.(e) And even where he suffers him to go at large without bail, he is not, it seems, liable to an action, provided he have him at the return of the writ.(f) But if he have him not then, or afterwards suffer him to go at large, without lawful authority, he is, in either case, liable to an action.(g) And where an action is brought against the sheriff, after he has taken bail, he must plead the statute; and cannot take advantage of it on demurrer to the declaration, or in arrest of judgment.(h)

(a) 8 Mod. 240.

(b) *Ante*, 218.

(aa) 6 Mod. 154, and see 1 Str. 99, 100.

(bb) 8 Mod. 80.

(c) *Id. ibid.*, and see 2 Bac. Abr. tit. *Escape*, E. 3.

(d) 2 Bac. Abr. tit. *Escape*, C. E. 3, and see stat. 8 & 9 W. III. c. 26. 7 Moore, 552. 1 Bing. 156, S. C.

(e) Cro. Eliz. 624, 852. Noy, 39, S. C. 1 Sid. 23. 1 Vent. 55. 3 Salk. 314, 15. Gilb. C. P. 22. 2 Wms. Saund. 5 Ed. 61, c. (6.)

(f) 2 Durnf. & East, 172. 2 Bos. & Pul. 35, and see 2 Wms. Saund. 5 Ed. 61, a. b. (4.) 2 Barn. & Ald. 56.

(g) Noy, 39. 1 Mod. 228, 9. 2 Mod. 178, S. C. Gilb. C. P. 22. 2 Durnf. & East, 174, &c. 7 Durnf. & East, 109. 1 Bos. & Pul. 225. 9 Moore, 584. 2 Bing. 317, S. C. 3 Anstr. 675, and see 2 Wms. Saund. 5 Ed. 61, a. b. (4.)

(h) Cro. Eliz. 460. Moor, 428, S. C. 1 Sid. 22, 439. 1 Vent. 85. 1 Mod. 33, 57, S. C. 2 Wms. Saund. 5 Ed. 154, 5.

[A] Nothing but the act of God or the public enemies will excuse the sheriff for an escape. *Fairchild v. Case*, 24 Wend. 381. *Rainey v. Dunning*, 2 Murph. 386. *Call v. Haggard*, 8 Mass. 423. *Patten v. Halsted*, Cox, 277. *Colby v. Sampson*, 5 Mass. 310. *Lowry v. Barney*, 2 Chip. 11. *Adams v. Turrentine*, 8 Ired. 147. *Mabry v. Id.*, *Id.* 201. *State v. Halford*, 6 Rich. 58. But unless the process under which the arrest is made is judicial process, the sheriff is not guilty of an escape in letting the prisoner go at large. *Ellis v. Gee*, 1 Murph. 445. Although no informality in the process will justify the prisoner in effecting an escape. *The State v. Murphy*, 3 Shep. 100. It is otherwise if the process be void. Neither will the insecure state of the jail excuse the sheriff for an escape. *Smith v. Hart*, 1 Brevard, 146. *Parsons v. Lee*, Jefferson, 50; or even if there be no jail. *Gurnn v. Hubbard*, 3 Blackf. 14. Nor will the death of the prisoner before recapture, although there has been a fresh pursuit, purge the escape. *Whicker v. Roberts*, 10 Ired. 485.

An action against the sheriff for an escape may it seems be defeated, by putting in bail in the original action, of the term in which the writ was returnable, though after the expiration of the time allowed for putting it in; and even after the action for an escape is brought.(i) To prevent this, the plaintiff should oppose the justification of bail if put in: and in a late case,(k) where bail had been permitted to justify without opposition, the court of King's Bench set aside the rule for the allowance of bail, on payment of the costs of justification. And, in that court, bail put in after the term in which the writ is returnable, is not an answer to an action against *the sheriff for an escape, brought before it was put [*236] in.(aa) So, in the Common Pleas, if the sheriff omit to take a bail-bond upon the arrest, and afterwards, upon an action being commenced against him for an escape, he causes bail to be perfected, the court will order the allowance of bail to be set aside, that the action may proceed.(bb) But the court of Exchequer would not set aside an order for the allowance of bail, obtained after an action commenced against the sheriff for an escape, though no bail bond had been taken, nor bail above put in in due time, where the defendant had been rendered on the day of the expiration of the rule to bring in the body.(cc) And in an action against the sheriff, for not assigning a bail bond, that court would not grant a motion, to enter the recognizance of bail on the record, as taken on the true day, (it being always entered generally as of the term,) to enable the plaintiff to proceed with his action.(d) If a bail bond has been taken by the sheriff, though his clerk, on inquiry at the office, deny that he has taken one, the plaintiff cannot maintain an action against him for an escape:(e) It is therefore usual, in declaring against the sheriff, to insert three counts; First, for an escape; 2dly, for not taking the defendant when he had an opportunity; and 3dly, for not assigning the bail bond, on request. And, in an action for an escape upon mesne process, it is enough, without producing the warrant, or giving direct evidence of the arrest or escape, to prove the sheriff's return of *cepi corpus*, and to show that the party did not put in bail, and was not in the sheriff's custody at the return of the writ.(f)

When the defendant is *rescued* upon mesne process, as he is going to prison, the sheriff may return the rescue;(g) but not, where the defendant is rescued after he is put in prison, except by the king's enemies.(h) And it seems that a return by the sheriff to a bill of *Middlesex*, stating that he took and detained the defendant, until he rescued himself, and that he was not afterwards found, &c. is sufficient, without naming the rescuers, or stating

(i) 1 Esp. Rep. 87. 2 Bos. & Pul. 35, 246. 1 Taunt. 25. 1 Chit. Rep. 575, (a). 5 Barn. & Cres. 244.

(k) *Bosanquet v. Simpson*, E. 42 Geo. III. K. B.

(aa) 4 Maule & Sel. 397; and see 2 Chit. Rep. 93.

(bb) 1 Taunt. 119; and see *id.* 23. 6 Taunt. 167. 1 Marsh. 520, S. C.

(cc) 1 Price, 103; and see 5 Barn. & Cres. 244.

(d) 3 Price, 36; but see 9 Price, 406.

(e) 5 Taunt. 325.

(f) 3 Campb. 397. And for the evidence necessary to charge the defendant with the act of his bailiff, see 7 Durnf. & East, 113. 1 Campb. 389. Holt, Ni. Pri. 217. 1 Stark. Ni. Pri. 413. 2 Stark. Ni. Pri. 189, 202, 314. 7 Taunt. 8. 5 Moore, 183. 3 Brod. & Bing. 26, S. C. Holt Ni. Pri. 537. 5 Moore, 184, (h). 3 Brod. & Bing. 27, (a), S. C. 6 Moore, 120. 1 Car. & P. 7, (a). 3 Bing. 164, 492.

(g) Cro. Jac. 419. 3 Bulst. 198. 1 Rol. Rep. 338, 440, S. C. 3 Lev. 46. 1 Str. 435. Gilb. C. P. 23; but see Cro. Eliz. 868. Moor, 852, *contra*.

(h) Cro. Jac. 419. 1 Rol. Rep. 441. 1 Str. 435. 5 Bur. 2814.

them to be people of the county ;(*i*) but the return not stating the arrest to have been made in the proper county, was holden to be bad.(*i*) And if the defendant escape, owing to the negligence of the officer, this will not justify the return of a rescue.(*k*) Upon the sheriff's return of a *rescue*, the [*237] plaintiff has a triple remedy against the rescuers ; by *attachment, action on the case, or indictment.(*a*) The return of a rescue is of itself a conviction ;(*b*) and the courts will grant an *attachment* upon it in the first instance,(*c*) which should be made returnable on a *general* return, though the original process was at a day *certain*.(*dd*) But, without the sheriff's return, the courts will not grant an attachment upon a mere affidavit of the fact.(*ee*) It was formerly the constant course, upon the return of a rescue, to set a certain fine of four nobles on each offender :(*ff*) but of late years, the courts have fined according to their discretion, upon considering the circumstances of the case.(*gg*) And as the sheriff's return of a rescue is not traversable, the court of King's Bench will proceed to punish the rescuers, without going through the ordinary course of examining them upon interrogatories.(*hh*) But where a defendant in that court, was brought up on an attachment, for rescuing a person arrested on a warrant for obstructing excise officers, it was said to be the invariable practice of the court, in such a case, to put the defendant to answer interrogatories, though he did not deny the charge in the affidavits, unless the prosecutor waived putting them.(*i*)

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*CHAPTER XII.

Of APPEARANCE and BAIL to the ACTION.

HERETOFORE, when a writ issued out of the King's Bench, it was entered upon a roll ; so that though the officer had not returned the writ, yet the defendant might have appeared at the day given by the roll ; and that either to save himself from corporal pain by imprisonment, or to prevent the loss of issues, or to save his freehold or inheritance.(*aa*) And so it was in the Common Pleas ; where they entered the writ upon a roll, by way of recital, *viz. Dominus rex misit breve suum clausum, in hæc verba, &c.*(*aa*)

Appearance is the first act of the *defendant* in court ;(*bb*) and differs from putting in *bail*, which is the act of the court itself,(*cc*) as is evident from

(*i*) 1 Barn. & Ald. 190. Holt, Ni. Pri. 539, n. S. C.

(*k*) Holt, Ni. Pri. 537. 5 Moore, 184, (*b*). 3 Brod. & Bing. 27, (*a*), S. C. ; and see 2 Stark. Ni. Pri. 189.

(*a*) Com. Dig. tit. *Rescous*. D. An indictment for preventing an arrest, on process issuing out of an inferior court, must state that the process was directed to the officer of the court. 5 East, 304.

(*b*) Cas. temp. Hard. 112.

(*c*) 2 Salk. 586. Say. Rep. 121. 4 Bur. 2129.

(*dd*) 1 Str. 624.

(*ee*) 2 Salk. 586. 6 Mod. 141. 1 Str. 531 ; and see 1 Ken. 138. Say. Rep. 253.

(*g*) T. Jon. 198. 2 Salk. 586.

(*gg*) 1 Str. 642.

(*hh*) 4 Bur. 2129 ; but see 2 Salk. 586.

(*i*) 5 Durnf. & East, 362.

(*aa*) Co. Lit. 135, a. 1 Salk. 64.

(*bb*) Com. Dig. tit. *Pleader*, B. 1.

(*cc*) 1 Salk. 8.

the language of the bail-piece in the King's Bench, wherein the defendant is stated to be *delivered* to bail,(d) &c.: and it is either *voluntary* or *compulsive*. [A] A *voluntary* appearance is of no effect, in the King's Bench, unless the plaintiff's attorney, within *fourteen* days after such appearance, sue out a writ of *latitat*, or bill of *Middlesex*, where the defendant abides in that county.(e) But this rule cannot be taken advantage of by any but the defendant, unless some particular fraud be alleged.(f) In the Common Pleas it is a rule, that no bail be put in for any party against whom no writ or process is sued out, without leave of the court.(g) And no bail is required in that court, but a common appearance only, if the defendant appear upon a summons, attachment or distress, or by *superseas quia improvidē*, &c.(h)

In actions by *original*, in the King's Bench, the appearance is entered with the *filacer* of the county where the action is brought;(ii) and upon a summons, attachment or *distringas*, it should be entered on or before the *quarto die post* of the return of the writ.(k) So, in the Common Pleas, the appearance by *original* is entered with the proper *filacer*:(l) and the defendant in that court, must appear upon a summons, attachment or *distringas*, within *four* days after the return, which are reckoned *inclusive* both of the return day and *quarto die post*.(m)

*The appearance of the defendant is triable by the record:(aa) [*239] and in the Common Pleas it is a rule,(b) that "all appearances for defendants, upon writs of *capias*, *alias* and *pluries*, issuing out of that court, ought to be entered of record, or otherwise they are not warranted by the course of the court; neither can the defendant, if he have been arrested, plead *comperuit ad diem*, in discharge of the sheriff's bond taken for his appearance." By that rule, the appearance is required to be entered with the proper *filacers*; but there does not seem to be any *appearance* roll, or entry of the defendant's appearance, except the statement of it on the *recognizance* roll, or on the *imparlance*, *plea*, or *issue* roll, and the entries in the *filacer's* books; which entries however cannot be considered as records.

Bail to the action are *common* or *special*. [B] In the King's Bench by *bill*, *common* bail must be filed in all cases where special bail is not necessary, or has been dispensed with by the court; and they are particularly

(d) 1 Atk. 239.

(e) R. T. 4 W. & M. reg. 1 K. B.

(g) R. H. 14 Jac. I. reg. 2, § 4.

(ii) Trye, in *pref.* and see Append. Chap. XII. § 1, 2.

(l) R. M. 14 Jac. I. reg. 1, 2. R. M. 1654, § 13.

(m) 1 H. Blac. 9.

(aa) Cro. Eliz. 466, 7.

(f) 1 Maule & Sel. 408, (a).

(h) R. M. 1654, § 12, C. P.

(k) Trye, 67, 8.

(b) R. M. 14 Jac. I. reg. 2, C. P.

(b) R. M. 14 Jac. I. reg. 2, C. P.

[A] Entry of appearance, or plea to the merits, cures defective service, *Smith v. Robinson*, 13 Metc. 165. *Brewer v. Sibley*, *Id.* 175. *Barker v. Norton*, 5 Shep. 416. *Harrison v. The Bank*, 2 Sm. & Marsh. 307. *Raney v. M'Rae*, 14 Geo. 589. *Amer v. Weston*, 4 Shep. 266; or irregularity in seal or signature, *Lowell v. Labine*, 15 New Hamp. 29. *Garland v. Bretton*, 12 Ill. 232; or in return day, *Graves v. Cole*, 2 Greene, Iowa, 467. An appearance by a defendant after an amended declaration has been filed, and consenting to a continuance and entering into an agreement of record recognizing the amended declaration, is a waiver of the irregularity in filing such amended declaration, after the time allowed by the court for filing it. *Brinkley v. Duncan*, 5 Eng. 252.

[B] A bail bond to the sheriff must be conditioned for the appearance of the party only, otherwise it will be void. *Blanding v. Rodgers*, 2 Brevard, 294. *Lane v. Townsend*, Ware, 286. *Roseland v. Seymour*, 2 Metc. 599. *Stewart v. M'Clure*, 1 Brevard, 407. *Embree v. Norris*, 2 Ala. 271.

required in *ejectment*, for the casual ejector, *(c)* and to authorize judgments by warrant of attorney, default, or *non sum informatus*. *(d)* These bail are merely *nominal*. *(e)* In the Common Pleas, there is no *common* bail; but in that court, and also in the King's Bench by *original*, a *common appearance* is entered for the defendant, in cases where special bail is not necessary.

Before the making of the statute 12 Geo. I. c. 29, the defendant being always arrested upon process against his person, it was discretionary in the courts to discharge him upon common bail, or a common appearance, or hold him to special bail. *(f)* Anciently, if the cause of action were for a sum under *twenty* pounds, or for uncertain damages, *(g)* the courts let the defendant out of custody upon *common* bail; but if it were for a sum certain above twenty pounds, they made him find *special* bail. *(h)* Afterwards, the sum was reduced to *ten* pounds: *(i)* And now, by the statute 7 & 8 Geo. IV. c. 71, *(k)* "no person shall be held to *special* bail, upon any process issuing out of any court, where the cause of action shall not have originally amounted to the sum of *twenty* pounds or upwards, over and above and exclusive of any costs, charges and expenses, that may have been incurred, recovered, or become chargeable, in or about the suing for or recovering the same, or any part thereof." So that special or common bail is no longer discretionary in the court, but is governed by the *arrest*; it being a general rule, that whenever the defendant [*240] may be *arrested, he may be holden to special bail; and *è converso*, that whenever the defendant cannot be arrested, common bail is sufficient.

Common bail may be filed, or a common appearance entered by the defendant or his attorney, or by the plaintiff according to the statute; *(a)* and it may be filed or entered by the defendant originally, or in consequence of a rule of court, *(b)* or judge's order, for discharging him out of custody, on filing or entering it. [A] In the King's Bench, where the defendant has been served with the copy of a bill of *Middlesex*, or other process thereon, he should file common bail at the return of it, or within *eight* days after such return, *(cc)* which are reckoned *exclusively*; and *Sunday* is not accounted as

(c) R. T. 14 Car. II. reg. 1. R. M. 33 Car. II. K. B.

(d) R. H. 1 W. & M. R. T. 4 W. & M. reg. II. K. B.

(e) For the origin of *common* bail, see Gilb. K. B. 309; for the difference between *common* and *special* bail, see Gilb. C. P. 34, 5. Crompt. Introd. 3 Ed. lx.; and for the manner in which the courts formerly exercised their discretion of allowing common, or requiring special bail, see Gilb. C. P. 35, 6. Crompt. Introd. 3 Ed. lxxxi.

(f) R. M. 1654, § 9, K. B. Gilb. K. B. 309. 2 Keb. 101.

(g) Gilb. C. P. 36, 7.

(h) *Id.* 35. R. T. 24 Eliz. § 1. R. M. 1654, § 12, C. P.

(i) Gilb. C. P. 36; and see the statutes 12 Geo. I. c. 29. 19 Geo. III. c. 70, § 1, 2.

(k) § 1; and see stat. 51 Geo. III. c. 124, § 1; continued by 57 Geo. III. c. 101.

(a) 12 Geo. I. c. 29.

(b) 1 Chit. Rep. 282.

(cc) Stat. 5 Geo. II. 27, § 1. This is the same time as was allowed to file common bail upon an arrest, before the statute 12 Geo. I. c. 29. And if the defendant did not file it within that time, he was liable to the penalty of *five* pounds, to be paid to the plaintiff. Stat. 5 W. & M. c. 21, § 3, 9 & 10 W. III. c. 25, § 33. 5 Mod. 392. 1 Cl. Inst. 57. The rule for payment of this penalty was absolute in the first instance; the words of the statute, being that the court shall *immediately* award judgment, whereupon the plaintiff may take out execution. 2 Str. 737. Gilb. K. B. 369.

[A] See *Lane v. Cook*, 8 Johns. 359. *Byrne v. Morris*, 2 Cow. 472. *Pardee v. Reed*, 4 Cow. 51. And the court will permit the filing of common bail on motion *nunc pro tunc*, where judgment has been inadvertently taken without it. *Phelps v. Bronson*, 4 Cow. 61. *Colden v. Knickerbocker*, 2 Cow. 31.

one of them, if it happen to be the last.(d) These bail are *entered* on a piece of parchment called a bail-piece,(e) which is filed with the clerk of the common bails; who is required to mark the bail-pieces *numerically*, as they are received.(f) The defendant, having been served with a copy of a *capias*, or other process by *original*, in the King's Bench, should enter a common appearance with the *filacer* of the county where the action is laid, within *eight* days after the appearance day, or *quarto die post* of the return of the process.(g) In the Common Pleas, the eight days are reckoned from the return day, and not from the *quarto die post* of the return of the writ;(h) and the appearance is entered with the filacer of the county to which the writ is directed, upon a *præcipe* or note of appearance being made out and delivered to him, on unstamped paper, which he enters in a book kept for that purpose.(i) In an action against husband and wife, when the husband alone has been arrested, special bail may justify for him only, on his filing common bail for his wife;(k) but when the husband alone has been served with process, he ought regularly to file common bail, or enter an appearance for himself and his wife.(l) Yet, where he entered an appearance for himself only the court of Common Pleas held it to be so far regular, as that the plaintiff could not sign judgment, without demanding a plea.(m) And where, in a similar case, an appearance was entered for the husband only, by his attorney, who expressly disclaimed any interference for the wife, and the latter not appearing, an appearance was entered for her by the plaintiff according to the statute, upon which the plaintiff declared against the husband and wife jointly, and the *former pleaded [*241] for himself only; the court of Exchequer held, that an interlocutory judgment signed against both, for want of a joint plea, was regular.(n)

When an attorney of either court has accepted a warrant, or subscribed a process, declaration, or warrant to appear, the rule in the King's Bench is, that "he shall be compelled to cause an appearance, or liable to an attachment, or put out of the roll, as the case requires; and the party is not to be received to countermand such appearance after his retainer."(b) And in the Common Pleas it is a rule, that "every attorney accepting or subscribing any warrant to appear for any defendant, to any writ issuing out of that court, shall within *four* days after the appearance day to the return of every such writ in *London* or *Middlesex*, and within *eight* days after the appearance day in any other county, enter the appearance of such defendant with the proper officer; and if he do not, he shall be liable to an attachment, and not discharged therefrom till he hath paid full costs to the plaintiff; and the defendant, when he appears, shall be compelled to plead as of the time when he should have pleaded, if his appearance had been duly entered."(c) The usual mode of proceeding against an attorney, for not filing common bail, or entering an appearance, pursuant to his

(d) 1 Bur. 56.

(e) Append. Chap. XII. § 3.

(f) R. E. 30 Geo. III. K. B. 3 Durnf. & East, 660.

(g) Imp. K. B. 10 Ed. 527. 2 Chit. Rep. 35. 3 Barn. & Cres. 110. 4 Dowl. & RyL 713, S. C.

(h) Imp. C. P. 7 Ed. 161, 2. Pr. Reg. 32. Barnes, 245, 6.

(i) Imp. C. P. 7 Ed. 161.

(k) 1 Chit. Rep. 75.

(l) Barnes, 412.

(m) 1 H. Blac. 235; and see 1 Salk. 114.

(n) *Russell v. Buchanan & wife*, Man. Ex. Addend. 625, &c. 6 Price, 139, S. C.(b) R. M. 1654, § 10, K. B. R. M. 1654, § 13, C. P.; and see Loft, 192, 3, by which it appears that the undertaking must be *signed*: but see 2 Chit. Rep. 36.

(c) R. H. 6 Geo. I. reg. 2, C. P.

undertaking, is by attachment; (*d*) and if an attorney undertake to appear, the courts will oblige him to do it in a proper manner: therefore, if he undertake to appear for an *infant*, he must appear by *guardian*. (*e*) And though he may have been imposed upon by the sheriff's officer, yet they will oblige him to fulfil his undertaking. (*f*) But a general undertaking by an attorney to *appear* to process, does not oblige him to put in special bail to bailable process. (*g*) And where the attorney for the defendants, on their being sued by the plaintiff, undertook by letter, to procure their signature to a *cognovit* for payment of the debt and costs, which he failed to do, but the plaintiff afterwards said that he would proceed with the action; the court of Common Pleas held, that this was virtually a waiver of the attorney's undertaking, and that he could not be called on by the court to perform it. (*h*)

Before the statute 12 Geo. I. c. 29, common bail could only have been filed, or a common appearance entered, by the defendant or his attorney. But now, by that statute, (*i*) as altered by the 5 Geo. II. c. 27, "if the defendant, having been served with process, shall not appear at the return thereof, or within *eight* days after such return, the plaintiff, upon *affidavit* of the service of such process, (*k*) made before a judge, or commissioner of the court for taking affidavits, or before the proper officer *for entering common appearances, or his deputy, (and which affidavit shall be filed *gratis*,) may enter a common appearance, or file common bail for the defendant, and proceed thereon, as if such defendant had entered his appearance, or filed common bail." The affidavit required by these statutes cannot be dispensed with; (*a*) nor can it be taken in the King's Bench, before a commissioner who is concerned as attorney for the plaintiff; but in the Common Pleas it is otherwise. (*b*) And common bail cannot be filed, or common appearance entered, by the plaintiff, till the *ninth* day after the return of the writ; the defendant having all the *eighth* to file or enter it. (*cc*) Common bail however should be filed, or a common appearance entered, by the plaintiff for the defendant, of the term in which the writ is returnable: (*dd*) but it may be filed or entered as of that term, in the term next after the return of the writ, (*ee*) or before the *quarto die post* of the first return of the following term; it being holden that till then, common bail may be filed, or an appearance entered, as of the preceding term. (*ff*) In practice it is usual for the plaintiff to file common bail, or enter a common appearance, for the defendant, according to the statute at any time before judgment is signed; though if filed or entered in a subsequent term, it must be filed or entered as of the term in which the writ was returnable. And though judgment has been irregularly signed, without filing common bail for the defendant according to the statute, till after the term succeeding that in which the writ was returnable, and after the judgment itself has been entered up,

(*d*) 6 Mod. 42, 86. 4 Dowl. & Ry. 719.

(*e*) 1 Str. 114, 445.

(*f*) *Id.* 693; and see 1 Chit. Rep. 129, (*a*). 4 Dowl. & Ry. 719.

(*g*) 2 Chit. Rep. 415.

(*h*) 8 Moore, 208.

(*i*) § 1.

(*k*) Append. Chap. XII. § 4.

(*a*) 2 Moore, 462. 8 Taunt. 410, S. C.

(*b*) R. E. 13 Geo. II. *reg.* 1, C. P.

(*cc*) Imp. K. B. 10 Ed. 167. Pr. Reg. 32. Imp. C. P. 7 Ed. 163.

(*dd*) *Cas. temp.* Hardw. 138. *Holmes v. White*, Imp. K. B. 10 Ed. 165, 6. 6 East, 314. 2 Chit. Rep. 37. 3 Barn. & Cres. 555. 5 Dowl. & Ry. 352, S. C. 9 *Id.* 18.

(*ee*) 2 Durnf. & East, 719, 20. 7 Durnf. & East, 206.

(*ff*) 5 Durnf. & East, 65; and see 6 East, 314. 2 Chit. Rep. 37.

yet the defendant, having given a *cognovit*, is estopped from objecting to the irregularity, if the plaintiff has filed common bail *nunc pro tunc*, before the time of making the objection. *(g)* If the defendant be sued by a *wrong* name, and do not appear, the plaintiff cannot rectify the mistake, by appearing for him in his *right* name, according to the statute: *(h)* nor can he appear for him in the name by which he is sued, and afterwards declare against him in his *right* name. *(i)* But, in the Common Pleas, if the writ and declaration be against the defendant in his *right* name, an appearance entered for him by the plaintiff according to the statute, in a *wrong* name, may be amended. *(k)* Where the plaintiff, having sued out a writ against *four* defendants, for separate causes of action, and filed separate declarations against *three* of them conditionally, and given three separate rules to plead, afterwards entered a common appearance, according to the statute, for all the *three* defendants, and signed three separate interlocutor judgments for want of a plea, the court of King's Bench held this to be irregular: For, by declaring *separately [*243] against the three defendants, the plaintiff had made there separate causes, and had thereby elected to proceed separately; and by the practice of the court, he ought to have entered a *separate* appearance for each of them. *(a)*

For preventing inconveniences which happened to plaintiffs, by the defendant's omitting to file common bail, according to the ancient usage and course of the court, there is an old rule in the King's Bench, that "all clerks, &c. do within *ten* days after the end of every term, deliver to the secondary a note of all such appearances as have been made unto them the term before, and by whom they were made, so that the person appointed to enter the bails may see whether they are filed for every such appearance or not." *(b)* And for the better distinguishing by whom common bail shall have been filed, it is ordered, that "in all cases where common bail shall be filed by the plaintiff for the defendant, by virtue of the act, these words shall be written on the bail-piece, *viz.* '*filed according to the statute,*' or words to the like effect." *(c)* And where the plaintiff files common bail for the defendant, on any day between the *second* and *sixth* of *November*, and he is in other respects entitled to sign judgment, it is signed as on the day preceding the *essoin* day of *Michaelmas* term. *(d)*

It should also be remembered, that by the statute 45 Geo. III. c. 124, § 3, a common appearance may be entered by the plaintiff, in actions against members of the house of commons, if the defendants do not appear at the return of the summons, or within *eight* days after such return. *(e)* And by the annual *mutiny* and *marine* acts, *(f)* a common appearance may be entered by the plaintiff, in actions against *volunteer* soldiers, or marines. Also, by the statutes 43 Geo. III. c. 46, § 2, & 7 & 8 Geo. IV. c. 71, § 2, the plaintiff is authorized to enter a common appearance, or file common bail, for the defendant, after money has been deposited in the sheriff's

(g) 7 Durnf. & East, 206.

(h) 3 Durnf. & East, 611. 2 New Rep. C. P. 132. 11 East, 225, *accord.* 1 Bos. & Pul. 105, *contra*.

(i) 10 East, 328. 11 East, 225; and see 3 Maule & Sel. 450.

(k) 3 Wils. 49.

(a) 5 Barn. & Ald. 892. 1 Dowl. & Ry. 545, S. C.

(b) R. E. 1657, *reg.* 2 K. B.

(c) R. M. 10 Geo. II. *reg.* 1, K. B. 2 Str. 1027. Cas. *temp.* Hardw. 207, S. C.

(d) 5 Durnf. & East, 65; and see 6 East, 314.

(e) *Ante*, 120, 21.

(f) 7 & 8 Geo. IV. c. 4, § 130, c. 5, § 71; and see 9 Geo. IV. c. 3, § 71; and see 4, § 130.

hands,(g) or paid into court,(h) on those statutes, in case the defendant shall not duly put in and perfect bail in the action. And, by the statutes 51 Geo. III. c. 124, § 2, & 7 & 8 Geo IV. c. 71, § 5, if the defendant, on being personally served with the summons or attachment by *original*, do not appear at the return of such writ, or of the *distringas*, as the case may be, or within *eight* days after the return thereof, the plaintiff, upon affidavit being made and filed in the proper court, of the personal service of such summons or attachment, or of the due execution of such *distringas*, &c. may enter a common appearance for the defendant, and proceed thereon, as if he had himself entered his appearance.(i)

[*244] *When the defendant has been arrested, and discharged out of custody, upon giving bail to the sheriff for his appearance at the return of the writ, or upon depositing with the sheriff the sum for which he was arrested, together with 10*l*. in addition for costs, he should regularly appear, if not surrendered to and in custody of the sheriff,(a) and put in and perfect *special* bail to the action, or bail *above*: so called, in contradistinction to sheriff's bail, or bail *below*. Or, instead of putting in and perfecting special bail, the defendant may, under the statute 7 & 8 Geo. IV. c. 71, deposit and pay into court the sum indorsed upon the writ, together with an additional sum, as a security for costs, to abide the event of the suit. By the above statute,(b) reciting that by an act passed in the 43*d* year of the reign of his late majesty,(c) persons arrested upon *mesne* process were enabled, in lieu of giving bail to the sheriff, to deposit in his hands the sum indorsed upon the writ, together with *ten* pounds in addition, to answer the costs which might accrue up to the time of the return of the writ, and also so much further sum, if any, as should have been paid for the king's fine upon any original writ, and should thereupon be discharged from such arrest; and that it was expedient to extend the provisions of the said act, and to enable persons who have been arrested, to deposit or pay into the court in which the writ shall be returnable, the sum indorsed upon the writ, together with an additional sum as a security for costs, to abide the event of the suit, instead of putting in and perfecting bail in the said action, it was enacted, that "in all cases in which any defendant shall have been discharged from arrest, upon making such deposit as was required by the said recited act, and the sum so deposited shall have been paid into court, it shall be lawful for such defendant, instead of putting in and perfecting special bail in the action, according to the course and practice of the court, to allow the sum so deposited with the sheriff, and by him paid into court as aforesaid, together with the additional sum of *ten* pounds, to be paid into court by such defendant, as a further security for the costs of the action, to remain in the court, to abide the event of the suit: And in all cases where any defendant shall have been arrested and given bail to the sheriff, or shall have been arrested and remain in custody, it shall be lawful for such last mentioned defendant, instead of putting in and perfecting special bail, to deposit and pay into the said court, the sum indorsed on the writ, together with the amount of the king's fine, if any,

(g) *Ante*, 228.(h) *Post*, 244.(i) *Ante*, 114.(a) 6 Durnf. & East, 753. 7 Durnf. & East, 122. *Ante*, 226, &c.

(b) § 2.

(c) 43 Geo. III. c. 46, § 2. *Ante*, 227, &c.

upon the original writ, and the further sum of *twenty* pounds as a security for the costs of the action, there to remain, to abide the event of the suit; and thereupon the said defendant may, and he is thereby required, to enter a common appearance, or file common bail in the action, within such time as he would have been required to have put in and perfected special bail in the action, according to the course of the said court; or in default thereof, the plaintiff in the action is thereby empowered to enter such common appearance, or file common bail, for the said defendant; and the cause may proceed, as if the defendant had put in and *perfected special bail: And in case judgment in the said action shall be [*245] given for the plaintiff, he shall be entitled by order of the court, upon motion made for that purpose, to receive the said money so remaining in, or so deposited or paid into the court as aforesaid, or so much thereof as will be sufficient to satisfy the sum recovered by the judgment, and the costs of the application: and if judgment be given in the said action for the defendant, or the plaintiff discontinue his suit, or be otherwise barred, or in case the sum deposited and paid into court be more than sufficient to satisfy the plaintiff, the said money so deposited or paid into court, or so much thereof as shall remain, shall, by order of the court, upon motion to be made for that purpose, be repaid to such defendant.

“Provided always, that it shall and may be lawful for the said defendant, who hath made his election to make such deposit and payment as aforesaid, at any time in the progress of the cause, before issue joined in law or fact, or final or interlocutory judgment signed, to receive the same out of court, by order of the said court, upon putting in and perfecting special bail in the cause, and payment of such costs to the plaintiff as the said court shall direct. Provided also, that it shall and may be lawful for any defendant who shall have put in and perfected special bail in any cause, upon motion to the court in which the action is brought, if the court shall so think fit, to deposit and pay into court, the sum which would have been deposited and paid, in case the defendant had originally elected so to do, together with such further sum, to answer the costs, as the court may direct, to abide the event of the said suit, and to be disposed of in manner aforesaid; and thereupon it shall be lawful for the said court to direct a common appearance to be entered, or common bail to be filed for the defendant, and an *exoneretur* to be entered upon the bail piece in the said cause.” It is remarkable, that in a case long prior to the above statute, the Court of Common Pleas permitted a defendant instead of giving bail, to pay into court a sum sufficient to cover the debt and costs, in order to abide the event of the cause.^(a)

Special bail are *two* or more real and responsible persons, who undertake generally, or in a sum certain, that if the defendant be convicted, he shall satisfy the plaintiff, or render himself to the custody of the *marshal* of the King's Bench, or *warden* of the Fleet prison. *One* bail is not deemed sufficient, even for the purpose of rendering the defendant;^(b) but there must be *two* bail at least, and in general there are two only: though, in the King's Bench,^(c) and Exchequer,^(d) where the debt is large, the court

(a) 1 Taunt. 425.

(b) Barnes. 60. 1 Chit. Rep. 602, *in notis*.

(c) Lofft, 26, 252. *Smith v. Trinder*, II. 7 Geo. III. K. B. 1 Sel. Pr. 1 Ed. 169. *Per Cur.* M. 29 Geo. III. K. B. *Miller v. Jenkin*, cited in Forrest, 138. 1 Chit. Rep. 601.

(d) Forrest, 138. Wightw. 110.

will allow *three* or *four* persons to become bail, in different sums, amounting altogether to the requisite sum. In the Common Pleas, however, it is said that notice given to justify *three* bail is irregular:(*e*) And, in the Exchequer, if more than *two* persons are meant to be bail to a large [*246] amount, leave *should be first asked of the court to permit them to justify; for they will not be allowed to do so, on motion merely in the ordinary course.(*a*) In cases of felony, it is said to be an invariable rule to require *four* bail, in order to discharge a prisoner on a *habeas corpus*.(*b*)

Special bail may be put in by the defendant, or by his attorney, in pursuance of his undertaking; or by the sheriff,(*c*) or his bail,(*d*) for their own indemnity: And the sheriff, or his bail, may put in or justify bail above, by their own attorney:(*ee*) In practice however it is usual for the attorney, employed by the sheriff or his bail to put in and justify bail above, to describe himself as the *defendant's* attorney in the notice, though he be not actually employed by the defendant.(*f*) It is no objection to bail, that they were put in by an uncertificated attorney:(*g*) Nor does it seem to be a ground for an attachment against the sheriff, that bail had been put in by a new attorney, without an order for the former attorney being changed.(*h*) But where two notices are given by different attorneys, one on behalf of the defendant, and the other for the sheriff, of two different sets of bail, and the bail put in for the sheriff have already justified, the defendant is entitled to have his bail justified, and allowed.(*i*) If a defendant be arrested by process of the King's Bench, and removed by *habeas corpus* to the Common Pleas, he may put in and justify bail in either court.(*k*)

The general qualification of bail above is, that they should be *house-keepers*, or *freeholders*;(*l*) and, except where there are more than *two* bail, that they are respectively worth double the amount of the sum sworn to, or *one thousand* pounds beyond that sum, if it exceed *one thousand* pounds,(*m*) after payment of all their debts. A person resident in *England* has been admitted to be bail, in respect of mortgage money secured on an estate in *Ireland*:(*n*) and, in the Common Pleas, it seems that the court will permit the bail to justify as tenant by the curtesy of lands in the *Isle of Man*, without an affidavit or other evidence that the law of tenancy by the curtesy prevails there.(*o*) But a *copyhold* estate of the bail, in right of his wife is not sufficient to qualify him to become

(*e*) 2 Blac. Rep. 1123; and see 1 Chit. Rep. 601, 2, (*a*).

(*a*) 13 Price, 448. And see further, as to special bail to the action, and the mode of putting in, excepting to, and justifying the same, Petersd. Part I. Chap. VII. VIII. IX.

(*b*) 6 Dowl. & Ryl. 154.

(*c*) Peake's Cas. Ni. Pri. 3 Ed. 226. 1 Chit. Rep. 81, 329. 5 Price, 558; but see 8 Moore, 398. 1 Bing. 367, S. C.

(*d*) 2 Str. 876. 7 Taunt. 47. 2 Marsh. 365, S. C. 1 Chit. Rep. 81. 2 Barn. & Ald. 604. 1 Chit. Rep. 329, S. C. And see 1 Stark. Ni. Pri. 190, as to the liability of the bail in such case, to the defendant's attorney, for the general expenses of the suit.

(*ee*) 7 Taunt. 48. 2 Marsh. 365, 6, S. C. 1 Chit. Rep. 81. 2 Barn. & Ald. 604. 1 Chit. Rep. 329, S. C. 5 Price, 558; and see 1 Ken. 376. 7 Dowl. & Ryl. 259.

(*f*) *Per Bayley*, J. after consulting the Master, 7 Dowl. & Ryl. 261.

(*g*) 2 Chit. Rep. 98, *ante*, 77.

(*h*) *Id.* 76; but see *id.* 87, 93.

(*i*) 1 Chit. Rep. 81; and see 7 Dowl. & Ryl. 259.

(*k*) 1 Bos. & Pul. 311.

(*l*) 8 Taunt. 148.

(*m*) *Post*, 251.

(*n*) *Per Cur.* M. 42 Geo. III. K. B.; but see 1 Sel. Pr. 2 Ed. 161, where it is said, that property in *Scotland* is not sufficient, because it is not liable to the process of our courts.

(*o*) 8 Taunt. 148.

bail.(p) And though it has been *ruled in the bail court, that [*247] long beneficial *leases*, at small rents, are sufficient to entitle bail to justify,(aa) yet this point does not seem to be settled.(bb)

A peer of the realm,(c) or member of the house of commons,(d) is not allowed to be bail, as not being liable to the ordinary process of the court. And a servant in the King's household, liable to be called upon to attend the person of his majesty, cannot justify as bail; for his person cannot be taken in execution.(e) It is also a rule in both courts, that "no attorney shall be bail, in any action or suit depending therein."(f) This rule, which was calculated for the benefit of attorneys, and intended to protect them against the importunity of their clients, has been extended to their clerks.(g) And, in the King's Bench, a conveyancer, engaged in partnership with an attorney of this court, and sharing the general profits of the business of the office, though he did not himself practise as an attorney, was not allowed to justify as bail.(h) But the *sixty* sworn clerks, of the *six* clerks in *Chancery*, do not come within the operation of the rule which prohibits *attorneys* from being bail.(i) And an attorney, or his clerk, may be put in as bail, though he cannot justify;(k) and if not excepted to, he is liable to be sued on his recognizance.(l) So, he has been allowed to become bail, in order to surrender the defendant immediately, without justification.(m) It is also a rule, founded on principles of prudent jealousy, that "no sheriff's officer, bailiff, or other person concerned in the execution of process, shall, in either court, be permitted to be bail, in any action or suit depending therein:"(n) which latter rule has been applied to the keeper of the *Poultry* compter,(o) a *turnkey* of the King's Bench prison,(p) and *marshalsea* court officers.(q) *Bankrupts*, who have not obtained their certificates, are not allowed to be bail, for want of property;(r) or such as have been *twice* bankrupts, and not paid *fifteen* shillings in the pound under the second commission;(s) And for the same reason, *insolvent* debtors, discharged under any of the general insolvent acts,(t) are disqualified from being bail: as their future effects are liable under these acts.

Though if a person who, by the *rules of the court, is not per- [*248] mitted to become bail, be put into the bail-piece, and not excepted to, the plaintiff, in the King's Bench, cannot take an assignment of the

(p) 2 Chit. Rep. 97.

(aa) 2 Chit. Rep. 96, *per Bayley, J.*

(bb) *Id. ibid.*

(c) 2 Marsh. 232; and see 1 Dowl. & RyI. 126.

(d) 4 Taunt. 249. 1 Dowl. & RyI. 126.

(e) 1 Dowl. & RyI. 127, n.

(f) R. M. 1654, § 1. R. M. 14 Geo. II. *reg.* 1, K. B. R. T. 24 Eliz. § 8. R. M. 1654, § 1. R. M. 6 Geo. II. *reg.* 5, C. P. 1 Chit. Rep. 8.

(g) Cowp. 828. Doug. 466. *Mason v. Caswell*, T. 26 Geo. III. K. B. 2 East, 182; and see 1 H. Blac. 76. 2 H. Blac. 349. 1 Bos. & Pul. 356. 2 Bos. & Pul. 49, 564. 1 Taunt. 162, 164, C. P. 3 Price, 263, *in Scac.*

(h) 1 Dowl. & RyI. 9.

(i) 2 Chit. Rep. 77.

(k) 1 Chit. Rep. 714, (a).

(l) *Id.* 714, 15.

(m) *Per Cur.* M. 42 Geo. III. K. B. 2 Blac. Rep. 1180. 7 Moore, 403, C. P.; and see 1 Chit. Rep. 714, (a), where an attorney who had not practised for *six* years, was allowed to justify as bail.

(n) R. M. 14 Geo. II. *reg.* 2, K. B. 2 Str. 890. 1 Barnard, K. B. 417. Lofft, 153. R. M. 6 Geo. II. *reg.* 7, C. P. 2 Blac. Rep. 799. 2 Bos. & Pul. 150. *Id.* (a).

(o) Doug. 466.

(p) 5 Moore, 72. 2 Brod. & Bing. 359, S. C.

(q) *Per Cur.* T. 18 Geo. III. K. B.

(r) 1 Chit. Rep. 9.

(s) *Mountain v. Wilkins*, M. 21 Geo. III. K. B. 1 Chit. Rep. 293.

(t) 53 Geo. III. c. 102. (1 Chit. Rep. 9; and see *id.* 143.) 1 Geo. IV. c. 119. 7 Geo. IV. c. 57.

bail-bond, and proceed upon it, as if no bail had been put in. *(a)* But, in the Common Pleas, if an attorney be put in as bail, even though another person be afterwards added in his stead, *(b)* the plaintiff may treat the bail as a nullity, and take an assignment of the bail-bond, or proceed against the sheriff: *(cc)* If the plaintiff, however, except to the added bail, who thereupon justifies without opposition, the court will not set aside the rule of allowance. *(d)* And if added bail be excepted to on the ground that the original bail were attorneys' clerks, the court will give time to put in and justify fresh bail. *(e)*

Bail above are in general put in, at or within a certain number of days after the return of the writ; *[A]* but they may be put in before, for the purpose of surrendering the defendant: *(f)* and, after the return of the writ, they may be put in at any time pending the action, and even after verdict *(g)* or final judgment, and before the defendant is charged in execution. *(h)* Where a verdict has been found for the plaintiff, in a larger sum than in the judge's order to hold to bail, the defendant, in order to obtain his discharge out of custody, must justify bail in such larger sum; unless a rule has been made absolute for a new trial, in which case it is sufficient for the bail to justify in the smaller sum. *(i)* And, after a final judgment

(a) *Thomson v. Roubell*, E. 22 Geo. III. K. B. cited in Doug. 466. 2 East, 181. 1 Chit. Rep. 713, *accord.*; and see *id.* 714, *(a)*.

(b) *Jackson v. Hillas*, E. 45 Geo. III. C. P. 1 Taunt. 162.

(cc) 1 Bos. & Pul. 356. 2 Bos. & Pul. 564. 1 Taunt. 162, 164.

(d) 1 Taunt. 162.

(e) 3 Moore, 240.

(f) 8 Durnf. & East, 456. Barnes, 81, 83. 9 Moore, 556. 2 Bing. 271, S. C.

(g) 2 Chit. Rep. 72.

(h) *Hill v. Stanton*, H. 55 Geo. III. K. B. 2 Chit. Rep. 73. 2 Marsh. 374; but see Barnes, 92.

(i) 2 Chit. Rep. 72.

[A] In Maine, New Hampshire, and Massachusetts, on the arrest of the defendant, he gives bail by bond to the sheriff, with condition that he shall appear and answer the plaintiff, and abide the order and judgment of the court in the action, and shall not avoid; and the effect of this condition is, that the principal shall satisfy the plaintiff's judgment, or surrender himself to be taken in execution, or that the bail shall pay the debt, &c. Bail thus given answers the purposes of bail below and bail above at common law. *Hamilton v. Dunklee*, 1 N. Hamp. 172. *Hale v. Russ*, 1 Greenl. 336. *Pierce v. Reed*, 2 N. Hamp. 360. *Champion v. Noyes*, 2 Mass. 484. *Harrington v. Dennie*, 13 Mass. 94. *Broaders v. Welsh*, 2 N. & M. 569. In Georgia, appearance bail entered to the sheriff, is equivalent to special bail. *Lowther v. Lawrence*, Wright, 180. In South Carolina, bail to the sheriff is bail to the action by statute. *Harwood v. Robertson*, 2 Hill, 336. *Fletcher v. Weatherby*, 3 Strobbh. 56. So, also, in North Carolina. *West v. Ratledge*, 4 Dev. 40. In New Hampshire, bail generally put their names on the back of the writ, and thereby take upon themselves the liability of bail. This rests upon uninterrupted usage. *Pierce v. Read*, 2 New Hamp. 362. In Virginia, if the principal does not appear according to the condition of the bail bond, judgment is taken against him, and also against his bail, by default, unless they appear, &c. *Lee v. Carter*, 3 Munf. 121. *Carter v. Cockrill*, 2 Munf. 448. *Keerle v. Norris*, 2 Virg. Cas. 217. But if special bail be afterwards put in, this judgment will be set aside. *Ibid.* Bail to the sheriff in New York will be relieved in all cases on the usual terms, upon the return of the writ against them. *Haswell v. Bates*, 9 Johns. 80. *Bulkley v. Collin*, 1 *Ib.* 515. *Berry v. Elles*, Coleman, 57. In Pennsylvania, where bail to the sheriff entered special bail, which he refused to justify, and was thereupon sued on the bail bond, but surrendered the principal before the writ was returned, the surrender was held to be good, and the bail was relieved on the usual terms. *Stockton v. Throgmorton*, 1 Baldw. 148. In Ohio, if special bail be not put in and perfected in due time, the plaintiff may elect to proceed against the appearance bail, or rule the sheriff to bring in the defendant; but he cannot do both; and the entry of the rule, although not served, is an election to proceed against the defendant. *Valentine v. Smith*, 8 Ham. 26. In Connecticut, the officer indorses on the writ that he has taken special bail, if he would preserve a hold on the defendant's body. The condition of the bond is performed by the defendant's appearance. *Hubbard v. Shaler*, 2 Day, 199. *Halsey v. Fanning*, 2 Root, 101. *Gallup v. Denison*, Kirby, 434.

has been signed, the defendant's bail may put in fresh bail; for the purpose of rendering him.(k)

In the King's Bench, if the defendant be arrested in *London or Middlesex*, special bail should be put in within *four days exclusive*, or, if in any other county, within *six days* after the return of the process,(l) or *quarto die post* by original:(m) And if either the fourth or sixth day fall on a *Sunday*, the defendant has all the *Monday* following to put in bail.(n) But, excepting *Sunday*, bail above may be put in on a *dies non juridicus*, as on the *second of February*, which is considered as a day for such business as is transacted at the judge's chambers.(o) In the Common Pleas, on process returnable the *first* return of the term, special bail should be put in within *four days*, in *London or Middlesex*, or, in any other city or county, *within *eight days* after the appearance day, or *quarto* [*249] *die post* of the return of the process,(a) *exclusive* of the day on which it is returnable: but on process returnable the *second* or any other subsequent return of the term, special bail should be put in within *four days*, in *London or Middlesex*,(b) or, in any other city or county, within *eight days exclusive* after the return of the process, or day on which it is actually made returnable.(c) And in either court, if any further time be required for putting in bail, it may be obtained by taking out a summons for that purpose; and the judge will make an order, upon the terms of putting the plaintiff in the same state as he would have been in, if bail has been put in in due time. In the Exchequer, it seems, the defendant is allowed only *three days* after the return day of the writ, to put in bail.(dd)

Before the statute 4 & 5 W. & M. c. 4, special bail could only have been put in before a judge in town. But this practice being found productive of great expense and inconvenience, it was enacted by the above statute,(ee) that "the chief justice, and other the justices of the court of King's Bench for the time being, or any two of them, whereof the chief justice for the time being to be one, and the chief justice of the court of Common Pleas, and other the justices there for the time being, or any two of them, whereof the chief justice of the same court to be one, and also the chief baron and barons of the degree of the quof, of the court of Exchequer for the time being, or any two of them, whereof the chief baron for the time being to be one, shall or may, by one or more commission(f) or commissions, under the several seals of the said respective courts, from time to time, as need shall require, empower such and so many persons, other than common attorneys and solicitors, as they shall think fit and necessary, in all and every the several shires and counties within the kingdom of *England*, dominion of *Wales*, and town of *Berwick* upon *Tweed*, to take and receive all and every such recognizance or recognizances of bail or bails, as any

(k) 2 Chit. Rep. 74.

(l) R. M. 8 Ann. reg. 1 K. B. Former rule, E. 11 W. III. reg. 2 K. B.

(m) 4 Durnf. & East, 377; but see 2 Barn. & Cres. 626. 4 Dowl. & Ryl. 160, S. C., wherein the court were of opinion, that the bail bond was forfeited, by not putting in bail on the *quarto die post*; and that the other *four* or *six* days were allowed merely *ex gratia*.

(n) R. M. 8 Ann. 1, (b), K. B. 2 Str. 782, 914.

(o) 5 Durnf. & East, 170.

(a) 2 H. Blac. 276.

(b) *White v. Girdler*, T. 26 Geo. III. Imp. C. P. 4 Ed. 196, 7.

(c) R. T. 30 Geo. III. C. P. Imp. C. P. 7 Ed. 110, 11, 129, 30, 137, 8.

(dd) 1 Price, 104, (a).

(ee) § 1.

(f) This commission is subject to the stamp duty of 10s. by stat. 55 Geo. III. c. 184. Sched. Part II. § III.

person or persons shall be willing or desirous to acknowledge or make before any of the persons so empowered, in any action or suit depending in the said respective courts, in such manner and form, and by such recognizance or bail-piece, as the justices or barons of the said respective courts have used to take the same: which said recognizance or recognizances of bail or bail-piece, so taken as aforesaid, shall be transmitted to some or one of the justices or barons of the said respective courts; who, upon affidavit made of the due taking of the recognizance of such bail or bail-piece, by some credible person present at the taking thereof, shall receive the same, upon payment of the usual fees; which recognizance of bail or

[*250] bail-piece, so taken and transmitted, shall be of the like effect, as if the same were taken *de bene esse*, before any of the *said justices and barons: for the taking of which recognizance, the person empowered shall receive only the sum or fee of *two* shillings, and no more." But, in the Exchequer, it has been holden, that a commissioner is not confined to that sum, if he have been put to expense by travelling, or have taken extraordinary trouble, at the instance of the parties, to effect the taking of the recognizance, or where there are other circumstances in the case, which afford reasonable ground for a further charge.(a) And any judge of assize, in his circuit, shall and may take and receive all and every such recognizance and recognizances of bail or bails, as any person shall be willing and desirous to make and acknowledge before him; which being transmitted in like manner, shall, without oath, be received in manner as aforesaid, upon payment of the usual fees.(b) Since the making of the above statute, special bail may be put in before a judge in town, a commissioner in the country, or a judge of assize in his circuit. And one of the bail may be taken by affidavit, before a commissioner in the country, and the other before a judge in town.(c)

In the King's Bench, special bail are put in, before a judge in town, at his chambers; and, in actions by *bill*, their recognizance is taken by the judge's clerk, on a *bail-piece*,(d) made out by the defendant's attorney; stating the term, the county into which the writ issued,(e) and the names of the parties together with the names and additions of the bail, and the sum sworn to.[A] In actions by *original*, in the King's Bench, special bail are put in before a judge in town, with a *filacer* or his clerk, who enters it of the county into which the *capias* issued;(f) the defendant's attorney first making out and delivering to him a note in writing, answering to the bail-piece by bill:(g) and bail must likewise be put in that county, on a *testatum capias*.(h) But where the defendant had been arrested on a *testatum capias* from *Middlesex* to *Kent*, and bail was put in in the latter county, *Kent* being inserted in the bail-piece, but in the

(a) 5 Price, 2.

(b) § 3.

(c) 2 Chit. Rep. 90.

(d) Append. Chap. XII. § 5, 6.

(e) 7 Durnf. & East, 96.

(f) 1 Chit. Rep. 237.

(g) Trye, 67, 8. Append. Chap. XII. § 7. And for the filacer's entry of special bail by original, in K. B. see *id.* § 8.

(h) 1 East, 603. 2 Bos. & Pul. 516. 3 Moore, 76; and see Barnes, 63. R. H. 22 Geo. III. C. P.

[A] Bail may justify at the time and place specified in the notice before a different officer from him who is named in the notice, but the plaintiff must not be misled. *Southerland v. Sheffield*, 2 Wend. 293. And before officers authorized to take recognizances, or in open court, see Rule of Court, 13 Johns. 422; or in vacation before a judge at chambers. *Fenn v. Smith*, 6 Id. 124. The matter is generally regulated by rules of court.

margin these words, "*Testatum from Middelsex*," the court held, that the notice in the margin made it regular.⁽ⁱ⁾ And where the defendant, by mistake, put in bail in the Common Pleas, to an action in the King's Bench, and thereby misled the plaintiff, who declared without discovering the mistake, the court ordered the defendant to rectify the same, by putting in and perfecting bail in the King's Bench, of the proper term.^(k) The recognizance of bail by *bill*, in the King's Bench, if taken *before* judgment, is general,^(l) that if the defendant be condemned in the action, he shall satisfy the costs and condemnation money, or render himself to the custody of the marshal; or that the bail will pay the costs and condemnation money for him:^(m) And "the bail piece is left [*251] at the judge's chambers, until the bail are perfected. By *original*, the recognizance is taken in a penalty or sum certain, being double the amount of the sum sworn to,^(u) or *one thousand* pounds beyond that sum, if it exceed *one thousand* pounds:^(b) And where bail is put in *after* judgment, the recognizance is taken in double the amount of the sum recovered.^(c)

In the Common Pleas, bail should be put in with the *filacer* of the county into which the *capias* issued,^(d) who attends to take them at the judge's chambers; and, on being furnished with an abstract of the writ, and the names and additions of the bail,^(e) he will make an entry thereof in a book kept for that purpose:^(ff) or bail may be taken in the absence of the filacer, upon bringing a true abstract of the writ on parchment,^(gg) in form of a bail-piece.^(hh) The entry of bail in the filacer's book is of the term generally, which of course relates to the first day of it; and therefore, in an action on a bail bond, if the issue depend on the date of the appearance, the court, upon an application by the plaintiff, will order the day of appearance to be entered in the filacer's book; although issue has been already joined on the plea of *comperuit ad diem*.⁽ⁱⁱ⁾ Formerly, the defendant, in the Common Pleas, might have entered into the recognizance of bail himself; and in that case he was bound in *double* the sum sworn to, and each of the bail in the *single* sum only;^(kk) but now, by a late rule,^(ll) "in all actions requiring bail, the defendant shall not be permitted to enter into the recognizance; but the bail shall each of them enter into a recognizance, in *double* the sum sworn to, or, by a subsequent rule,^(mm) *one thousand* pounds beyond that sum if it exceed *one thousand* pounds. In the Exchequer, there is a similar rule:⁽ⁿ⁾ And, in that court, the form of a recognizance of bail after judgment, and before the defendant has been charged in execution, is to render him to

(i) 3 Maule & Sel. 532.

(k) *Boyce v. Rust*, T. 22 Geo. III. K. B.

(l) 2 Bulst. 232. Cro. Jac. 449, 645. Cro. Car. 481. 2 Salk. 564.

(m) Append. Chap. XII. § 12.

(n) Trye, 121, 2.

(b) R. M. 51 Geo. III. K. B. 13 East. 62.

(c) *Hill v. Stanton*, II. 55 Geo. III. K. B. 2 Chit. Rep. 73. Append. Chap. XII. § 46.

(d) R. T. 1 W. & M. reg. 2, C. P. 2 Blac. Rep. 1061. 2 Bos. & Pul. 516. 3 Moore, 76. 3 Bing. 603.

(e) Append. Chap. XII. § 7.

(ff) *Id.* § 9, 11.

(gg) *Notice*, II. 8 Geo. II. § 3, C. P.

(hh) Append. Chap. XII. § 10.

(ii) 1 Taunt. 23.

(kk) R. 10 Mar. 5 W. & M. § 1, C. P. 1 Bos. & Pul. 206, 7.

(ll) R. E. 36 Geo. III. C. P. 1 Bos. & Pul. 530. 1 Brod. & Bing. 490.

(mm) R. M. 51 Geo. III. C. P. 3 Taunt. 341. 2 Chit. Rep. 378.

(n) Wightw. 115. Man. Ex. Append. 226. 3 Price, 508.

the prison of the *Fleet*, on or before the *fourth* day of the next following term.(o)

Before a *commissioner* in the country, a bail-piece is made out in the King's Bench,(p) whether the action be by *bill* or *original*, and the recognizance taken thereon, in the same manner as in town, where the action is by *bill*.(q) In the Common Pleas, the recognizance is taken on a bail-piece,(r) in a sum *certain*:(s) And where the defendant had been arrested in the county palatine of *Lancaster*, upon a *testatum capias* [*252] from **London*, and it appeared on the face of the bail-piece, that they had been put in at *Lancaster*, the court held that the bail-piece was wrong, and that it should have been taken as upon a *testatum* from *London* into the county palatine.(a) In both courts, an *affidavit* of the due taking of the bail should be made, either before the judge to whom the bail-piece is transmitted, or before a commissioner for taking affidavits;(b) which affidavit is in general made before a commissioner, (not being the person who took the bail,) and annexed to the bail-piece:(c) but no such affidavit is necessary upon the transmission, when the bail is taken by a judge of assize in his circuit. The rules of court require the bail-piece to be transmitted to the chief-justice, or other judge of the court of King's Bench, in *eight* days, if taken within *forty* miles of *London* or *Westminster*, or, if taken above that distance, in *fifteen* days after the taking thereof; and in the Common Pleas, the bail, if taken within *forty* miles of *London*, should be transmitted within *ten* days, or, if taken above that distance, within *twenty* days after the taking thereof;(d) unless all the judges are on their circuits, and then as soon as any one of them is returned.(e) But it is said that, notwithstanding these rules, the bail-piece must actually be filed with one of the judges, on the *sixth* day after the return of the writ in the King's Bench, or *eighth* day in the Common Pleas, or the bail-bond may be assigned.(f) And where the action is by *original*, in the King's Bench or Common Pleas, the bail-piece being transmitted and allowed by the judge, should be filed with the *filacer* of the county where the action is laid.(g)

In putting in special bail, the parties to the suit should be *named* as in the process, unless the defendant be called therein by a wrong name, and mean to avail himself of the misnomer; in which case he should put in bail in his right name, stating that he was arrested or sued by the name in the writ: For if a defendant, sued by a wrong name, appear and perfect bail by his right name, without identifying himself as the person sued by the other name, the plaintiff may treat the bail as a nullity, and attach the sheriff.(h) And if the defendant, after being arrested, were to put in bail above in a wrong name, it would estop him from pleading the misnomer in abatement;(i) even though he were himself no party to the recognizance.(k) But

(o) McClell. 310. 13 Price, 589, S. C.

(p) Append. Chap. XII. § 16.

(q) R. T. 8 W. III. reg. 3, § 1, K. B.

(r) R. 10 March, 5 W. & M. § 1, C. P. Append. Chap. XII. § 17.

(s) Append. Chap. XII. § 19.

(a) 3 Moore, 76.

(b) R. T. 8 W. III. reg. 3, § 2, K. B. R. 10 March, 5 W. & M. § 2, C. P.; and see Append. Chap. XII. § 20.

(c) R. T. 8 W. III. reg. 2, (a), K. B.

(d) R. 10 Mar. 5 W. & M. § 3, C. P.

(e) R. T. 8 W. III. reg. 3, § 3, K. B.

(f) Imp. K. B. 10 Ed. 137. Imp. C. P. 7 Ed. 129, 30.

(g) 1 East, 603. Imp. K. B. 10 Ed. 528. 1 Crompt. 3 Ed. 51, 2. R. H. 6 Geo. I. reg. 2, R. M. 13 Geo. I. R. M. 6 Geo. II. reg. 1, C. P.

(h) 4 Taunt. 818.

(i) Willes, 461. Barnes, 94, S. C.; and see 1 Salk. 8. 3 Durnf. & East, 611.

(k) 2 New Rep. C. P. 453.

where the plaintiff sued out an *original* writ against the defendant in his wrong name, the *præcipe* being right, and the defendant put in bail in his right name, the court set aside an attachment obtained against the sheriff, for not bringing in the body, but without costs on either side. *(l)* And where the defendant was named in the notice of bail by his right name, as *having been sued by a wrong one, but in the bail-piece he was [*253] called by the wrong name only, this was deemed sufficient. *(a)* If the parties be rightly named in the recognizance of bail, it is sufficient, where there is no exception, though they are misnamed in the affidavits of sufficiency, and acknowledgment of the bail. *(b)*

Special bail are *absolute* or *de bene esse*. *(c)* In *criminal* cases no justification being requisite, the bail are absolute in the first instance; *(d)* but in *civil* cases, they cannot be taken *absolutely*, without the consent of the plaintiff, or his attorney; *(e)* And when they are taken *de bene esse*, the defendant's attorney should give notice thereof in writing without delay, to the plaintiff's attorney. *(f)* Formerly, the defendant's attorney was required to give notice of bail, in the King's Bench, to the plaintiff's attorney, before it was put in; *(g)* and the plaintiff's attorney, on such notice being given to him, was obliged to attend before a judge, to accept of, or except to the bail: *(hh)* But notice of bail is not now given, until after it is put in: and though it should regularly be given before the time for putting in bail is expired, yet if it be not given in time, the plaintiff cannot, after notice, regularly take an assignment of the bail bond. *(ii)* In the Common Pleas, where bail was put in in due time, the defendant was not formerly bound to give notice thereof, but the plaintiff must have searched in the filacer's book; *(kk)* though it was otherwise, if they had not been put in in due time: *(ll)* But now, by a late rule of court, *(m)* "when special bail is put in for the defendant, a notice in writing of such bail being so put in, must be forthwith given to the plaintiff's attorney or agent; and special bail shall not be considered as put in, until such notice shall be given."

The *notice* of bail in town is, that they are put in; *(n)* or, if taken before a commissioner, that the bail-piece is *filed*, *(o)* with an affidavit of the due taking thereof, at a judge's chambers; or, in actions by *original*, in the King's Bench or Common Pleas, that the bail has been allowed by a judge, and the bail-piece and affidavit are filed with the filacer. The notice, in either case, should be properly *entitled*; *(p)* and, where it is of bail put in, *should set forth with truth and certainty, their [*254]

(l) 2 Chit. Rep. 56.

(a) 2 Chit. Rep. 81.

(b) 5 Taunt. 663; and see 1 Price, 385.

(c) The origin of bail *de bene esse* is thus related by *Glyn*, Ch. J. "A bishop, (says he,) having arrested a man for a large debt, he tendered bail to chief justice *Richardson*, who took it in his chamber; and the bail being insufficient, the bishop represented the matter to parliament, and prayed their remedy for it: upon which it was enacted, that no bail, taken before a judge in his chamber, should bind the plaintiff, without his assent thereto, or the confirmation of such bail taken by all the court." 2 Sid. 91. For the proceedings in this case, see *Man. Ex. Append.* 243.

(d) 2 Blac. Rep. 1110. And for the rules respecting bailing prisoners, on the return of a *habeas corpus*, in *criminal cases*, see 1 Chit. Cr. L. 129. 2 Chit. Rep. 109, 10. 6 Dowl. & Ry. 154. *Petersd.* Part III. Chap. III.

(e) R. M. 1654, § 8, K. B. R. M. 1654, § 11, C. P.

(f) R. M. 16 Car. II. K. B. *Append.* Chap. XII. § 13, 15.

(g) R. M. 7 Jac. I. K. B.

(hh) R. M. 21 Car. I. K. B.

(ii) *Per Cur.* M. 44 Geo. III. K. B.

(kk) 2 Ken. 467.

(ll) 1 H. Blac. 529.

(m) R. E. 49 Geo. III. C. P. 1 Taunt. 616.

(n) *Append.* Chap. XII. § 13, 15.

(o) *Id.* § 21, 22.

(p) *Lofft*, 237; and see 2 Chit. Rep. 77, 81.

names,(a) places of abode,(b) and degrees or mysteries,(c) in order that the plaintiff may have an opportunity of inquiring after them:(d) And if the bail above are the same persons as were bail to the sheriff, it is usually so expressed in the notice.

In setting out the places of abode of the bail, it seems sufficient to describe them in the notice, by their place of business:(e) But the *parish* wherein they live, without the *street*, or other certain place of their residence, is too vague a description:(f) And a mistake in the number of the house in which the bail resides, is a ground of rejection.(g) So, it is not sufficient to describe the bail generally, as of a large town, such as *Liverpool*,(h) *Lancaster*,(i) *Leeds*,(k) *Leicester*,(k) *Birmingham*,(l) or the town and county of the town of *Nottingham*,(m) without any further description, to direct the plaintiff in his inquiries as to their sufficiency: In all large towns, the street ought to be mentioned in the notice.(n) And a description of bail as of one of the large villages near *London*, such as *Clapham*,(o) or *Walworth*,(pp) or *Battle Bridge*,(q) is too general, if there be a known and particular designation of the place where the bail resides. But when the plaintiff has had a long time to inquire after the bail,(r) or has in fact found them,(s) the court will not reject the bail, on account of a generality of description, which would otherwise have been fatal: And, in the Common Pleas the court will not take judicial notice of the size of the place, where the bail are described as residing; and if it be too large, that fact must be shown by affidavit.(t) As to the degree or mystery of the bail, a *schoolmaster*,(u) or *clerk* in the custom-house,(x) is holden to be well described as a *gentleman*: but the description of bail as a *gentleman*, when it appears he is a *servant*,(x) or *clerk* in a mercantile house,(y) or has recently been a *butcher*, and is about to set up again in that trade,(z) is insufficient; and though the bail has been found, yet the objection is not aided.(z) So, where a *baker* was described in the notice as a *gentleman*, the court of Common Pleas rejected him; and desired that it might be understood in future, as a general rule, that a false addition to the name of the bail, should be considered as a ground of rejection.(*). But it is not a sufficient ground for rejecting a *person as bail, in that [*255] court, that he is described in the notice, to be of A. in the county of B. *gaol-keeper*.(aa) It seems that *shopkeeper* is in general a sufficient description of bail;(bb) though bail so described have, under particular circumstances, been rejected.(bb) The notice of bail should regularly be served, either upon the plaintiff's attorney *personally*,

(a) Lofft, 187. 5 Taunt. 854. 1 Marsh. 386, S. C. 1 Moore, 126; but see 4 Dowl. & Ry1. 30.

(b) Lofft, 72, 194. 1 Bos. & Pul. 325, 335. 5 Taunt. 173, 554.

(c) Lofft, 187, 281. 2 Taunt. 173. 5 Taunt. 554.

(d) 1 Price, 400.

(d) 6 Mod. 24.

(f) Lofft, 72, 194.

(g) *Per Cur.* H. 55 Geo. III. K. B. 1 Chit. Rep. 493, *in notis*.

(h) 1 Chit. Rep. 492. *Id.* 492, 3, (a).

(i) *Id.* 492, (a).

(k) *Id. ibid.* 6 Moore, 44.

(l) *Per Cur.* E. 22 Geo. III. K. B.

(m) *Per Cur.* E. 59 Geo. III. C. P.

(n) *Per Cur.* E. 22 Geo. III. K. B. *Ante*, 31.

(o) 5 Taunt. 173; but see 6 Moore, 332, where a notice of bail, as residing at *Clapham*, was deemed sufficient, it appearing that he resided in the *Clapham* road.

(pp) 1 Chit. Rep. 493, *in notis*.

(q) 2 Chit. Rep. 81.

(r) 1 Chit. Rep. 493, *in notis*.

(s) *Id.* 503.

(t) 5 Taunt. 554.

(u) *Id.* 759.

(x) 1 Chit. Rep. 494, *in notis*.

(y) 7 Dowl. & Ry1. 772.

(z) 1 Chit. Rep. 76, (a), *per Abbott, J.*

(*) 2 Taunt. 173, 4.

(aa) 2 Bos. & Pul. 150.

(bb) 1 Chit. Rep. 494, *in notis*.

or upon some clerk or servant in his office: but when the attorney cannot be met with, and his office is not open, it is sufficient to stick up a copy of the notice in the King's Bench office, and put another under the attorney's door.(c) And service of notice of bail, by leaving the same at a stationer's, where the plaintiff's attorney's papers are usually left for him, has been deemed sufficient.(d)

The plaintiff or his attorney, upon being served with this notice, either accepts of, or excepts to the bail. If he *accept* of them, the defendant's attorney, in the King's Bench, should cause the bail-piece to be filed with the master, within *twenty* days after such acceptance:(e) or if the plaintiff do not except to the bail for insufficiency, within *twenty* days next after notice thereof given to him or his attorney, then, upon an affidavit in writing of such notice on the back of the bail-piece, for which affidavit no fee shall be taken, the bail-piece shall be filed by the defendant's attorney, within *four* days next after the end of the *twenty* days.(f) But if the plaintiff be not satisfied with the bail, he may *except* to them in either court, and thereby compel a justification. If the bail to the sheriff become bail above, the plaintiff, in the King's Bench, is not at liberty to accept of them, after he has taken an assignment of the bail bond;(g) for by so doing, he has admitted them to be sufficient: but if exception be taken to the bail *before* the bond is assigned, they are bound to justify, notwithstanding such assignment:(h) and in the Common Pleas it is a rule, that "in all cases wherein bail bonds shall be taken, and the same bail is put in above, the plaintiff may except against such bail."(i) The delivery of a declaration *in chief* before special bail put in, is holden in both courts, to be a waiver of the bail; and, before justification, it is an acceptance of them:(k)[A] But the plaintiff may declare *de bene esse*, or conditionally, provided good bail be put in, or the bail already put in do justify:(l) though the demand or acceptance of a plea will even then, in general, be deemed a waiver of the bail, or justification.(m) When bail above is put in in due time, and notice thereof given to the plaintiff's attorney, the bail should be excepted to, and notice of the exception given to the defendant's attorney, [*256] before the *sheriff is ruled:(a) And there is no difference in this respect, between the original and added bail; it being holden, that the adding bail afterwards, does not supersede the necessity of such exception, before an attachment can issue against the sheriff, on account

(c) 2 Chit. Rep. 81.

(d) *Id.* 82.

(e) R. T. 13 Car. II. K. B. Former rule, II. 23 Car. I. K. B.

(f) R. M. 16 Car. II. K. B.

(g) 1 Salk. 97. 7 Mod. 62, 117. 6 Mod. 122. R. M. 8 Ann. reg. 1, (c). R. E. 5 Geo. II. reg. 1, (a), K. B. (h) 11 East, 321.

(i) R. M. 6 Geo. II. reg. 2, C. P. Barnes, 63. 2 Wils. 6.

(k) R. M. 8 Ann. reg. 1, (c), K. B. R. E. 5 Geo. II. reg. 1, (a), K. B. Cas. Pr. C. P. 81, 155.

(l) R. M. 8 Ann. reg. 1, (c), K. B. Cas. Pr. C. P. 81.

(m) Barnes, 92; but see 1 Dowl. & Ry. 163. 4 Dowl. & Ry. 834.

(a) Lofft, 159. 8 Durnf. & East, 258. 1 New Rep. C. P. 139. 7 Dowl. & Ry. 264.

[A] By filing a declaration, exceptions to the bail are waived, but the bail is not discharged. *Filter v. Bryson*, 6 W. & S. 566. *Caton v. McCarty*, 2 Dall. 141. *Bohysshall v. Oppenheimer*, 4 Wash. C. C. 317. *Candee v. Kelsey*, 7 Ham. (Part 2,) 210. *People v. Stevens*, 9 Johns. 72. *Briggs v. Rowe*, 7 Cow. 593. *Com. v. Heilman*, 4 Barr. 455. *Culpepper Society v. Digges*, 6 Rand. 165. The right to special bail may always be waived, and the trial proceed. *Paul v. Purcell*, 2 Browne, 20. Thus, a rule to arbitrate before special bail is entered, is a waiver. *Moulson v. Rees*, 6 Binn. 32. *Nones v. Gelband*, 11 S. & R. 9. *Phillips v. Oliver*, 5 *Id.* 419. *Maus v. Seitzinger*, 2 *Id.* 421; or a judgment for want of an affidavit of defence. *Barbe v. Davis*, 1 Miles, 120.

of the added bail not having justified in time.(bb) But when bail above is not put in at the time of ruling the sheriff to return the writ, or bring in the body, he must put in and perfect bail at his peril, or render the defendant, within *four* days in a town cause, or *six* days in a country cause, without any exception; for otherwise, if the plaintiff excepted, the sheriff would have *four* days after exception to perfect bail, and by that means would have more than the time allowed him, by the practice of the court, to return the writ, and bring in the body.(c)

In the King's Bench, the exception to bail, if put in in due time, should be put in the bail book at the judge's chambers by *bill*.(d) or in the filacer's book by *original*.(e) within *twenty* days after notice of bail put in or filed,(f) and not afterwards.(g) If it be not entered within that time, the bail becomes absolute;(h) and the bail-piece should be filed by the defendant's attorney, within *four* days after the end of the *twenty* days.(i) But if bail above be not put in in due time, they must be justified, though not excepted to by the plaintiff.(k) The exception being entered, *notice* thereof should be given in writing, without delay, to the defendant's attorney:(l)[A] and "if the notice be given in term-time, the defendant shall procure his bail to justify in *four* days *exclusive* after such notice: or shall add other bail, who shall justify within the said four days: but if such exception be entered in vacation, and notice thereof given in like manner, the bail put in or other additional bail, shall justify upon the *first* day of the subsequent term."(m) The notice of exception to bail should be entitled in the cause; and if not so entitled, it is a nullity, although served upon the defendant's attorney at the same time as the declaration.(n) And notice of exception to bail, entitled by mistake "In the Lord Mayor's court," instead of "In the King's Bench," is a nullity; and an attachment against the sheriff was in consequence set aside.(o)

[*257] *In the Common Pleas it is a rule, that in all cases of exception to bail, such exception should be made, either in the filacer's book, or on the bail-piece, if taken by a commissioner, before it is transmitted, and afterwards above in the filacer's book, or the bail-piece;(a)

(bb) 8 Durnf. & East, 258. 7 Durnf. & East, 109. 7 East, 607.

(c) *Per Cur.* E. 24 Geo. III. K. B. 2 Black. Rep. 1206, C. P.; and see 2 Chit. Rep. 82, 108, 9.

(d) R. M. 8 Ann. reg. 2, (a), K. B. 1 Chit. Rep. 174. 4 Dowl. & Ryl. 365. 5 Barn. & Cres. 389. 8 Dowl. & Ryl. 149, S. C., and see Append. Chap. XII. § 23.

(e) R. E. 2 Geo. II. K. B.

(f) R. M. 16 Car. II. K. B. 1 Salk. 98. 6 Mod. 24. 2 East, 406, 7.

(g) R. M. 8 Ann. reg. 2, K. B.

(h) 1 Chit. Rep. 174. 4 Dowl. & Ryl. 365.

(i) R. M. 16 Car. II. K. B.

(k) 7 Durnf. & East, 109. 7 East, 607. 2 Chit. Rep. 108, 9.

(l) R. M. 8 Ann. reg. 2, (a). R. E. 2 Geo. II. R. E. 5 Geo. II. reg. 1. 7 Durnf. & East, 26. 5 Barn. & Cres. 389, K. B. 1 H. Blac. 80, 106, C. P., and see Append. Chap. XII., § 24.

(m) R. E. 5 Geo. II. reg. 1, K. B. R. T. 3 & 4 Geo. II., C. P., and see 4 Barn. & Cres. 864. 7 Dowl. & Ryl. 374, S. C.

(n) 1 Chit. Rep. 741.

(o) *Id.* 374.

(a) Cas. Pr. C. P. 33, 55. Barnes, 161.

[A] If bail do not justify within the time allowed by the rules of the court, they cease to be bail, and cannot be held by the plaintiff's giving notice that he waives the exception. *People v. The Judges*, 3 C. 1 Cow. 54. *Waterman v. Allen*, *Id.* 60. *Trotter v. Hawley*, *Id.* 226. *Thorp v. Faulkner*, 2 Cow. 514. *Cooper v. Spieer*, *Id.* 619; but the plaintiff may waive the exception without requiring the justification, provided the waiver be before the expiration of the time of justification. *The People v. The Supreme Court*, 20 Wend. 607. *Boyd v. Weeks*, 6 Hill, 71. And special bail, if excepted to, must justify in at least double the amount each. *Louis v. Mitchell*, 2 Hill, 379.

and notice of the exception must also be given in writing to the defendant's attorney.(b) But notice of justification of bail is in that court a waiver, as between the parties, of a neglect to give notice of exception; though it is not a waiver, with respect to the sheriff, so as to support a rule to bring in the body.(cc) If special bail put in by the defendant be excepted to, the defendant in that court shall perfect his bail, within *four* days after exception taken; in default whereof the plaintiff shall be at liberty to proceed upon the bail bond:(dd) and of these four days, the first is reckoned *exclusively*, and the last *inclusively*; so that where the exception is on *Wednesday*, an attachment cannot regularly issue against the sheriff till the *Tuesday* following, *Sunday* being considered as a *dies non*;(dd) and if an attachment issue on the *fourth* day, the court will set it aside, without first calling on the defendant to justify bail.(e)

In the exchequer, it is a rule,(f) that "in every action where special bail is put in before the barons of this court, the plaintiff may except there-to within *twenty* days next after the putting in of such bail, and notice thereof given in writing to the plaintiff, his attorney or clerk in court; but no exception to bail shall be admitted, after the time hereinbefore limited: And in case exception shall be taken to the bail, within the time aforesaid, and notice of such exception given in writing to the defendant's attorney or clerk in court, the defendant shall perfect his bail, and justify the same, (if the notice be given in term-time,) within *four* days after such notice; but if exception be taken in vacation time, and notice thereof given in like manner, the defendant shall perfect his bail, and justify the same, upon the *first* day of the subsequent term, unless the plaintiff, his attorney or clerk in court, shall consent to a justification before one of the barons of this court, in which case the bail shall justify themselves before one of the barons, within *four* days after notice of such exception in writing given to the defendant, his attorney or clerk in court: and in default of the defendant's justifying his bail, in either of the said cases, the plaintiff shall be at liberty to proceed on the bail bond." Notice of exception is not entered, in this court, on the bail-piece, but is given on a separate paper, to the defendant's attorney or clerk in court, within the *twenty* days; except when the *twentieth* day falls on *Sunday*, in which case the exception may be made on the following day.(g)

By the statute 4 & 5 W. & M. c. 4, § 2, "the justices of the courts of King's Bench, &c. shall make such rules and orders, for the *justifying of such bails as are taken by a commissioner in the [*258] country, and making of the same absolute, as to them shall seem meet; so as the cognizor or cognizors of such bail or bails be not compelled to appear in person in the said courts, to justify him or themselves; but the same may, and is thereby directed to be determined by affidavit or affidavits, duly taken before the said commissioners, who are thereby empowered and required to take the same, and also to examine the sureties upon oath, touching the value of their respective estates; unless the cognizor or cognizors of such bail do live within the cities of *London* and *Westminster*, or within *ten* miles thereof." And by the rules of all the

(b) Barnes, 88.

(cc) 1 H. Blac. 80, 106. 1 Chit. Rep. 174, (a).

(dd) 2 H. Blac. 35.

(e) 1 New Rep. C. P. 139. 2 H. Blac. 35, *semb. contra*.(f) R. T. 26 & 27 Geo. II. § 1, in *Seac.* Man. Ex. Appen l. 209.

(g) 7 Durnf. & East, 26.

courts, "every commissioner is required to have a book, kept purposely for entering exactly the names of the defendant and his bail, and of the plaintiff, as it is in the bail-piece, and the time of the taking thereof, and the name of him by whom such bail shall be transmitted;" and also, in the King's Bench and Exchequer, the name of the attorney for the defendant: and the plaintiff's attorney shall be at liberty to repair to the commissioner's book, for the names of the bail, to the end that he may inquire of the sufficiency of them; and if they are found insufficient, he may except against them, within *twenty* days after the said bail is transmitted, and notice to the plaintiff or his attorney of the taking thereof: and in that case the defendant must either put in better bail, or the cognizors of such bail must justify themselves in open court, either by affidavit taken before such commissioner that took the said bail, or by oath made in court, or before one of the judges of the said courts respectively.(a)

When the bail already put in do not mean to justify, others should be *added*, before a judge, on the bail-piece by *bill*, or in the filacer's book by *original*, in the King's Bench; or, in the Common Pleas, with the filacer or his clerk, within the time allowed for their justification: and if there be not time enough, the defendant's attorney may take out a summons, and obtain an order for further time.(b) The summons in such case, if made returnable before the time allowed for justifying bail has expired, will operate as a stay of proceedings.(c) It seems that, generally speaking, bail are not in a condition to make any motion to the court, until they have justified.(d) And when bail are excepted to, they are considered as no bail, unless they justify;(e) and if they do not justify, the court will order their names to be struck out of the bail-piece:(f) But until this be done, they are liable to be proceeded against:(g) and if it be not done until after proceedings have been had against them, they must pay the costs of such proceedings.(h) It should also be observed, that one who is bail, being interested, cannot be a *witness* in the cause for his principal; nor is the wife of bail competent to give evidence for [*259] the defendant, on *whose behalf her husband became bound:(aa) and therefore, if the defendant be likely to have occasion to examine one of his bail as a witness, he must make an affidavit that such bail will be a material witness for him in the cause;(bb) and thereupon move the court for a rule to show cause, why his name should not be struck out of the bail-piece, on adding and justifying another in his stead; which the courts will order, on an affidavit of service, if no sufficient cause be shown to the contrary.(cc) And where one of the sureties in a *replevin* bond was a material witness in the cause, the court granted a rule for substituting another surety in his place, upon giving the defendant's attorney notice of such rule.(dd)

Previous to the justification of bail, there should be a *notice*, setting

(a) R. T. 8 W. III. *reg.* 3, § 4, 5, K. B. R. 10 *March.* 5 W. & M. § 4, 5, C. P. 1 Burt. 128, 9. Man. Ex. Pr. 106, 7, *in Scac.*

(b) 1 Crompt. 3 Ed. 62, 84, &c.

(c) 6 Taunt. 240.

(d) 7 Durnf. & East, 226.

(e) 7 East, 580.

(f) Say. Rep. 58. 1 Wils. 337, S. C. 1 Ken. 382.

(g) 1 Ken. 382. Say. Rep. 308, 9, S. C. 1 Taunt. 427.

(h) 1 Blac. Rep. 462. 4 Bur. 2107. 7 East, 581.

(aa) 8 Dowl. & Ry. 65.

(bb) Barnes, 69.

(cc) 2 Chit. Rep. 103. *Whalley v. Fearnley*, E. 33 Geo. III. C. P. Imp. C. P. 7 Ed. 128; and see 1 Phil. Evid. 6 Ed. 127, 8.

(dd) 1 Bing. 92. 7 Moore, 439, S. C.

forth that the bail already put in will, on a certain day, justify themselves in open court; *(cc)* or that one or more persons will be added, and justify themselves as good bail for the defendant. *(ff)* [A] This notice should be properly *entitled*; and therefore in an action at the suit of *two*, if the notice of justification and recognizance of bail are at the suit of *one* only, the bail may be treated as a nullity: *(gg)* But it is no objection to the notice of justification, that it states that two were added bail, when in point of fact one only was added. *(hh)* In the King's Bench, the notice of justification should regularly contain the *christian* and *surnames* of the bail. *(i)* and also, in the case of added bail, their additions; *(k)* but this does not seem to be necessary, in the case of justifying bail already put in, whose additions must have been before inserted in the notice of bail. *(l)* The same distinction was formerly observed in the Common Pleas: *(m)* But by a late rule of that court, *(n)* "in every case wherein the same bail have been already put in, or wherein other bail are intended to be added to the original bail put in, the names and descriptions, or name and description, of such same original bail intended to justify, or added bail to be put in and justify, shall be inserted in every notice of such same or added bail to be justified, or to be put in and justified, pursuant to such notice; and that in default thereof, in either of the cases aforesaid, no rule for the allowance of such same or added bail shall be drawn up." If the bail were put in before a commissioner, the notice should express that they will justify themselves *by affidavit*: *(o)* And, except where the defendant is a prisoner, *(p)* it cannot be given by a new attorney, without an order for changing the attorney before employed. *(q)* In the King's Bench, when *the bail already put in intend to justify, [*260] one day's previous notice of justification, or notice for the next day, is deemed sufficient; *(a)* unless *Sunday* intervene, and then notice must be given on *Saturday* for *Monday*. But where other bail are added to those already put in, there must be *two* days' previous notice of justification, one inclusive and the other exclusive, as *Monday* for *Wednesday*, *(b)* or, if *Sunday* intervene, *Saturday* for *Tuesday*, &c. In the Common Pleas, *two* days' notice of justification must be given, as well where the bail already put in intend to justify, as in the case of added bail. *(c)* And *Sunday* is not reckoned a day for this purpose: therefore, notice of added bail on *Saturday* for *Monday* is not sufficient. *(d)* If the time

(cc) Append. Chap. XII. § 25.

(ff) *Id.* § 26, 7.

(gg) 2 Chit. Rep. 77.

(hh) *Id.* 86.

(i) *Taylor v. Halliburton*, M. 55 Geo. III. K. B. 1 Chit. Rep. 351, *(a)*, 494, in *notis.* 9 Moore, 579, 80.

(k) 1 Chit. Rep. 351, *(a)*.

(l) Imp. K. B. 10 Ed. 127. Archb. Forms, 50.

(m) 1 Bos. & Pul. 335. 9 Moore, 579, 80.

(n) R. M. 7 Geo. IV. C. P. 4 Bing. 51, 2.

(o) Append. Chap. XII. § 25.

(p) 1 Chit. Rep. 291; and see *id.* 88, 329. 2 Chit. Rep. 93.

(q) *Per Cur.* M. 24 Geo. III. K. B.

(a) *Wright v. Ley*, H. 15 Geo. III. K. B.

(b) *Per Cur.* M. 21 Geo. III. K. B. 9 East, 435. 1 Chit. Rep. 308.

(c) Barnes, 82, 88. 2 Bos. & Pul. 30. 1 Marsh. 322.

(d) Case of *Overton's* bail, M. 26 Geo. III. K. B. Imp. K. B. 10 Ed. 129. Barnes, 303.

[A] In bail to the action, the plaintiff is entitled to two persons if he require it. *Lang v. Billings*, 9 Mass. 480. *Rice v. Hosmer*, 12 *Id.* 130. *Wendover v. Ball*, Coleman, 44. But if one real and one fictitious person be given, or two who are insufficient, the bail piece does not become thereby a nullity. *Caines v. Hunt*, 8 Johns. 358. *Ferris v. Phelps*, 1 Johns. Cas. 249.

allowed for justifying expire on a day in term, which happens to be *Midsummer* day, or any other holyday when the court does not sit, the notice of justification, in the King's Bench, should be for the day they ought to justify, to prevent an assignment of the bail bond; and the bail may justify the next day as a matter of course: *(e)* but, in the Common Pleas, the notice ought to be given for the bail to justify on the following day. *(f)* In the Exchequer, the clerk in court must sign all the proceedings: It is not sufficient that it be done by the attorney or agent: *(g)* Therefore, bail in that court were not allowed to justify, when the notice of justification was signed by a person describing himself as the defendant's agent, not being an attorney of the Exchequer, or clerk in court. *(h)* And a notice to justify bail on a day on which the court sits in equity, is holden to be a bad notice. *(i)*

When bail above is put in, and exception entered in *vacation*, the defendant's attorney, in the King's Bench, must, within *four* days after the exception, give notice of justification of the same bail for the first day of the next term; or the plaintiff may take an assignment of the bail bond; *(k)* It is not necessary, however, that the *same* bail should justify; the rule of court *(l)* requiring, that if the exception be entered in vacation, and notice thereof given, the bail put in, or other *additional* bail shall justify on the first day of the subsequent term: and therefore, where bail were excepted to in vacation, and the defendant gave *four* days notice of justification for the first day of the next term, but *two* days before that time gave notice of *added* bail, the court of King's Bench held, that the latter bail were entitled to justify. *(m)* In the Common Pleas, notice of justification may be given at

any time in vacation, so as there be *two* days notice before the [*261] first day of the next term: *(n)* And, in that court, *two* days notice of bail is *not required on an attachment, but reasonable notice is sufficient. *(a)* In the Exchequer, when an exception is entered in vacation, notice of justification for the *first* day of the ensuing term, must be given within *four* days after such exception; *(b)* and the bail cannot regularly justify at chambers in vacation, without consent, except in the case of a prisoner. *(c)*

The notice of justification of bail, like the notice of putting it in, *(d)* must be *personally* served, either upon the plaintiff's attorney, or upon some clerk or servant in his office. *(ee)* And service of the notice of justification on the master of a house, in which the attorney had an office, is not sufficient, unless some privity be shown to exist between them. *(ff)* But if an attorney be not at chambers in office hours, service on a person with whom his papers are directed to be left, is deemed sufficient: *(gy)* and notice of justification may be stuck up in the King's Bench office, for the plaintiff's attorney, who had no known place of residence or business. *(hh)* This notice must have been formerly served before *ten* o'clock at night, in the

(e) Per Master Forster, T. 45 Geo. III. K. B.

(f) 8 Moore, 528. 1 Bing. 430, S. C. 10 Moore, 95. 2 Bing. 440, S. C.

(g) 2 Chit. Rep. 84. *(h)* 9 Price, 148.

(i) 2 Chit. Rep. 84.

(k) 9 East, 434. 1 Sel. Pr. 2 Ed. 153, *accord*.

(l) R. E. 5 Geo. II. reg. 1, K. B.

(m) 1 Chit. Rep. 4. 2 Chit. Rep. 84. 1 Dowl. & Ry. 7.

(n) Barnes, 101.

(a) 2 Blac. Rep. 1110.

(b) Man. Ex. Pr. 103.

(c) 1 Price, 2.

(d) *Ante*, 255.

(ee) 1 Chit. Rep. 78.

(ff) 2 Chit. Rep. 88.

(gy) *Id.* 87.

(hh) *Id.* 89.

King's Bench; (*i*) or *nine* o'clock at night, in the Common Pleas. (*k*) And, in the former court, it was holden, that an affidavit that the office door was shut, and the notice left there, before *ten* o'clock at night, would not suffice, (*l*) unless the plaintiff's attorney had afterwards acknowledged the receipt of it, (*mm*) and that service of the notice of justification after *ten* o'clock was bad, though the person on whom it was served read, or even retained it. (*nn*) But where notice of bail was served in due time, by leaving it at the office of the plaintiff's attorney, who returned it the next day in a letter, saying that he should not accept the notice, because he had taken an assignment of the bail bond, but the letter did not state the time when the notice was received, this was deemed a sufficient acknowledgment to render the service of the notice effectual. (*o*) And now, it is a rule in all the courts, (*p*) that, "every notice for justifying bail in *person*, shall be served before *eleven* o'clock in the forenoon of the day on which, according to the present practice, such notice ought to be served; except in case of an order of the court for further time, in which case it shall be sufficient to serve the notice before *three* o'clock in the afternoon of the day on which such order shall be granted: and in all the cases aforesaid, the affidavit of service shall specify the time of day at which notice shall be served." This rule, however, does not seem to apply to country bail, who are justified by *affidavit*.

*The court in which bail are added and justified, in the King's Bench, (commonly called the *bail* court,) is now usually holden [*262] before one of the judges of that court, in pursuance of the statute 57 Geo. III. c. 11, by which it is declared to be lawful "for any one of the judges of the King's Bench, when occasion shall so require, to sit apart from the other judges of the same court, in some place in or near to *Westminster hall*, for the business of adding and justifying special bail, in causes depending in the same court, whilst others of the judges are at the same time proceeding in the dispatch of the other business of the same court in *bank*, in its usual place of sitting for that purpose in *Westminster hall*; and the proceedings so had by and before such one of the judges, so sitting apart for those purposes, are made as good and effectual in the law, to all intents and purposes, as if the same were had before the court assembled and sitting as usual, in its ordinary place of sitting in *Westminster hall*." In the Common Pleas and Exchequer, there is no distinct or separate court for the justification of bail.

It was formerly a rule, (*a*) made in consequence of the obstruction of access to *Westminster hall* during Mr. *Hastings's* trial, that the court of King's Bench should sit in *Serjeant's Inn hall*, every morning during term, from half past *eight* o'clock till *ten*, for the purpose of taking justifications of bail, and hearing motions of course, and discharging insolvent debtors; and that it should adjourn on *Mondays, Fridays, and Saturdays*, from *Serjeant's Inn* to *Westminster hall*, to transact the usual business,

(*i*) R. M. 41 Geo. III. K. B. 1 East, 132. 1 Chit. Rep. 77, (*a*).

(*k*) R. E. 10 Geo. II. C. P. 1 Chit. Rep. 77, (*a*).

(*l*) 1 Chit. Rep. 78; and see *id.* 76, (*a*), 79, 100, 294.

(*mm*) *Id.* 77, 100, 294.

(*nn*) 2 Chit. Rep. 88.

(*o*) 1 Chit. Rep. 77, (*b*), *per Holroyd, J.*, but see 3 Taunt. 234.

(*p*) R. T. 59 Geo. III. K. B. 2 Barn. Ald. 818. 1 Chit. Rep. 756. 2 Chit. Rep. 374, 5. R. M. 60 Geo. III. C. P. 4 Moore, 2. 1 Brod. & Bing. 469. R. T. 59 Geo. III. Excheq. 8 Price, 509; and see 5 Moore, 472, 3, as to the service of the continuance of notice of bail.

(*a*) R. E. 28 Geo. III. K. B.

except the justifying of bail and discharging insolvent debtors, which business was directed to be transacted entirely at *Serjeant's Inn hall*; and it was ordered, that the bail should attend before half past *nine*, and that if they did not, they should not be permitted to justify. This rule was repealed by a subsequent one, *(b)* ordering, that the sittings of the court in *Serjeant's Inn hall*, should be discontinued; and that the business there transacted should be done in the court of King's Bench at *Westminster*, where one of the judges would sit, during term-time, every morning at half past *nine* o'clock, for the purpose of taking the justification of bail, and discharging insolvent debtors; and it was directed, that no bail should be permitted to justify after *ten* o'clock: And accordingly, when the bail court was established, Mr. Justice *Bayley*, sitting in that court, directed it to be understood in future, that bail intended for justification, must be in *Westminster hall*, by half past *nine* o'clock in the morning; and that if the bail were not ready, and the papers delivered to counsel by *ten* o'clock, no bail would be taken after that hour. *(c)* When there are but few bail, it is necessary that they should be very punctual in the time of their attendance; for if they are not ready when the judge takes his seat, he will not wait for them till *ten* o'clock; but when the bail are numerous, the exact time of their attendance is not so material: And, on the last day of term, [*263] bail are still allowed to justify, as formerly, in full court, at its *rising, whether by affidavit or otherwise. In the Common Pleas, it is a rule, *(aa)* that "bail shall justify at the *sitting* of the court only, and at no other time, except on the last day of term, when bail, who may have been prevented from attending at the sitting of the court, shall be permitted to justify at the *rising* of the court." And, in the Exchequer, the *junior* baron attends in court alone, a few minutes before *ten* o'clock, every morning during term, for the purpose of taking the justification of bail, and such motions as are merely of course; and it is expected that all such matters should be then brought on, in order that they may be disposed of before the court is full, that they may not interfere with the more important business. *(bb)* This, however, does not extend to the justification of bail by affidavit. *(cc)* But no bail will be permitted to justify in person, unless they are in attendance, and counsel instructed, by half past *ten* o'clock at the latest. *(d)*

The justification of bail is either in *person* or by *affidavit*. When the bail are put in before a judge in town, whether by bill or original, they must *personally* appear in court; or, by consent, *(e)* before a judge at his chambers: and in order to justify themselves, must swear that they are housekeepers, or freeholders, and, if more than *two*, that they are respectively worth double the sum sworn to, or 1000*l.* beyond that sum, if it exceed 1000*l.*, *(f)* after all their debts are paid, or over and above all

(b) R. T. 35 Geo. III. K. B., which rule was directed by that of H. 46 Geo. III. K. B., to be strictly attended to.

(c) H. 59 Geo. III. K. B.; and see 1 Chit. Rep. 1, *(a)*.

(aa) R. M. 51 Geo. III. C. P. 3 Taunt. 569. 2 Chit. Rep. 378; but see 8 Taunt. 56, where bail were permitted to justify, under particular circumstances, at the *rising* of the court, before the last day of term.

(bb) 8 Price, 612; and see R. E. 46 Geo. III. in *Seac.* 2 Chit. Rep. 381. 2 Price, 327. 4 Price, 155. 2 Chit. Rep. 94.

(cc) 3 Price, 35.

(e) 6 Mod. 24. R. E. 5 Geo. II. *reg.* 1, *(b)*, K. B.

(f) R. M. 51 Geo. III. K. B. C. P. & Excheq. *Ante*, 251.

(d) 9 Price, 57.

debts or demands due from them to any person or persons whomsoever; (g) it not being sufficient for bail to swear they are worth a certain sum, exclusive of their debts. (h) Bail put in before a commissioner must justify themselves in the same manner, where they live in *London* or *Westminster*, or within *ten* miles thereof; (i) But where they live at a greater distance, they may be justified without their personal attendance, by *affidavit*, duly taken before the commissioner, of their being housekeepers, &c.; (k) and they may be so justified, though the defendant has been arrested in *London*, in a town cause; (l) nor is it necessary that, in bail by affidavit, both the bail should justify before the same commissioner. (m) The affidavit of justification must state the addition of the degree or mystery, as well as the names and places of residence of the bail; (n) and it is usually annexed to the bail-piece, and a copy of it delivered to the plaintiff's attorney, at the time of giving him *notice of [*264] the bail-piece being filed; after which, if an exception be entered, which seldom happens, the affidavit must be produced and read in court as a justification, upon notice given thereof, and an affidavit of the service of such notice. An affidavit that A. and B. and each of them, were worth double the sum sworn to in the affidavit to hold to bail, exclusive of all debts due to any other person, is sufficient. (a) And the affidavit of justification need not be sworn before the same commissioner, as the affidavit of taking the bail. (bb) In the Exchequer, the affidavit of justification of country bail ought to be taken before the bail commissioner; and the affidavit of caption, before a commissioner for taking affidavits, or the baron to whom the bail is transmitted. (c)

When the bail are to be justified in court, an *affidavit* must be made of the service of notice of justification; (d) which should state the manner in which the notice of justification was served. (e) And where the notice of justification was served, and affidavit of the service thereof made, by different attorneys, without a rule to change the former attorney, the bail were rejected. (f) This affidavit should be properly entitled: (gg) and is delivered to counsel in the King's Bench, or a serjeant in the Common Pleas, with a brief or motion paper, indorsed "to move to justify the within bail:" And at the time appointed by the notice of justification, they are allowed to justify, if present, as a matter of course; unless they are *opposed* by counsel *vivâ voce*, or, if taken before a commissioner, upon cross affidavits. (hh) If bail are to be added, they ought to attend for the purpose, in the King's Bench, before the judge goes into the bail court, otherwise they are themselves delayed, and the business is impeded: and care should be taken, in actions by *bill*, to have the bail-piece in court, otherwise the bail cannot justify: (ii) In actions by *original*, the filacer attends with his book. And when bail are opposed in two actions, they must be opposed in each separately. (kk) In the King's Bench, opposition

(g) R. T. 8 W. III. *reg.* 3, § 5, (c). R. E. 5 Geo. II. *reg.* 1, (b), K. B. R. E. 33 Geo. III. in *Scac.* Man. Ex. Append. 217.

(h) 4 Taunt. 704.

(i) Stat. 4 & 5 W. & M. c. 4, § 2.

(k) *Id. ibid.* R. T. 8 W. III. *reg.* 3, § 5. R. E. 5 Geo. II. *reg.* 1, (b), K. B.; and see Append. Chap. XII. § 30.

(l) 5 Price, 13.

(m) 2 Chit. Rep. 91. *Ante*, 250.

(n) 2 Chit. Rep. 95. "

(o) 1 McClell. & Y. 119.

(p) 1 Chit. Rep. 43, 77, 8, 9, 100. *Ante*, 261.

(gg) 1 Chit. Rep. 1.

(h) 2 Chit. Rep. 83.

(n) 1 Chit. Rep. 292.

(bb) *Id.* 91.

(d) Append. Chap. XII. § 28, 9.

(f) 2 Chit. Rep. 37.

(hh) Append. Chap. XII. § 31.

(kk) *Id.* 94.

to bail must be before justification; and a mistake of counsel, in not opposing in time, will not be a ground for being afterwards permitted to examine them.*(l)* So, in the Common Pleas, if bail justify, without the observation of counsel instructed to oppose them, the court will not require them to come up again, and justify *de novo*.*(m)*

The common grounds of opposing bail are first, that there is some defect in the *bail-piece*. But where the bail piece was not entitled of the court, or in the cause,*(n)* or it did not appear thereby, that the person before whom the bail was taken was a commissioner,*(o)* time was given, in the King's Bench, to amend the defect. And when bail has been [*265] put in by a *wrong name, a misnomer in the bail-piece may be amended, if the bail be rightly named in the notice.*(a)*

Secondly, It is a good ground of opposition, that there is some defect in the *notice* of bail; which should truly and accurately describe the persons intended to justify, so that the plaintiff may not be misled: and therefore, where one of the bail was described as the housekeeper, and it turned out that his father was really the occupier of the house, the bail court would not permit him to justify, nor grant time to add and justify another, without an affidavit repelling all intention to mislead.*(b)* So, notice given of bail as put in before one judge, when in fact they were put in before another, is irregular:*(cc)* And, in the King's Bench, any material defect in the notice of bail, as that it is not properly entitled,*(dd)* or that it does not set forth with truth and certainty, the names,*(ee)* places of abode,*(ff)* and degrees or mysteries*(gg)* of the bail, will be a good ground for opposing them; provided it be verified by affidavit, that the defendant's attorney has not from that cause been able to find them, and make the requisite inquiries into their sufficiency: But where that is not the case, and there is no ground to suspect fraud, objections of this sort are in general overruled, or the court will give time to correct them.

Thirdly, Bail may be opposed, on account of some defect in the *form*, or irregularity in the *service of notice* of justification; or in the *affidavit* of such service.*(h)* In the King's Bench, we have seen,*(i)* the christian and surnames of the bail should regularly be inserted in the notice of justification, as well as in the notice of their being put in:*(k)* And it is a good ground of rejection, that one of the bail referred to in the notice, as the bail put in before, is described by a different christian name from that which was before given him.*(ll)* But it is no ground for rejecting bail, that the plaintiff's and defendant's names are transposed, in the notice of justification.*(mm)* It is said, that the notice of justification ought to contain the addition of the bail:*(nn)* but this, it is conceived, only applies to

(l) 1 Chit. Rep. 83; but see 2 Chit. Rep. 98, *semb. contra*.

(m) 4 Taunt. 666.

(n) 1 Chit. Rep. 79.

(o) *Id.* 9.

(a) 1 Bos. & Pul. 31. 4 Moore, 65; and see 1 Price, 385. 2 Chit. Rep. 81. *Ante*, 252, 3.

(b) 1 Chit. Rep. 88.

(cc) 2 Chit. Rep. 109.

(dd) Lofft, 237.

(ee) *Id.* 187. 1 Moore, 126; but see 4 Dowl. & Ry. 30.

(ff) Lofft, 72, 195; and see 1 Chit. Rep. 492, 3, 4. *Ante*, 253, 4, 5.

(gg) Lofft, 187, 281; and see 2 Taunt. 173, 4. 1 Chit. Rep. 494, *in notis*.

(h) *Ante*, 264.

(i) *Ante*, 259.

(k) *Taylor v. Halliburton*, M. 55 Geo. III. K. B. 1 Chit. Rep. 351, *(a)*, 494, *in notis*. 9 Moore, 579, 80.

(ll) 1 Chit. Rep. 494, *in notis*.

(mm) 2 Chit. Rep. 86.

(nn) *Id.* 351, *(a)*.

added bail; for it seems that, in the King's Bench, when the *same* bail are regularly put in and excepted to, the defendant need not describe them in his notice of justification.^(o) And where the notice of justification did not state the addition of the bail, but described him, contrary to the fact, as bail of whom notice had before been given, time was allowed to justify, on condition that the defendant should produce an affidavit that the error was accidental.^(p) In the *Common [*266] Pleas, we have seen^(a) that, by a late rule of court, the names and descriptions of the original, or added, bail must in all cases be inserted in the notice of justification. And bail by affidavit were rejected in that court, on the ground that one of them was described in the notice of justification as *J. M.* generally but in the affidavit of justification, as *J. M. the younger.*^(b) But, previously to the above rule, where bail had been misnamed in the notice of justification, and was sworn accordingly, the court of Common Pleas permitted him to justify, on his swearing that he had sufficient property; it appearing that he had been found by the party inquiring after him, with reference to his becoming bail:^(c) And the want of a description in the notice of justification of bail already put in, was holden to be waived by the plaintiff's having excepted to them; as he must have seen, when he entered his exception in the filacer's book, where the bail lived, so as to give him an opportunity of inquiring after them.^(d) When there is a wrong christian name in the notice of justification, the bail court will allow time to amend and justify:^(e) And where, in the case of bail by affidavit, the name of the bail were omitted in the notice of justification, through the neglect of the attorney in the country, the court gave *two* day's time to serve fresh notice, there being no suggestion that the omission was for the purpose of delay.^(f) But the bail court will not allow time to correct a misnomer, in the notice of justification of bail by *habeas corpus.*^(g) In the King's Bench, notice of justification by *three* bail, has been holden good;^(h) though it is otherwise in the Common Pleas:⁽ⁱ⁾ but notice that *A. B. and C., or two* of them, will justify, is irregular.^(k) And, in the latter court, special bail are allowed to justify, although they did not actually become bail, before the notice of their justification was delivered to the plaintiff's attorney or agent.^(l)

It has been already shown, in what manner the notice of justification should be served:^(m) and if the service of such notice, or the affidavit thereof, be defective, the bail will be rejected; unless time be asked by counsel to rectify the mistake, which is in general granted, on condition of putting the plaintiff in the same situation as he would have been in, if the mistake had not happened. Indeed, this is quite a matter of course, if the bail be not opposed, and the objection arise from a mere mistake or clerical error, as where the affidavit of service is not properly entitled.⁽ⁿ⁾

(o) Imp. K. B. 10 Ed. 127. Archb. Forms, 50. *Ante*, 259.

(p) 2 Chit. Rep. 86.

(a) *Ante*, 259.

(b) 5 Taunt. 854. 1 Marsh. 386, S. C.

(c) 7 Moore, 282.

(d) 1 Taunt. 17, 18.

(e) 1 Chit. Rep. 351, (a).

(f) *Id.* 351.

(g) *Id.* 76.

(h) Loft, 26. Forrest, 138. Wightw. 110. *Ante*, 245.

(i) 2 Blac. Rep. 1122. 1 Chit. Rep. 601, 2, (a). *Ante*, 245.

(k) Loft, 26.

(l) R. M. 37 Geo. III. C. P. 1 Bos. & Pul. 660. R. M. 18 Geo. III. C. P. 1 H. Blac. 291, *contra*.

(m) *Ante*, 261.

(n) 1 Chit. Rep. 1.

And where there were *two* different notices of justification, one being of added bail, and the affidavit of service did not designate which of the notices had been served on the plaintiff's attorney, it was holden that the affidavit was defective and must be amended and re-sworn, before the bail could justify.^(o) An *affidavit however, of the service of notice [*267] of justification, wherein the deponent was described by mistake as agent for the *plaintiff*, instead of the *defendant*, was allowed to pass conditionally, provided, before the rule for allowance should be drawn up, a fresh affidavit was filed, in which the mistake should be corrected.^(a)

Fourthly, When bail are taken before a commissioner, they may be opposed on account of a defect in the *affidavit* of caption, or justification: And an affidavit of justification, stating the names and places of residence of the bail, without the addition of their degree, has been deemed insufficient;^(b) but time was allowed to amend the affidavit:^(b) And the like indulgence was given, where one of the bail was named *Lloyd*, with a double *Ll* in the notice of bail, and *Loyd* with a single *L* in the affidavit of justification.^(c) In the King's Bench, where the same persons are bail in more actions than one, it is sufficient for them to swear, in the affidavit of justification in each action, that they are worth double the amount of the sum sworn to in that action, after payment of all their just debts;^(d) but, in the Common Pleas, each affidavit ought to state, that they are worth double the amount of the debts, in all the actions wherein they offer to become bail;^(e) unless where actions are brought against different parties, on the same bill of exchange or promissory note;^(f) And, in the Exchequer, where one indorser had become bail for another, on the same bill, and both of them were also bail in other actions, the court held, that they ought to swear themselves worth double the sum sworn to, over and above all, their just debts, and the sums for which they had justified in the other actions; and the bail, who was an indorser, should also have included in his affidavit, the amount of the bill on which the action was brought.^(g) An affidavit of the caption, or justification of country bail must state, in the *jurat*, the names of all the deponents,^(h) and the place at which it was sworn:⁽ⁱ⁾ but time will be allowed to amend the defect.⁽ⁱ⁾ It is said, however, that on bail by *affidavit*, time will not be given to amend a mistake in the *jurat*, occasioned by the error of the commissioner in the country, unless the defendant produce an affidavit of merits:^(k) And it is a rule, in these cases, that the defendant's attorney must pay the costs of the amendment.

Fifthly, It is a good ground for opposing bail, that he is a peer of the realm, or member of the house of commons;^(l) or an attorney, or attorney's clerk;^(l) or a sheriff's officer, or bailiff, or other person concerned in the execution of process.^(l)[A] And where one of the bail was an attorney,

- (o) *Id.* 43. (a) 1 Chit. Rep. 496, (a). (b) *Id.* 292. (c) *Id.* 495, 6.
 (d) *Per Grose, J.*, after referring to the Master, M. 42 Geo. III. K. B. 1 Chit. Rep. 305.
 (e) 3 Bos. & Pul. 39.
 (f) 7 Taunt. 324. 1 Moore, 29, S. C.; and see 1 Chit. Rep. 306, (a).
 (g) 3 Price, 261; and see 1 Chit. Rep. 306, (a).
 (h) 11 Price, 509.
 (i) 1 Chit. Rep. 10, 495; and see *id.* 495, (a). 7 Price, 662.
 (k) 2 Dowl. & Ry. 362; and see 2 Chit. Rep. 83, (a). (l) *Ante*, 247.

[A] In Vermont, the sheriff may himself become bail, by indorsing his name on the back of the writ in the manner required by statute. *Meriam v. Armstrong*, 7 Washb. 26. And in North Carolina and Tennessee, where he lets a prisoner go at large without taking bail, or

the bail court refused time to add and justify another; holding, that the *defendant ought to have known that circumstance, before notice was given.^(a) But an attorney or his clerk, we have seen,^(b) may be put in as bail, though he is not in general allowed to justify: and an attorney who had not practised for *six* years, has been permitted to justify as bail.^(c) So, the husband of a defendant, who had married after the arrest, and before the return of the writ, has been allowed to be bail.^(d)

Sixthly, it is a rule in the Common Pleas,^(e) and has become the settled practice of the King's Bench,^(f) that "no person shall be permitted to justify himself as good and sufficient bail, if he shall have been indemnified for so doing, by the attorney concerned for the defendant." Under this rule, the court of Common Pleas rejected bail, who had received a verbal promise of indemnity from the defendant's attorney, though they allowed the defendant time to put in fresh bail:^(g) In the King's Bench, bail was rejected, where he was to receive a commission on the amount for which he proposed to justify.^(h) And where it appeared, after bail had justified, that money had been given to one of them for his trouble and loss of time in coming up to justify, the court, though they did not set aside the allowance of bail, imposed terms upon the defendant, of producing an affidavit of merits, bringing the sum sworn into court, and taking short notice of trial.⁽ⁱ⁾ But it is no objection to bail, that they are indemnified by the sheriff's officer,^(k) or a third person."^(l)

Seventhly, One of the principal objections to bail is, that they are not *housekeepers*, or *freeholders*.^(m) And bail cannot justify as a housekeeper, in respect of a house which he has taken, if prevented from obtaining possession by a death in the family of the former tenant;⁽ⁿ⁾ or who has ceased to be a house-keeper, since he agreed to become bail:^(o) nor the occupier of a tap connected with a tavern, the license being taken out in the name of the tavern-keeper;^(p) nor the occupier, under a lease of every room in a house except one, which is reserved for his landlord, who pays the taxes:^(q) Also, bail was rejected, who had rented a house, and underlet the same to another, who paid the taxes, and let the first floor to the bail; but the landlord refusing to accept the undertenant, the rent for the whole house was paid by the latter to the bail, who paid it over to the landlord.^(r) If the bail however are housekeepers, the rent of their houses is immaterial, though it be under *ten* pounds;^(s) nor is it necessary that they should have been assessed to the *poor's* rate:^(t) though bail have been

(a) 1 Chit. Rep. 8.

(b) *Ante*, 247.

(c) 1 Chit. Rep. 714, (a). *Ante*, 247, (m).

(d) 2 Chit. Rep. 94.

(e) R. II. 37 Geo. III. C. P.

(f) *Preston v. Bindley*, M. 24 Geo. III. K. B.

(g) 1 Bos. & Pul. 103; and see 8 Moore, 516. 1 Bing. 423, S. C.

(h) 7 Dowl. & Ry. 783.

(i) 2 Dowl. & Ry. 253.

(k) 1 Chit. Rep. 714, (a).

(l) 1 Bos. & Pul. 21.

(m) 1 Chit. Rep. 7, 88, 144. *Ante*, 246.

(n) 1 Chit. Rep. 288.

(o) *Id.* 6.

(p) *Id.* 316.

(q) *Id.* 502.

(r) *Id.* (a).

(s) Lofft. 148.

(t) *Id.* 328.

takes a bail bond and does not assign it; or takes insufficient bail, and exception is made thereto, it is said he becomes himself special bail. *Hart v. Lanier*, 3 Hawks. 244. *Gray v. Hoover*, 4 Dev. 473. *Stuart v. Fitzgerald*, 1 Car. Law Reps. 236. *McKee v. Love*, 2 Overt. 243. In New Hampshire, a deputy sheriff may become bail. *Plummer v. Brewster*, 2 New Hamp. 473; but, generally speaking, the English rule prevails. *Coster v. Watson*, 15 Johns. 535. *Bailey v. Warden*, 20 Ib. 129. *Craig v. Scott*, 1 Wend. 35. *Brown v. Lord*, Kirby, 209.

rejected, for not paying arrears of *king's* taxes.(u) In the Com-
 [*269] mon Pleas, the court allowed *a person to justify as bail, in re-
 spect of a house kept by him and his partner, who carried on
 business therein, where the rent and taxes were paid by them jointly, and
 his partner resided in the house, though he lodged himself at a considera-
 ble distance therefrom:(a) And where a person had taken a house, occu-
 pied by several tenants or lodgers, from one of whom he had received
 rent, he was holden to be qualified to justify as bail, although he had not
 occupied the house himself.(b) The plaintiff also, in that court, may
 waive the qualification of the bail being housekeepers, &c. in which case
 they only swear, in justifying, to the amount of their property.(c) In the
 Exchequer, a person employed by the commissioners in the repair of
 water-works, who was allowed a house to live in during the period of his
 employment, for which he paid no rent or taxes, was permitted to justify
 as bail.(d) But a person living in lodgings in *London*, was not allowed to
 justify as bail, although he was a housekeeper in *Scotland*.(e) Where a
 bail has ceased to be a housekeeper, at the time he comes up to justify,
 the bail court will give time to add and justify another in his stead:(f)
 but where notice had been given of bail, one of whom was notoriously not
 a housekeeper, and had refused to become bail on that ground, after he
 had agreed to do so, the bail court refused time to add and justify an-
 other.(g)

Eightly, It is a good objection to the sufficiency of bail, that they are
 not respectively worth double the amount of the sum sworn to, or *one*
thousand pounds beyond that sum, if it exceed *one thousand* pounds, after
 payment of all their debts. To this head may be referred *bankrupts*, who
 have not obtained their certificates,(h) or such as have been *twice* bankrupts,
 and not paid fifteen shillings in the pound under the second commission,(i)
 and *insolvent* debtors, discharged under the general insolvent act, who are
 not allowed to be bail, until they have paid all their debts.(k) And a bail
 who had been recently a bankrupt, was not permitted to justify, although he
 swore that he had since acquired property, by the bounty of his friends, to
 the requisite amount.(l) So, where one of the bail admitted on examina-
 tion that he was a certificated bankrupt, but had since been arrested, and
 could not remember how often, but admitted that it was at least *six* times,
 the court rejected both, and would not grant further time to add and justify
 other bail.(m) And a bail was not permitted to justify, who had recently
 been bankrupt, and obtained his certificate, but did not know whether his
 estate had paid any dividend;(n) or who could not say whether, during the
 interval between his bankruptcy and certificate, he had or had not
 [*270] justified as bail.(o) But the bankruptcy is of itself an *objection,
 when the party has obtained his certificate;(aa) and an insolvent

(u) 1 Chit. Rep. 309.

(a) 1 Moore, 529; and see 8 Moore, 525. 1 Bing. 430, S. C. *accord*.

(b) 8 Moore, 365.

(c) 5 Taunt. 174.

(d) 2 Price, 8; and see 1 Chit. Rep. 502.

(e) 11 Price, 158.

(f) 1 Chit. Rep. 6; and see *id.* 288, 316. 11 Price, 158.

(g) 1 Chit. Rep. 7; and see *id.* 144.

(h) *Id.* 9. *Ante*, 247.

(i) *Mountain v. Wilkins*, M. 21 Geo. III. K. B. *Ante*, 247. 1 Chit. Rep. 293.

(k) 1 Chit. Rep. 9; and see *id.* 143. *Ante*, 247.

(l) 2 Chit. Rep. 78.

(m) 1 Chit. Rep. 3.

(n) *Id.* 288.

(o) *Id.* 289.

(aa) 1 Chit. Rep. 9; but see *id.* 3.

debtor discharged under the insolvent act, may be bail, after he has paid all his debts.(b)

A bail has also been rejected, on the ground of insufficiency, who admitted that he had been bail before, but did not know in how many actions, or for what sums;(c) or swore, that he did not know whether he had been arrested or not, during the space of two years:(d) or who had suffered his father to receive parochial relief,(e) or his children to be in the workhouse, without assigning a sufficient reason;(f) or because his name was on the book's of the King's Bench prison as a prisoner, and the action, though supersedeable, was not actually superseded.(g) And it seems, that when the court orders the bail to submit their property to inspection, in order to ascertain its sufficiency to enable them to justify, the plaintiff may cause it to be appraised by a broker.(h) But it is no objection to bail, that he had been transported *thirty* years before.(i) And it seems, that the circumstance of not knowing the defendant, being only a mark of suspicion, may be explained away.(k) So, it is no objection to bail, that they are liable as indorsers of the bill of exchange *on which the action is brought*.(l) But it is said to be a general rule, that so long as there are outstanding dishonoured bills which are not renewed, nor the right of proceeding upon them suspended, a person liable thereon cannot justify as bail.(m) And a bail was rejected, who had been liable to the sheriff in a former action, and not excepted to, it appearing that his property was not sufficient for both actions;(n) though time was allowed to add and justify another bail.(n) It has been doubted, in the Common Pleas, whether it is a sufficient objection to bail, that he lives within the verge of the court;(oo) but it seems that this, without other suspicious circumstances, such as his being much in debt and the like, is not sufficient.(p) In the case of bail by affidavit, they will not be allowed to justify, if an affidavit be produced on the part of the plaintiff, that they have declared themselves to be insufficient.(q)

Ninthly, *Foreigners*, it seems, are not admitted to be bail, merely in respect of property *abroad*, which is not liable to the process of the court;(r) though it has been said, that merely having no property in *England*, is not of itself a sufficient objection, without other auxiliary circumstances:(s) And where one of the bail was a *Portuguese*, and owned a ship, which *had for two years before traded between *London* and *Portugal*, and was then gone to *Cadiz*, whence she was expected to return, and was insured in *London*; the court of King's Bench permitted the bail to justify, although he did not swear to any effects in *England*.(a) So, bail have been allowed to justify, in respect of property consisting partly of cash, and partly of a freehold house at *Gibraltar*.(bb) And the distinc-

(b) *Id.* 116.

(c) *Lofft*, 72, 194.

(e) *Id.* 78.

(g) *Per Cur. M.* 21 Geo. III. K. B.

(i) *Id.* 98.

(l) 2 Bos. & Pul. 526. 1 Chit. Rep. 287, 305.

(m) 2 Chit. Rep. 79.

(oo) 2 Blac. Rep. 956, 7.

(r) 4 Bur. 2526, 7. *Lofft*, 34, 147. *Forrest*, 138. 1 Chit. Rep. 235.

(s) 1 Blac. Rep. 444. And see 2 Blac. Rep. 1323, 4, where a foreigner, long domiciled in

England, and having property abroad, was allowed to justify as bail for another foreigner.

(a) *Colson v. Carhordy*, T. 22 Geo. III. K. B.; and see the case of *Welsford's* bail, M. 57 Geo. III. K. B. 1 Chit. Rep. 286, *in notis*.

(bb) 4 Maule & Sel. 173, *per Dampier, J.*, on the authority of *Christie v. Filleul*, 2 Blac. Rep.

1323. 4 Maule & Sel. 371, S. P. *per Bayley, J.* But the cases upon this subject being con-

(d) 2 Chit. Rep. 95.

(f) *Id.* 77.

(h) 2 Chit. Rep. 80.

(k) *Id.* 97, 8.

(n) *Id.* 287.

(q) 1 Chit. Rep. 373, (a).

tion seems to be between *foreigners* and *British subjects* resident in this country: The former are not allowed to justify, in respect of property abroad; but with regard to the latter, it is said that the circumstance of their not having property in this country, subject to the process of the court, constitutes no objection to their becoming bail.(e)

Lastly, it is a rule in the King's Bench, that "whenever two or more notices of justification of bail shall have been given, before the notice on which bail shall appear to justify, no bail shall be permitted to justify, without first paying, or securing to the satisfaction of the plaintiff, his attorney or agent, the reasonable costs incurred by such prior notices, although the names of the persons intended to justify, or any of them, may not have been changed, and whether the bail mentioned in any such prior notices shall not have appeared, or shall have been rejected."(d) Prior to the above rule, which does not apply to country bail,(e) the costs of the former oppositions were not allowed, although there had been three notices of justification, where one of the notices was merely of bail put in for the purpose of a render.(f) And where, upon the removal of a cause by *habeas corpus* from an inferior court, *three* notices were given of the *same* bail, to justify in vacation, before different judges, the plaintiff had incurred the expense of *three* oppositions, the bail court held that, on their appearing to justify upon a *fourth* notice, they had no authority to compel the payment of the costs incurred in consequence of the former notices; though it might be the subject of an application to the court, against the attorney, for vexatious proceedings.(g) In the Common Pleas, bail were not permitted to justify, till the costs of a former opposition were paid to the plaintiff, though the defendant was in custody.(h) But if bail are opposed and rejected, and the defendant is surrendered on the next day, he may in that court justify

new bail, without paying the costs of the former opposition.(i) And [*272] where the defendant refused to move that his bail might *justify, till they had paid certain costs, the court permitted them to justify on their own motion.(aa) In the Exchequer, a too general description of bail, although a sufficient ground for opposing their justification, is not of itself enough to call upon the court to fix the defendant with the costs of the opposition at the time; but the consideration of costs will be reserved till the bail justify.(bb)

If the bail do not attend to justify at the time appointed, and no further time be given, they are said to be out of court.(cc) But further time is sometimes given, on the motion or suggestion of counsel, either to justify the same bail, or to add and justify others. And it is a rule, in the King's Bench,(dd) that "when a motion is made for further time to justify bail, it

tradictory, it must not (he observed,) be taken for granted, that a party can justify in respect of property abroad, when he has no other property. *Id. ibid.*

(e) 1 Chit. Rep. 285, 6, (a).

(d) R. H. 2 & 3 Geo. IV. K. B. 5 Barn. & Ald. 559. 2 Chit. 376. 1 Dowl. & Ryl. 196; and see 1 Chit. Rep. 658. 3 Barn. & Ald. 759. 5 Barn. & Ald. 533. 1 Dowl. & Ryl. 142, S. C. 1 McClel. & Y. 40.

(e) *Fennell v. Gardner*, E. 8 Geo. IV. K. B., *per Bayley*, J.

(f) 1 Chit. Rep. 658, (a).

(g) *Id.* 44. And see *id.* 80, where, on an application to the court for costs, against the attorney, the matter was referred to the Master. See also 2 Chit. Rep. 89.

(h) 1 Taunt. 57.

(i) 1 Bos. & Pul. 32.

(aa) 7 Taunt. 47. 2 Marsh. 365, S. C.

(bb) 11 Price, 379. And see further, as to the grounds of objection to bail, Petersd. 322, &c.

(cc) 7 Mod. 50. 1 Crompt. 3 Ed. 64; and see 7 Durnf. & East, 297. 1 Chit. Rep. 446, (a).

(dd) R. M. 36 Geo. III. K. B.

must be supported by an *affidavit* of the special facts alleged in excuse of the bail not attending at the time mentioned in the notice of justification; or, in case further time be given upon suggestion of counsel, then the bail shall not be permitted afterwards to justify, unless, at the given time, such an affidavit be produced as before described." The affidavit in such case should state, in the King's Bench, that the persons not attending had consented to become bail, and were believed to be competent to justify; (e) but that for some reason they had not been able to attend, or that the reason of their non-attendance is unknown: in the latter case, it is not unusual for the judge in the bail court to suspend giving time, till an affidavit satisfactorily explaining the non-attendance, has been laid before him. (f) And when the court granted indulgence for a particular day, to add and justify bail, and the party do not attend on that day, he cannot justify on a subsequent one, so as to prevent proceedings on the bail bond, or against the sheriff, for any previous default, without a fresh rule for that purpose. (g) In the Common Pleas, where bail were put in in time, but did not come to justify pursuant to notice, and the defendant's attorney gave a new notice for the next day, the court in one case permitted the bail to justify, on payment of the costs of the first attendance. (h) But from subsequent cases it seems, that nothing but the act of God, such as sudden illness, or some unforeseen accident, of a serious nature, will be deemed a sufficient excuse for the non-attendance of the bail, or a good ground for allowing time to substitute other persons in their stead. (i)

When an error or defect is discovered in the bail-piece, or notice of bail, or in the notice of justification, (k) or service thereof, or in the affidavit of such service, the court, we have seen, (l) will give time to amend or rectify the proceedings: And time is frequently granted for rectifying *mistakes in country affidavits, of the caption or justification of [*273] bail; as where the *jurat* omits to name all the deponents, (a) or contains any interlineation or erasure, (a) or, in the case of an illiterate person, does not notice that the affidavit was read to the deponent, and that he seemed perfectly to understand its contents, and wrote his signature in the presence of the commissioners. (a) But the court, in these cases, will sometimes, require an affidavit of merits. (b) So, when bail are prevented from justifying, by circumstances happening *after* they were put in, as by their subsequent bankruptcy, (cc) or insolvency, (dd) or by their having given up housekeeping, (ee) &c., the court will in general allow further time to add and justify other bail. (ff) And, in the Common Pleas, when the court gave time to one of the bail to justify before a judge at chambers in vacation, a judge's summons for further time, returnable before the original time has expired, operates as a stay of proceedings. (gg) But when bail offer themselves, and are rejected on account of some personal insufficiency, existing at the time they were put in, as by their being

(e) 1 Chit. Rep. 292. 2 Chit. Rep. 82. Append. Chap. XII. § 32.

(f) 1 Chit. Rep. 292.

(g) *Id.* 42.

(h) *M. Cormick v. Foulger*, M. 33 Geo. III. C. P. Imp. C. P. 7 Ed. 123.

(i) 8 Moore, 208. *Id.* 378. 1 Bing. 359, S. C.

(k) Lofft, 72, 187. *Per Cur.* M. 25 Geo. III. K. B.; and see 1 Chit. Rep. 2, (b), 351, 492,

(a). *Ante*, 265, 6.

(l) *Ante*, 265, 6, 7.

(a) 1 Chit. Rep. 495, (a); and see 2 Chit. Rep. 92. 11 Price, 509.

(b) 2 Chit. Rep. 83, (a); and see 2 Dowl. & Ry. 362. *Ante*, 267.

(cc) 1 Chit. Rep. 11.

(dd) *Id.* 3.

(ee) *Id.* 6; and see *id.* 88, 288, 316. *Ante*, 268, 9.

(ff) 1 Chit. Rep. 2, (b). *Ante*, 259.

(gg) 6 Taunt. 240.

then attorneys, *(h)* bankrupts, *(i)* or insolvent debtors, or by their not being then housekeepers, *(k)* &c., the court will seldom allow time to add and justify others: *(l)* And it is a rule never to allow time to justify bail in error, *(m)* or on a *habeas corpus*, *(n)* on account of the delay, except in case of unavoidable accident, such as the unexpected illness of the bail; *(o)* or where they are prevented from coming up, by any misconduct of the opposite party. *(p)* If the plaintiff, on the other hand, has been taken by surprise, not expecting that the bail intended to come up to justify, *(q)* or the bail on examination give evasive answers, *(r)* or the account given by them of their sufficiency is suspicious, *(s)* the bail court will in general give the plaintiff further time to inquire into their character and circumstances: And when the plaintiff has been allowed time for that purpose, the defendant is at liberty to put in fresh bail. *(t)* But, in the case of bail by affidavit, where time was given to answer an affidavit on the part of the plaintiff, that the bail was a prisoner for debt; the court held, that the defendant could not give notice of and justify fresh bail, before the affidavit was answered. *(u)* A judge will not interfere with another [*274] *judge's order for time: *(a)* And a mistake in drawing up a rule for further time to justify bail on a wrong day, is immaterial. *(a)*

The bail may be opposed, either by their personal examination or by *affidavit*. When the former method is adopted, the counsel should endeavour, by a rigid examination, to obtain from the bail an acknowledgment of their real situation. When the latter mode is pursued, an *affidavit* should be produced, disclosing such facts as will convince the court, that there has been some irregularity or defect in the proceedings, or that the bail are incapable of fulfilling their engagement. A foreigner may be sworn and examined by an interpreter. *(b)* And, in opposing bail, they may be asked any questions respecting their qualifications as housekeepers, &c., and the nature and amount of their property, to the extent of the sum for which they are required to be answerable, but no further; and questions are not allowed to be asked, which will unnecessarily expose the circumstances of the bail, or of other persons. But where one of the bail was asked, whether he had not stood in the pillory for *perjury*, which question was objected to as tending to criminate him, the court overruled the objection, saying there was no impropriety in the question, as the answer could not subject him to any punishment; and the bail admitting the fact, he was of course rejected. *(c)* In opposing bail by *affidavit*, the affidavit must be put in and read, before they are examined; as it is a settled rule, than an affidavit impugning their sufficiency cannot be read, or the substance stated to the court, after any

(h) 1 Chit. Rep. 8. *Ante*, 247, 267.

(i) *Id.* 3. *Ante*, 247, 269, 70.

(k) *Id.* 7; and see *id.* 38, 144. *Ante*, 268, 9; but see 1 Chit. Rep. 283, 316.

(l) *Per Cur. T.* 24 Geo. III. K. B. 1 Chit. Rep. 2, *(b)*.

(m) *Per Bayley*, J. E. 55 Geo. III. K. B. 1 Chit. Rep. 76, *(a)*, but see 1 Dowl. & Ryl. 9.

(n) 1 Chit. Rep. 76, *(a)*; but see 8 Taunt. 126. *Ante*. 266.

(o) 2 Chit. Rep. 107. *Ante*, 272. 9 Dowl. & Ryl. 6.

(p) 1 Dowl. & Ryl. 9.

(q) 1 Chit. Rep. 289; and see 2 Chit. Rep. 93. *Ante*, 264.

(r) 1 Chit. Rep. 354, *(a)*.

(s) *Id.* 309, *(a)*.

(t) *Id.* 354, *(a)*. 2 Chit. Rep. 84, S. C.

(u) *Id.* 354.

(a) 2 Chit. Rep. 83.

(b) 2 Blac. Rep. 957, 1324.

(c) 4 Durnf. & East, 440.

questions have been asked them.(d) It must set forth the particular objection intended to be relied on, with certainty and precision; merely suggesting matters of report and general opinion, without alleging any particular fact, from which a distinct inference of incompetency can be collected, will be of no avail.(e) Affidavits containing general statements of slanderous matter, injurious to the character of the bail, cannot be received.(f) And, in the Common Pleas, if the justification of bail by affidavit be opposed by another affidavit, stating the insolvency of one of the bail, the court will not allow the matters of the latter affidavit to be answered.(g)

When the bail, on cross examination, are guilty of gross prevarication they may be committed to the custody of the marshal,(h) or to *Newgate*.(i) for a contempt of the court; and if they forswear themselves, they may be indicted for perjury.(k) But the court of Common Pleas will not set aside the justification of bail, on account of perjury subsequently discovered, but will leave the party to his indictment for perjury.(l) Where a man who had offered himself as bail confessed, on being examined by the court, that he had forsworn himself, he was presently adjudged to be committed to *prison, and to stand upon the pillory, with a paper [*275] mentioning the cause, *viz.* "for false bail," and to be brought into the courts of King's Bench, Common Pleas and Exchequer; and this, upon his confession, was recorded in court, without other proceedings against him.(a) And, where bail had assumed *feigned* names, the court of Common Pleas ordered them and the attorney to be set in the pillory.(b) Also, by the statute 21 *Jac.* I. c. 26, § 2, "if any person shall acknowledge or procure to be acknowledged, any recognizance or bail, in the name of another person, not privy or consenting to the same; or, (by the statute 4 & 5 *W. & M.* c. 4, § 4,) before a commissioner, shall represent or *personate* another person, whereby he may be liable to the payment of any debt or damages, he shall, on conviction, suffer death as a felon, without benefit of clergy." And, where bail had been personated, the court of King's Bench made the attorney pay costs to the plaintiff, and to the personated bail, and procure good bail, besides setting aside the execution that had issued against the personated bail.(c) But the courts will not vacate the proceedings against the party personated, until the offender be convicted;(dd) nor can a conviction take place, until the bail-piece be filed.(ee)

When bail are opposed, they are either *rejected*, or *allowed* by the court, unless further time be given to justify, or inquire into their circumstances:(ff) And bail may be rejected, after having been permitted to pass, before the rule of allowance is drawn up, if sufficient cause be shown, as that they were afterwards rejected in another action.(gg) The rejection of one bail is a rejection of both: therefore, where one bail only had been.

(d) 1 Chit. Rep. 373, (a). Imp. K. B. 10 Ed. 134, (a).

(e) 1 Chit. Rep. 676; and see *id.* 321.

(g) 5 Moore, 482. *Ante*, 264.

(i) *Id.* 117. 8 Dowl. & Ryf. 41.

(k) 1 Chit. Rep. 116; and see 5 Taunt. 776.

(l) 5 Moore, 321. 2 Brod. & Bing. 619, S. C. 8 Moore, 381. 1 Bing. 365, S. C. *accord*.

(a) Cro. Car. 146.

(b) 1 Str. 384. But the punishment of the pillory is now abolished, except for perjury and subornation of perjury, by the statute 56 Geo. III. c. 138.

(c) *Keble v. Markham*, E. 20 Geo. III. K. B.

(dd) T. Jon. 64. 1 Vent. 301. 3 Keb. 694. 1 Ld. Raym. 415.

(ee) 2 Sid. 90.

(ff) *Ante*, 272, 3; and see 1 Chit. Rep. 287, 8; 292, 3; 316, 354, (a).

(gg) 1 Chit. Rep. 307.

rejected, and notice was given of adding and justifying another, the court held, that the original notice was a nullity, and that there should have been a fresh notice of putting in and justifying *de novo*.^(h) And, when bail are rejected, the plaintiff is at liberty to take an assignment of the bail bond, or proceed against the sheriff by attachment for not bringing in the body; unless further time be given to add and justify other bail. But bail who have been rejected are still competent to render the defendant, in the King's Bench, so long as they remain on the bail-piece; ⁽ⁱ⁾ though it is otherwise in the Common Pleas, where they must enter into a fresh recognizance, before they can render the defendant.^(k) To detect frauds by hired bail offering themselves to justify, after they have been rejected in other actions, a book is kept by the master in the King's Bench; in which the names and descriptions of rejected bail are entered: And it is an [*276] established rule, that if bail has been once rejected, and entered in the *master's book, the circumstances under which the rejection took place, cannot, on a subsequent occasion, be inquired into; and consequently, the party afterwards continues incompetent to become bail.^(a) So, bail were rejected in the King's Bench, it appearing that one of them had been before rejected in the Palace court.^(b) And where bail, of whom notice had been given, having been rejected in another cause on the day in which they were intended to justify, were not offered for justification, according to the notice; and on the next day, the defendant applied for time to add and justify, and to stay proceedings against the bail below; the bail court held that this could not be done, in the absence of the plaintiff, who was unapprized of the motion.^(c) The general rule, however, that bail once rejected are always rejected, must be understood to apply only to cases where they have been rejected for insufficiency of property, or other good cause; and therefore, where bail had been rejected on a former occasion, merely on the ground of their having been indemnified by the defendant's attorney, they were allowed to justify.^(d)

When bail are *allowed*, a rule or order of allowance should be drawn up, with the clerk of the rules in the King's Bench,^(e) or secondaries in the Common Pleas,^(f) and a copy of it served on the plaintiff's attorney, or on the plaintiff himself, if he has not appointed an attorney: And where a plaintiff sued in person, and his residence was unknown to the defendant, and his servant refused to disclose it, the court of Common Pleas ordered, that the affixing a copy of the rule of allowance, and of that order, in the prothonotaries' office, should be deemed good service.^(gg) The rule of allowance, in the King's Bench, must be served on the plaintiff's attorney, even though he has opposed the justification of bail;^(hh) or though the bail justified after opposition of counsel, in the presence of the plaintiff's attorney:⁽ⁱⁱ⁾ and if it be not served, he may take an assignment of the bail bond,^(kk) or proceed by attachment against the sheriff.^(l) When bail justify at chambers by

(h) 5 Barn. & Ald. 704. 1 Dowl. & Ry1. 350, S. C.

(i) *Per Cur. E.* 40 Geo. III. K. B. 1 New Rep. C. P. 138, (a). 1 Chit. Rep. 446, (a).

(k) 1 Taunt. 163, 4, *per Heath, J.*; and see 3 Moore, 240, (a). 1 Chit. Rep. 446, (a).

(a) *Per Bayley, J.* 1 Chit. Rep. 82; and see 3 Dowl. & Ry1. 5.

(b) 1 Chit. Rep. 676.

(c) *Id.* 290, *per Best, J.*

(d) 1 Dowl. & Ry1. 488.

(e) Append. Chap. XII. § 33, 4, 5.

(f) *Id.* § 36.

(gg) 7 Taunt. 145; and see 1 Chit. Rep. 675, (a).

(hh) 4 Durnf. & East, 493. 2 Bos. & Pul. 341; and see 3 Maule & Sel. 145.

(ii) 2 Chit. Rep. 99.

(kk) 2 Bos. & Pul. 341.

(l) 4 Durnf. & East, 493.

consent, the practice of the court requires that the defendant should serve a rule for their allowance, or at least give notice that they have justified.^(m) And where a bail described himself as having property to a great amount, and the court directed an inquiry, which the bail eluded by running away, they would not permit the rule of allowance to be entitled of the term he came up to justify, but discharged the application with costs.⁽ⁿ⁾ If bail has been improperly allowed, the court, we have seen,^(o) will set aside the rule of allowance: And, in the King's Bench, it is a good ground for setting aside the allowance of bail, that [*277] they *were afterwards rejected in other causes.^(a) And a rule for the allowance of bail was discharged with costs, to be paid by the defendant on an affidavit that the bail had perjured himself on his justification, in swearing that an action in which he had been bail, had been compromised.^(b) It also seems, that the justification of bail may be set aside in that court, under circumstances of gross imposition and fraud, on the part of the bail;^(c) and where the defendant's attorney is privy to their misconduct, the court will make him pay the costs of the application.^(d) But if the bail have sworn to the false account of their property, without the privity of the defendant or his attorney, the plaintiff it seems has no other remedy than by indictment for perjury;^(e) though if the plaintiff can by any means connect the defendant, or his attorney, with the false swearing of the bail, the court will punish them; and they have the means to do so, for the one is a suitor, and the other the officer of the court.^(f)

After service of the rule or order of allowance, the bail-piece, in the King's Bench, should be obtained from the judge's chambers, and filed with the master; which should regularly be done the same term in which they were allowed:^(f) And in filing the bail in that court, it should be observed, that every bail taken on or before the continuance day, is a bail, and to be filed of the *preceding* term; and every bail taken after the continuance day, is a bail, and to be filed of the *subsequent* term:^(g) and it is said, that where new bail are added to other bail taken on or before the continuance day, the new bail shall be taken and filed as of that term in which the first bail was put in.^(h) But although bail, when added and justified in vacation, are filed as of the preceding term, yet bail acknowledged and justified in a subsequent term are not so filed, even when substituted for other bail put in of the preceding term.⁽ⁱ⁾

The bail-piece being filed in the King's Bench, or bail perfected in the Common Pleas, an *entry* should be made of the recognizance on a roll, called the recognizance roll; which should be docketed,^(k) and carried into the treasury chamber: And this should regularly be done, before any

(m) 1 Barn. & Cres. 285. 2 Dowl. & RyL. 436, S. C.

(n) 1 Chit. Rep. 131. (o) *Ante*, 235, 6.

(a) 1 Chit. Rep. 144, (b); and see *id.* 307. 3 Dowl. & RyL. 5.

(b) 1 Chit. Rep. 372; and see 2 Barn. & Ald. 768; but see 2 Brod. & Bing. 619.

(c) 1 Chit. Rep. 143. (d) *Id.* 144.

(e) *Per Cur. T.* 22 Geo. III. K. B. 5 Taunt. 776. 5 Moore 321. 2 Brod. & Bing. 619, S. C. *Ante*, 274.

(f) R. II. 1650, *reg.* 3 K. B.

(g) R. E. 5 Geo. II. *reg.* 1, (b), K. B. And as to the *continuance* day, see R. E. 11 W. III. *reg.* 2, K. B. 2 Str. 1215. 1 East, 406, 409.

(h) R. E. 5 Geo. II. *reg.* 1, (b), K. B. 1 Salk. 100, *semb. contra.*

(i) 3 Barn. & Ald. 515. (k) *Append. Chap. XII. § 43.*

proceedings are had against the bail; *(ll)* or at least before they are called upon to plead; for otherwise they may plead *nul tiel record*: and if the recognizance roll be not carried in till afterwards, it seems that they may withdraw their plea, and the plaintiff must pay the costs of it. *(m)* In the King's Bench, the recognizance of bail by *bill* is entered by the plaintiff's attorney, after the declaration, with a *memorandum* of the term [*278] it is of; *(n)* *but by *original*, it is entered by the *filacer*, after a recital of the process. *(a)* And in this court, the course is always to enter it as taken in court, though it be actually taken by a judge in his chamber, *(b)* or by a commissioner in the country; neither is it a record till entered: *(b)* And if, in a joint action against two defendants, the recognizance of bail be entered by mistake as in an action against one only, and the plaintiff, after two writs of *scire facias* against the bail, and *nihil* returned to them, sign judgment against the bail, and take out execution, the court will set aside the judgment and execution for irregularity. *(c)* In the Common Pleas, the filacer enters the recognizance on the roll, *(d)* and docket it: And in that court, when it is taken by a judge in his chamber, or by a commissioner in the country, it may be entered specially; it being a record immediately upon the first caption, and binds the lands, before it is filed at *Westminster*. *(e)* Where the plaintiff was called by a wrong name in the recognizance roll, the court would not rectify the mistake, but gave judgment for the defendants, on an issue of *nul tiel record*. *(f)* So, they would not amend a clerical error, in the spelling of the plaintiff's name in the recognizance, without the consent of the bail: *(g)* And where an original *capias* was issued into a county palatine, and the defendant was arrested and put in bail as upon a *testatum*, which was entered in *Middlesex*, and a declaration was afterwards delivered, in which the venue was laid in *Lincolnshire*, the court refused to interfere, after a considerable length of time, at the instance of the bail, by ordering the entry of the recognizance to be made conformable to the facts of the case. *(h)* But, in *scire facias* against bail, if there be a failure of record, through a misprision of the officer, the court will permit the entry of the recognizance to be amended. *(i)* And, in a subsequent case, the entry was amended, at the instance of the bail, where the plaintiff's name had been mis-stated. *(k)*

Such are the means of putting in and perfecting bail above, when the defendant is *at large*, in order to prevent an assignment of the bail-bond, or proceedings against the sheriff. Bail above may also be put in and perfected, at any time pending the action, where the defendant is in *custody* of the sheriff, or of the marshal of the King's Bench, or warden of the Fleet

(ll) R. E. 5 Geo. II. *reg.* 3, *(a)*, K. B.

(m) 1 Moore, 431.

(n) R. E. 5 Geo. II. *reg.* 3, *(a)*, K. B. Append. Chap. XII. § 41.

(a) Append. Chap. XII. § 42.

(b) 2 Salk. 564, 600, 659. 6 Mod. 42, 132. 7 Mod. 120, 21; and see 5 East, 461. 2 Smith R. 14, S. C.

(c) 1 Maule & Sel. 199. 2 Chit. Rep. 78, *(a)*.

(d) For the form of the entry of a recognizance of bail in C. P. see Append. Chap. XII. § 44, 5, 6, and for the entry of a recognizance of bail in the Exchequer, see *id.* § 47, 8.

(e) 2 Salk. 564, 600, 659. 6 Mod. 42, 132. 7 Mod. 120, 21; and see 5 East, 461. 2 Smith R. 14, S. C.

(f) 3 Taunt. 263.

(g) 5 Taunt. 814; and see 1 Chit. Rep. 323, *(a)*. 4 Moore, 65.

(h) 1 Moore, 514.

(i) 1 Taunt. 221; and see Cas. Pr. C. P. 74, 5. Barnes, 59, S. C. *Id.* 415; but see 1 Bos. & Pul. 481.

(k) 4 Taunt. 875; and see 8 Moore, 33. 1 Bing. 206, S. C.

prison. And it may even be put in, for liberating the defendant, after final judgment against him, and before he is charged in execution ;(*l*)

*otherwise, on a writ of error being brought, which is a *superse-* [*279] *deas* of execution, he must lie in custody until it be determined.

But bail who have rendered the defendant, in their discharge, cannot afterwards justify, so as to release him from imprisonment, without entering into a fresh bail-piece.(*a*) A doubt having arisen, whether a prisoner could be bailed in *vacation*, it was enacted by the statute 43 Geo. III. c. 46, § 6, that “if any defendant shall be taken, detained or charged in custody, at the suit of any person or persons, upon mesne process issuing out of any of his majesty’s courts of record at *Westminster* or *Dublin*, and shall be imprisoned or detained thereon after the return of such process, it shall and may be lawful for such defendant, in vacation time only, and upon due notice thereof given to the attorney for the plaintiff or plaintiffs in such process, to put in and justify bail, before any one of the justices or barons of the court out of which such process shall have issued; who may, if he shall think fit, thereupon order a rule to issue for the allowance of such bail, and may further order such defendant to be discharged out of custody, by writ of *supersedeas* or otherwise, according to the practice of such court, in like manner as the same is and may be done by an order of court in term time.” This statute only applies to arrests on *mesne* process, issuing out of the superior courts; but it seems that an *habeas corpus*, for the removal of a cause from an inferior court, is considered as *mesne* process.(*b*) To discharge a defendant out of custody on this statute, bail above must be put in before a judge,(*c*) and notice thereof given to the plaintiff’s attorney, and that the bail will justify themselves on a certain day, at a judge’s chambers ;(*d*) and an affidavit made of the service of such notice: and when the bail have justified, the judge will grant his *fiat*(*e*) for a rule to be drawn up for their allowance, and for the discharge of the defendant, if in custody of the marshal, or for a writ of *supersedeas* to issue, if in custody of the sheriff, or warden of the Fleet prison; and thereupon a rule being drawn up by the clerk of the rules in the King’s Bench,(*f*) or secondaries in the Common Pleas,(*g*) and a writ of *supersedeas*(*h*) issued when necessary, and delivered to the sheriff or warden, the defendant will be discharged out of custody.(*i*)

Before we dismiss the subject of bail, it may be proper to consider the nature and extent of their *liability*, and the means by which they are *discharged*.

By the terms of the recognizance of bail it is stipulated, that if the defendant be convicted in the action brought against him, he shall pay

(*l*) *Hill v. Stanton*, II. 55 Geo. III. K. B. 2 Chit. Rep. 73, 4. M’Clel. 310. 13 Price, 589, S. C. *Ante*, 248.

(*a*) 2 Chit. Rep. 76.

(*b*) *Per Holroyd, J.*; and on conference with *Abbott, Ch. J.*, he discharged a defendant on justifying bail thereon, in vacation: but see 1 Chit. Rep. 44, *semb. contra*.

(*c*) For the form of the bail-piece, see Append. Chap. XII. § 6.

(*d*) *Id.* § 14.

(*e*) *Id.* § 38.

(*f*) *Id.* § 39.

(*g*) *Id.* § 40.

(*h*) Append. Chap. XV. § 35, &c.

(*i*) For the form of the *entry* of a recognizance of bail on the above statute, when taken before a commissioner, after final judgment, see Append. Chap. XII. § 46.

[*280] the *debt, or damages, and costs recovered, or render his body to the custody of the marshal of the King's Bench, or warden of the *Fleet* prison: (a) and therefore if the plaintiff declare in due time, for the cause of action expressed in the process and affidavit to hold to bail, and proceed thereon to judgment against the defendant, whether by confession, *non sum informatus*, or *nihil dicit*, or on a demurer, *nul tiel record*, or verdict, the bail are in general liable to pay the condemnation money, or render the defendant.

In the King's Bench, the ancient course of the court was, that if a man became bail for another upon a *latitat*, &c. in any sum of money, however trifling, he was bail for him in all actions brought by the same plaintiff, during the same term, were the sums ever so great. (b) To rectify this extraordinary practice, a rule was made, that if the plaintiff should declare against the defendant, upon any bail by him put in, for a *greater* sum than was expressed in the process upon which the defendant was arrested, then the bail so put in should not be chargeable in that action. (c) Still, however, the bail were liable to all actions, wherein the plaintiff declared for and recovered a *less* sum than was expressed in the process; (d) and where he declared for and recovered a *greater* sum, the bail were totally discharged. (e) At length it was resolved, that as on the one hand, there was no colour to subject the bail to more than they were bound in, let the plaintiff's demand be ever so much more; so, on the other hand, there was no reason why the plaintiff should suffer by his moderation in taking bail; but the recognizance should be considered as an agreement to pay to the extent of the sum sworn to and costs, or render the defendant. (f) And accordingly it is now settled, in the King's Bench, that where the plaintiff declares for or recovers a *greater* sum than is expressed in the process upon which he declares, the bail shall not be discharged; but be liable for so much as is sworn to, and indorsed on the process, or for any less sum, which the plaintiff in such action shall recover, (g) together with the costs of the original action. (h) And there is no distinction in practice, between actions commenced by *bill* and by *original writ*; but the court, in either case, will enter an *exoneretur* on the bail-piece, on payment of the sum sworn to and costs, though less than the sum acknowledged to be due. (i) The bail, however, are not liable to pay the costs of a writ of error; (k) nor is the plaintiff entitled to levy equitable costs, out of the penalty of the recognizance. (l) In the Common Pleas, each of the bail is separately liable for the sum recovered, to the full extent of the [281] penalty of the recognizance, *being double the amount of the sum sworn to, or indorsed on the writ under a judge's order. (aa) But the bail are not liable, in that court, to the payment of interest on the sum

(a) *Ante*, 250, 51.

(c) R. T. 22 *Car.* II. K. B. 6 Mod. 267.

(e) 6 Mod. 266. 1 Salk. 102, S. C.

(g) R. E. 5 Geo. II. *reg.* 2 K. B. Lofft, 545.

90. 5 Maule & Sel. 511.

(h) The rule of E. 5 Geo. II. K. B. is silent as to the costs: But, in the case of *Peterken v. Sampson and another*, M. 25 Geo. III. K. B. it was determined by the court, that the bail are liable to pay them, as well as the sum sworn to: and see 6 East, 313.

(i) 6 East, 312. 2 Smith R. 402, S. C. 5 Maule & Sel. 511.

(k) 6 Durnf. & East, 288.

(l) 2 Str. 826. 1 Barnard. K. B. 125, S. C.

(aa) Barnes, 76. 1 Bos. & Pul. 205; and see 5 Maule & Sel. 511. 4 Moore, 167. 1 Brod. & Bing. 490, S. C.

(b) Cro. Jac. 449. 2 Sid. 163. 1 Mod. 16.

(d) 3 Keb. 16.

(f) 2 Str. 922.

Doug. 330. 8 Durnf. & East, 28, 9. 1 East,

recovered, subsequent to the judgment. *(bb)* And although bail, having rendered the defendant, instigate him to vexatious attempts to obtain his discharge under an insolvent act, that court will not compel them to pay the costs of the plaintiff's resisting those attempts. *(c)* In the Exchequer it is a rule, *(d)* that "upon a recognizance of bail, in any action brought in that court, the bail therein are not jointly or severally liable in such action, for more in the whole than the amount of the sum sworn to in the affidavit of the cause of action, together with the costs of such action, unless any proceeding be had upon their recognizance, in which case they will also be subject to such other costs as they are by law liable to."

The bail to the action are *discharged*, by performing the condition of the recognizance, or by some matter operating in excuse of performance: and the condition of the recognizance is performed, either by paying the debt, or damages, and costs for which the bail are liable, or (which is more usual,) by rendering the defendant to the custody of the marshal of the King's Bench, or warden of the *Fleet* prison.

In treating of the *render* in discharge of bail, it may be proper to consider by whom, or what bail, the render may be made, with the time and manner of making it. The render may be made not only by the bail put in by the defendant himself, but also by such as are put in by the sheriff, or his bail, for their own indemnity. *(e)* And, on an exception to bail, if notice be given of other bail, only one of whom justifies, and the names of the former still remain on the bail-piece, the first bail may render the principal, in the King's Bench. *(f)* Even bail who have been rejected have in that court been holden, so long as they remain on the bail-piece, competent to make a surrender: *(g)* And where one bail only had justified, and time had been refused by the court to justify another, the court held the render sufficient. *(h)* In the Common Pleas, when bail above were excepted to and could not justify themselves, they were formerly considered as no bail, and therefore could not have rendered the defendant to prison; but other fresh bail might have been put in, and before any exception taken to them, they might have surrendered him to prison in discharge of themselves: *(i)* And it is now holden, that bail, who have been rejected may enter *into a new recognizance, for the purpose of rendering the defendant. *(a)* But bail surreptitiously [*282] put in are not allowed to render him. *(b)*

The defendant having put in bail, may render himself, or be taken and rendered in their discharge, at any time pending the action; or after judgment for the plaintiff, and before the return of the *capias ad satisfaciendum*, or even after such return, and before the expiration of the time allowed for that purpose by the indulgence of the court. [A] But above, we have

(bb) 3 Taunt. 503.

(c) 4 Taunt. 192.

(d) R. H. 38 Geo. III. in *Seac. Man. Ex. Append.* 223. 8 Price, 502. And see further, as to the nature and extent of the liability of bail, Petersd. Part I. Chap. X.

(e) *Ante*, 246.

(f) 5 Durnf. & East, 633; and see 2 Blac. Rep. 1179.

(g) *Per Cur. E.* 40 Geo. III. K. B. 1 New Rep. C. P. 138, *(a)*, 1 Chit. Rep. 445. *Ante*, 275.

(h) 1 Chit. Rep. 446, *(a)*.

(i) 3 Wils. 59; and see 1 H. Blac. 638. 1 Bos. & Pul. 32. 1 New Rep. C. 137.

(a) 1 Taunt. 163, *per Heath*, J. Imp. C. P. 7 Ed. 136. *Ante*, 275.

(b) 2 Blac. Rep. 1179.

[A] Bail, may at any time during the return term of the writ against them, surrender their principal, in discharge of their liability on payment of the costs of the writ up to that time, and thereupon all proceedings shall be stayed, and an exoneretur be entered on the bail

seen, *(cc)* may be put in before the return of the writ, for the purpose of rendering the defendant; and it is not necessary, in either court, for the bail to justify, in order to render, even after they are excepted to, or though the sheriff has been ruled to bring in the body, *(dd)* or the plaintiff has taken an assignment of the bail bond. *(ee)* The render of the defendant is deemed equivalent to perfecting bail: *(f)* And, in the King's Bench, the sheriff is not liable to an attachment, when the defendant is rendered at any time before the expiration of the day allowed for bringing in the body; *(g)* or even after the rule for bringing it in is expired; *(h)* And the bail to the sheriff are entitled, in that court to the benefit of a render made without justifying, after the regular time of justification is expired, so as to stay the proceedings against them on the bail bond, upon payment of costs. *(i)* But where the defendant was rendered after the time for putting in bail had expired, but within the further time allowed him for that purpose by the indulgence of the court, it was holden that the render was out of time, and that an attachment issued after notice thereof was regular, and could not be set aside, without an affidavit of merits: *(k)* And where the rule for the allowance of bail was discharged, on account of perjury in one of the bail, and, pending the motion for setting aside the allowance, the defendant was rendered, the court of King's Bench held, that the plaintiff might notwithstanding proceed on the bail bond. *(l)* In the common Pleas, where the sheriff had suffered a person who had been arrested to go at large, without taking a bail bond, the court would not allow him to render the defendant, after an action commenced against him [*283] *for an escape, though he had not been ruled to return the writ, or bring in the body, before the action commenced. *(a)*

After judgment, it was anciently the course of the courts not to allow a render, subsequently to the return of *non est inventus* to a *capias ad satisfaciendum*. *(b)* But great mischief resulted from this practice: for the plaintiff would sue out a *capias* returnable the next day, so that the bail had little or no time to bring in the body: *(c)* To remedy which, when the plaintiff proceeded by *seire facias* the judges indulged the bail so far, as to permit them to render the body, upon the return of the first *seire facias*, if the *capias* were returnable *de di in diem*: *(d)* but if it were returnable the next

(cc) *Ante*, 248.

(dd) *Ashton v. King and another*, M. 21 Geo. III. R. T. 33 Geo. III. K. B. 5 Durnf. & East, 368. Barnes, 111, 117. 2 Blac. Rep. 758, 1179, 80. 1 H. Blac. 638. *Wardle, one &c. v. Bowland*, M. 24 Geo. III. C. P. Imp. C. P. 7 Ed. 126.

(ee) 5 Durnf. & East, 401.

(f) 4 Taunt. 669. 2 Maule & Sel. 562. 3 Maule & Sel. 283. 1 Chit. Rep. 446, *(a)*, 498.

(g) 7 Durnf. & East, 527. 8 Durnf. & East, 464; and see 1 Price, 103.

(h) 2 Maule & Sel. 562. 8 Dowl. & Ry. 137.

(i) 5 Durnf. & East, 534. 2 New Rep. C. P. 85, in which latter case, the proceedings were set aside, without payment of any costs, except those of the assignment: but see 7 Durnf. & East, 297, *semb. contra*. This latter case, however, appears to have been overruled. *Id.* 529; and see 11 Price, 633.

(k) 1 Chit. Rep. 567; and see 8 Durnf. & East, 29. 9 East, 468, S. C. cited. 1 Chit. Rep. 356, 496, *(a)*; but see 2 Maule & Sel. 562, *semb. contra*: and see 1 H. Blac. 9. 1 Bos. & Pul. 325. 2 Bos. & Pul. 38, by which it seems, that the practice is different in the Common Pleas.

(l) 2 Barn. & Ald. 768. 1 Chit. Rep. 496, S. C.; but see 11 Price, 633.

(a) 6 Taunt. 554. 2 Marsh. 261, S. C.; and see 6 Moore, 111; but see 1 Price, 103, *contra*; and see 5 Barn. & Cres. 244. *Ante*, 236.

(b) Cro. Eliz. 738.

(c) 1 Ld. Raym. 157.

(d) Cro. Eliz. 618.

piece, and during that term the court may in its discretion grant further time to make the surrender. *Broese v. Elmore*, 4 Rich. 436.

term, the bail were strictly holden to render the principal by the return of it.(e) *Popham*, Ch. J. extended this indulgence still farther and permitted the bail to render any time before the return of the second *seire facias*, or upon the return, *sedente curiâ*.(ff) This practice, however, appears to have been disallowed by Lord *Coke*:(gg) but it was soon after revived, in the time of *Croke* Ch. J.:(hh) and accordingly, it is now fully settled, that in the King's Bench, the render may be made at any time before the rising of the court, on the return day of the second *seire facias*, or of the first, when *seire feci* is returned, by *bill*.(ii) or by *original* in that court, as well as in the Common Pleas, at any time before the rising of the court on the appearance day, or *quarto die post* of the return, of the second *seire facias*.(k) or of the first, where *seire feci* is returned,(l) and not after.(m) Before the return of the *capias ad satisfaciendum*, the render is a matter of right, and may be pleaded.(n) But afterwards it is allowed by the grace and favour of the courts,(o) and not *ex debito justitiæ*; for the condition of the recognizance is broken, upon the return of *non est inventus* to the *capias*: and therefore a subsequent render cannot be pleaded:(p) though, if made in time, the bail may be relieved by motion.(p) If the bail, at any time after the return of the *capias*, render the principal at a judge's chambers, and he be committed to a tipstaff, from whom he escapes or is rescued, that will not be a good render;(q) for the courts will not suffer the plaintiff to be prejudiced, by their indulgence to the bail.

When the plaintiff proceeds by action of *debt* on the recognizance, the render may be made, in the King's Bench, by the space of *eight* entire days, *in full term, next after the return of the *latitat*, or [*284] other process against the bail:(a) and an intervening *Sunday* is to be reckoned as one of the *eight* days allowed for rendering the defendant.(b) If there be not the full number of days in the same term, they must be made up in the following one: And if an action be brought here against bail, on a recognizance taken in the Common Pleas, they have the same time allowed them for rendering the principal, as if the recognizance had been taken in this court.(c) Where an action was commenced, and afterwards discontinued, and then the bail rendered the principal before the bringing of a new action, the court held the render to be good, it being before the return of the process in this suit; and it was the fault of the plaintiff not to begin right at first.(d) So, where the plaintiff sued the bail on their recognizance, who did not render the principal within *eight* days, and then the plaintiff died, and his executors brought another action against the bail, it was ruled that the bail had *eight* days from the return of the process in the second action, to render the principal.(ee) In the Common Pleas, the render must be made before the rising

(e) *Id.* 738.(ff) *Cro. Jac.* 109.(gg) *Moor*, 850. 3 *Bulst.* 182, S. C.(hh) *W. Jon.* 139. *Sty. Rep.* 134. 8 *Mod.* 32.(ii) 1 *Ld. Raym.* 157. 6 *Mod.* 238. 8 *Mod.* 340. R. T. 1 *Ann. reg.* 2, (a). R. E. 5 *Geo. II, reg.* 3, (a), K. B.; and see 1 *Barn. & Cres.* 247. 2 *Dowl. & Ry.* 385, S. C.(k) 1 *Wils.* 270.(l) 4 *Bur.* 2134.(m) *Per Cur.* T. 21 *Geo. III. K. B.* 3 *Bur.* 1360. 1 *Blac. Rep.* 393, S. C. K. B. R. M. 1654, § 12, (a). *Cas. Pr. C. P.* 53. *Barnes*, 82. 2 *H. Blac.* 593, C. P.(n) 1 *Ld. Raym.* 156, 7. *Healey v. Medley*, M. 24 *Geo. III. K. B.*(o) R. T. 1 *Ann. reg.* 2, (a), K. B.(p) *Healey v. Medley*, M. 24 *Geo. III. K. B.* *Barnes*, 106, 7.(q) 6 *Mod.* 238. R. T. 1 *Ann. reg.* 2, (a), K. B.(r) R. T. 1 *Ann. reg.* 1, K. B. 1 *Salk.* 101. 1 *Ld. Raym.* 721. 6 *Mod.* 132.(b) 14 *East*, 537,(c) 7 *Durnf. & East*, 355.(d) 2 *Str.* 915.(ee) 8 *Durnf. & East*, 422.

of the court,(f) on the *quarto die post* of the return of the process;(g) which must be served on the bail *four* days at least before the return.(h) And in that court, they are allowed the same time for rendering the defendant on an attachment of privilege, as on a common *capias*.(i) And if a bail be served with process on his recognizance, and die before the *quarto die post*, and fresh process issue against his executors, they have until the *quarto die post* of the return of the second writ, to surrender the principal.(kk) In the Exchequer, only *four* days are allowed the bail to surrender their principal, when the plaintiff proceeds by *subpœna*;(ll) though *eight* days are allowed, when the proceeding is by *quo minus*:(m) In calculating the four days, one is reckoned *inclusive*, and the other *exclusive*.(n) And if an action be brought in this court, against bail, upon their recognizance entered into in the King's Bench, they must render their principal, as if the recognizance had been taken in the Exchequer.(o)

It was not formerly usual for the courts to enlarge the time for bail to surrender their principal: And, in one case,(p) the court of King's Bench refused to enlarge it, on an affidavit that the principal could not be removed, without endangering his life; and in another,(q) on the ground of the unwarrantable arrest and detention of the principal by a foreign enemy. So they refused to enlarge the time for the bail to [*285] render their *principal, on an affidavit that he was a *lunatic*; it not appearing that he was in such a state as to occasion any immediate peril of life, either to himself or those about him.(a) But in a later case,(b) time was allowed for the bail to surrender their principal, where, the latter being in custody under the process of another court, it appeared on the return made to a *habeas corpus* issued by the bail in order to render him, that he could not be removed out of such custody, without danger to his life, and that such impossibility still continued. And where the return to a writ of *latitat* stated, that the defendant was *insane*, and could not be removed without great danger, and continued so till the return of the writ, the court refused an attachment against the sheriff.(c) So, where the principal has become *bankrupt*, the courts will enlarge the time for surrendering him, till after he has finished his last examination.(d) So, where the defendant was in the *criminal* custody of the court of King's Bench for a conspiracy, the court of Common Pleas, though they would not take him out of such custody, enlarged the time for the bail to render him in their discharge.(e) And time has been enlarged, in the Exchequer, for the bail to surrender their principal, till a week after the expiration of the term of his imprisonment in a county gaol, under a conviction and sentence for a misdemeanour.(ff) The court

(f) Cas. Pr. C. P. 53. Barnes, 82. 2 H. Blac. 593.

(g) R. M. 1654, § 12, C. P. 2 H. Blac. 118.

(h) Cas. Pr. C. P. 18. Pr. Reg. 83. Barnes, 62. 6 Taunt. 286.

(i) 2 H. Blac. 117.

(kk) 1 Bos. & Pul. 61.

(ll) 2 Price, 296. 1 Young & J. 15.

(m) Wightw. 79. 5 Price, 170. 1 Young & J. 15; and see Forrest, 26.

(n) 2 Price, 298, (n).

(o) 1 Young & J. 15.

(p) 4 East, 102; and see 10 Moore, 170. 8 Dowl. & Ryl. 606.

(q) 4 East, 189.

(a) 13 East, 355; and see 2 Chit. Rep. 104. 4 Barn. & Ald. 279.

(b) 16 East, 389.

(c) 4 Barn. & Ald. 279.

(d) 3 East, 145, K. B. 1 Taunt. 320, C. P. 1 Price, 74. Excheq. but see 4 Bing. 80.

(e) 3 Moore, 259. 1 Brod. & Bing. 23, S. C.

(ff) 13 Price, 523, M'Clel. 252, S. C.

of King's Bench, however, will not grant a rule for that purpose, unless it be sworn that the application is made by the bail.(g)

When the defendant is *at large*.(h) he may come and render himself, or be taken and rendered by his bail, either in *court*, if sitting, or before a *judge* at his chambers; and the court or judge will make out a *committitur*, or minute of the render(i) and commitment,(k) and cause the defendant to be sent therewith, in custody of a tip-staff, to the King's Bench or Fleet prison.(l)[A] When bail above are put in, the principal is supposed to be delivered into their custody by the court;(mm) as is evident from the language of the bail-piece, which states him to be *delivered* to bail, &c.: and it is said that they have their principal always in a string, which they may pull whenever they please, and render him in their discharge.(nn) The bail may also take their principal on a *Sunday*, in order to render him;(o) and they may even take him, during his examination before commissioners of bankrupt,(p) or going to a court of justice.(q) So, they may justify entering the house of a third person, in which the principal resides, the outer door being open, in order to seek after, for the purpose of rendering him, although the principal was not in the house at the time.(r) When the *principal is taken, one of the bail, it is said, must always [*286] remain with him; for they cannot depute their right of custody to another, without the defendant's consent in writing, till he be rendered;(a) but it has been determined, that a third person may assist the bail in taking their principal, and may lawfully detain him, although the bail do not continue present.(b)[B] A render may be made by the party himself, without an attorney:(c) and it is not necessary that the defendant should be taken to a judge's chambers, for the purpose of rendering him in discharge of his bail, unless he desire it;(d) nor that a *committitur* should be entered, when a principal is rendered in discharge of his bail, but the bail may

(g) 2 Chit. Rep. 101.

(h) 6 Mod. 231.

(k) Append. Chap. XII. § 49.

(mm) 4 Inst. 178. 2 Hawk. P. C. 88.

(o) *Ante*, 218.

(q) 1 Chit. Pr. 2 Ed. 170; and see 3 Stark. Ni. Pri. 132.

197.

(r) 2 H. Blac. 120.

(a) 1 Sel. Pr. 2 Ed. 170.

(c) 2 Chit. Rep. 99.

(i) R. T. 3 Ann. K. B.

(l) 1 Chit. Rep. 364.

(nn) 6 Mod. 231.

(p) *Ante*, 197, 201.

(r) Dowl. & Ryl. Ni. Pri. 20. *Ante*,

(b) 3 Tannt. 425.

(d) *Id.* 74.

[A] The surrender of a principal by the sureties on the bail bond must be by some distinct unequivocal act, accompanied by such declarations or acknowledgment, as show its purpose and the case to which it applies, and be guarded by the means of clear proof. *Bomar v. Poole*, 2 Speers, 119. Thus, it has been held that a voluntary surrender by the principal to the sheriff without the knowledge of his bail, will discharge the bail; and placing himself in the sheriff's power for the purpose of being detained, is a surrender. *Deck v. Stoker*, 1 Dev. 91. So a surrender of the principal to the officer holding the execution before it is returnable discharges the bail. *Champion v. Noyes*, 2 Mass. 485. *Rice v. Carnes*, 8 Id. 490. *Collins v. Cook*, 4 Day, 1. *Ryan v. Watson*, 2 Greenl. 382. So, pending an action, the principle may be surrendered in court in discharge of bail's liability. *Coolidge v. Cary*, 14 Mass. 115. A principal confined in prison for crime may be brought into court by *habeas corpus* and surrendered in discharge of bail. *Bigelow v. Johnston*, 16 Mass. 218. *Bignell v. Forrest*, 2 Johns. 482. *Cutheart v. Cannon*, 1 Johns. Cas. 28. *Loflin v. Fowler*, 18 Johns. 335. *Ruggles v. Correy*, 3 Conn. 419. *Canby v. Griffin*, 3 Harring. 333. Consent by the plaintiff to the entry of an exoneretur will discharge the bail. *Kellogg v. Munroe*, 9 Johns. 300. Bail are regarded as sureties and are entitled to the benefit of the general principles applicable to sureties. *Rathbone v. Warren*, 10 Johns. 587. *Edwards v. Coleman*, 6 Mour. 573.

[B] Special bail may arrest his principal anywhere. *The State v. Mahon*, 3 Harring. 568.

enter an *exoneretur*, and be discharged.(e) In the King's Bench it is a rule, that "under every commitment should be entered the state of the cause, at the time of the render: If before declaration, *the sum sworn to on the arrest*; but if after declaration, these words should be added, *declaration filed or delivered, issue, or interlocutory judgment signed*, as the case is:(f) If after final judgment in debt, *the debt and damages*; in other cases, *the quantum of the damages*."(g) In the Common Pleas, the filacer attends with his book, at the judge's chambers, and takes the render: And where it was made on the last day, the court ordered the hour of the day, or true time of the defendant's surrender, to be entered by the filacer, in order that it might appear whether the surrender was made before or after the rising of the court.(h)

When the defendant is in custody on *civil* process, there must be a *habeas corpus cum causâ* for bringing him up, in order to render him in discharge of his bail. This writ may be issued in term or vacation, returnable *immediatè*;(i) and the judge will, on the defendant's being brought up, either commit him to the custody of the marshal in the King's Bench, or warden of the *Fleet*, in the Common Pleas and Exchequer, or remand him to his former custody. In general, when the crown is not concerned, the court will commit the defendant to the custody of the marshal, or warden: But where an impressed man, not being liable to be taken out of the king's service, by any process, other than for some criminal matter, was brought up by the keeper of the *Savoy*, to be surrendered in discharge of his bail, the court of King's Bench first committed him to the custody of the marshal, and then ordered him to be delivered *instantèr* to the keeper of the *Savoy*; which was done,* and an *exoneretur* entered on the bail-piece.(k) A *certiorari* will not lie, to remove the record of a judgment obtained against a defendant in the county palatine of *Durham*, for the purpose of enabling his bail to render him in the King's Bench, though he be a prisoner for debt in the custody of the marshal.(l)

*When the defendant is in custody on a *criminal* account, the [*287] court of King's Bench will in some cases grant a *habeas corpus ad subjiciendum*, for bringing him up; as where he is in custody under a charge of felony,(a) or of obtaining money under false pretences,(b) or has been committed to prison by commissioners of bankrupt, for not answering questions to their satisfaction.(c) The *habeas corpus*, in these cases, must be issued on the *crown* side of the court of King's Bench; on which side also must be taken out the subsequent rule for the defendant's surrender in the action, his commitment *pro formâ* to the marshal, and his recommitment to his former custody, charged with the several matters against him:(d) And under this writ, the court will remand him to his former custody.(ee) But if a defendant be in the *criminal* custody of the

(e) *Humphries v. Ditcher*, E. 21 Geo. III. K. B.

(f) Append. Chap. XII. § 50.

(g) R. E. 8 Geo. III. K. B. Append. Chap. XII. § 51.

(h) Barnes, 69.

(i) 3 Bur. 1875.

(k) 1 Bur. 339; but see 7 East, 405, where the court, in a similar case, ordered an *exoneretur* to be entered on the bail-piece, in the first instance.

(l) 2 Dowl. & Ry. 177.

(a) 7 Durnf. & East, 226.

(b) 15 East, 78; but see 13 East, 457.

(c) *Ex parte Pedley*, T. 23 Geo. III. K. B.; and see 3 East, 232, stat. 5 Geo. II. c. 30, § 18. 6 Geo. IV. c. 16, § 39.

(d) 3 East, 232.

(ee) 2 Str. 1217; but see 4 Bur. 2034. 7 Durnf. & East, 227.

court of King's Bench, the Court of Common Pleas will not take him out of such custody, in order to surrender him in discharge of his bail; *(f)* though, if the imprisonment in such case were only temporary, the court would it seems relieve the bail, by enlarging the time for surrendering the principal, until after the time of his imprisonment has expired. *(g)*

When the *crown* is concerned, the courts will not, in general, change the custody, without the express consent of its officers: *(h)* Though where a defendant, being charged in custody upon an *extent* or *information*, or for a *contempt* in not paying the king's debt, is brought up to the court of King's Bench on a *habeas corpus*, to be surrendered in discharge of his bail, and it appears that the civil action in which he was bailed was commenced before the other proceedings, and the court are satisfied that it is for a just debt, and the application really made by the bail, they will commit him, as their prisoner, to the custody of the marshal: For, by the 25 Edw. III. stat. 5, c. 19, "the king's debtors shall not be protected from the proceedings of their other creditors against them." *(i)* The attorney general, however, may have a *habeas corpus*, to remand the defendant. *(k)* In the Common Pleas, where A. was arrested and held to bail in a civil action, after which an *extent* issued against him at the suit of the crown, and he was thereupon committed to the custody of the sheriffs of London; on an application to the court by the bail for relief, it was holden, 1st, that the bail were not entitled to enter an *exoneretur* on the bail-piece; [A] 2dly, the crown having refused its consent to the defendant's being surrendered, unless he should be immediately remanded to the custody of the marshal, that this court would have no authority so to remand him, after he had *been surrendered to the warden of the Fleet; and 3dly, that the [*288] bail could not surrender the defendant by *habeas corpus*, as a matter of right, without the consent of the crown: *(a)* But the court expressed their readiness to give the bail time for surrendering the defendant. *(a)*

The defendant being rendered, *notice* thereof should be given, without delay, to the plaintiff's attorney; *(b)* to the end that the plaintiff, if he think proper, may charge the defendant in execution, or at least that he may not be at any further trouble or expense in proceeding against the bail. If the plaintiff therefore, through want of notice, continue to proceed against the bail, though this will not vitiate the render, yet they shall not be relieved until they have paid the charges. *(c)* But the notice need

(f) 3 Moore, 259. 1 Brod. & Bing. 23, S. C.; and see 13 East, 457.

(g) *Ante*, 285.

(h) *Rex v. Pedley*, T. 23 Geo. III. K. B. Barnes, 385, 388. 5 Taunt. 503. 1 Marsh. 166. S. C. 8 Taunt. 148. 2 Moore, 33, S. C. 3 Moore, 259. 1 Brod. & Bing. 23, S. C.; and see West on *Extents*, 90, &c., 95.

(i) Hob. 115. 1 Salk. 353. 1 Str. 641. 1 Wils. 248. 1 Bur. 339; and see West on *Extents*, 91, &c.

(k) 1 Wils. 248. Barnes, 288.

(a) 5 Taunt. 503. 1 Marsh. 166, S. C.

(b) 7 Durnf. & East, 528. 8 Durnf. & East, 223. 3 Bos. & Pul. 232. 1 Price, 338. Append. Chap. XII. § 52.

(c) R. T. 1 Ann, reg. 2, *(a)*, K. B. 6 Mod. 238. 8 Mod. 281. 4 Bac. Abr. 420, 21. 5 Durnf. & East, 368. 8 Durnf. & East, 222. 3 Barn. & Cres. 112. 4 Dowl. & Ryl. 712, S. C.; and see Append. Chap. XII. § 53.

[A] But where the governor of one State in the Union delivered one, on requisition, to the authorities of another State, who was under bail at the time on a criminal charge, it was held that such delivery discharged the bail from his recognizance. *The State v. Allen*, 2 Humph. 258.

not be given before the rising of the court, on the day of render: (d) And if the principal be surrendered in time, but the bail omit to give regular notice of it to the plaintiff, in consequence of which he proceeds upon the bail bond, or against the sheriff, the bail may apply to set aside the proceedings, on payment of costs, even after the execution levied, and the money is in the sheriff's hands. (e) After due notice of the render of the principal, the plaintiff still proceeded against one of the bail, in an action of *debt* on the recognizance, because no offer was made to pay the costs in the suit against him, nor any rule obtained to stay proceedings on payment of costs; and the court of King's Bench held the subsequent proceedings to be irregular, being contrary to the rule of *Trin. 1 Ann.*, which declares that on such notice of render, all further proceedings against the bail shall cease. (f) In the King's Bench, an affidavit is required to be made of the service of notice of render; (c) but this seems to be only for the purpose of getting the bail-piece from the judge's chambers, and not necessary in order to make the render complete, so as to discharge the bail below, and prevent an attachment against the sheriff: (g) Therefore, an attachment issued after notice of render, but before affidavit thereof, is irregular, in the King's Bench; (h) and, in the Common Pleas, an affidavit of the service of notice of render is altogether unnecessary. (i)

The next step to be taken, in order to discharge the bail, in the King's Bench, is to enter an *exoneretur* on the bail-piece: [A] to effect which, the bail-piece, if not already got, should be obtained from the judge's chambers, and a certificate (k) from the prison, that the defendant is in custody.

(d) *Per cur.* H. 26 Geo. III. K. B. 5 East, 533; and see 2 Smith, R. 242. 2 Chit. Rep. 103.

(e) 8 Durnf. & East, 222; and see 1 Price, 338. 2 Chit. Rep. 103, (a). 5 Barn. & Cres. 244.

(f) 3 East, 306; and see R. M. 1654, § 12, C. P. *Humphries v. Dutcher*. E. 21 Geo. III. K. B. 16 East, 168, 9. 1 Maule & Sel. 742. 2 Chit. Rep. 100.

(c) *Ante*, 287, note (c).

(g) 1 Chit. Rep. 360.

(h) *Id.* 359.

(i) Imp. C. P. 7 Ed. 529.

(k) R. T. 3 Ann, (a), K. B.

[A] It has been held, that a statute abolishing imprisonment for debt operating to discharge such as may be imprisoned at the time of its passage, operates to discharge a recognizance of bail entered into before that time. *Tousey v. Areny*, 11 Ohio, 90; and special bail may apply for an *exoneretur*, on the ground that the right to imprison the principal was abolished previous to the expiration of the time within which the principal might have been surrendered. *White v. Blake*, 22 Wend. 612. *Harrington v. Dennie*, 13 Mass. 94. *Gillespie v. Hewlings*, 2 Barr, 492. *Newton v. Tibbatts*, 2 Eng. 150. *Bronson v. Newberry*, 2 Doug. Mich. R. 38. An *exoneretur* will also be entered where the principal has been discharged as an insolvent debtor since the rendition of judgment against him. *Trumbull v. Healey*, 21 Wend. 670; and generally a discharge of the principal under the insolvent or bankrupt law before the bail are fixed, entitles them to an *exoneretur* without a surrender. *Saunders v. Bobo*, 2 Bailey, 492. *Seaman v. Drake*, 1 Caines, 9. *Kane v. Ingraham*, 2 Johns. Cas. 403. *Champion v. Noyes*, 2 Mass. 481. *Bailey v. Seal*, 1 Harring. 367. *McGlensy v. M-Lear*, *Id.* 466. *Harrison v. Young*, 1 Harr. & J. 102. *McCauseland v. Waller*, *Id.* 156. *McKing v. Marshall*, *Id.* 101. *Richmond v. De Young*, 3 Gill. & Johns. 64. *Rowland v. Stevenson*, 1 Halst. 149. A discharge of the principal is in all cases equivalent to a surrender and bail may avail themselves of it if it be obtained at any time before the time allowed to surrender has expired. *Olcott v. Lilly*, 4 Johns. 407. *Rathbone v. Blackford*, 1 Caines, 588. *Kenly v. Hughes*, 1 Browne, 258. But if the principal neglects to avail himself of his discharge, and suffers judgment to go against him, the court will not allow an *exoneretur* to be entered. *Mechanics' Bank v. Hazzard*, 9 Johns. 302. *Post v. Riley*, 18 *Id.* 54. *Campbell v. Palmer*, 6 Cow. 596.

A judgment on the merits in favour of the principal, though it may afterwards be reversed on error, discharges the bail. *Butler v. Bissell*, 1 Root, 102. *Fleming v. Lord*, *Id.* 214. *Ainsworth v. Peabody*, *Id.* 469. *Lockwood v. Jones*, 7 Conn. 439.

These being carried to the master, he will enter an *exoneretur* on the *bail-piece, which should then be filed with the signer of [*289] the writs; for if the bail-piece be filed without an *exoneretur*, the bail remain liable, though the defendant be actually in prison. (aa) Yet, where the bail-piece has been previously delivered out to be filed, to the plaintiff's attorney, who neglects to file it, he cannot proceed against the bail, for want of an *exoneretur*: (bb) And where the render is in other respects regular, the court will not order an *exoneretur* to be entered on the bail-piece, upon paying the costs that have accrued subsequent to the render. (c) In the Common Pleas, the *exoneretur* is entered in the filacer's book, on making the render at the judge's chambers. (d) And when judgment having been entered up against a defendant in the Common Pleas, he brought a writ of error in the King's Bench, where the judgment was affirmed, and afterwards brought a writ of error in the House of Lords, and pending such a writ surrendered himself in discharge of his bail to the King's Bench prison; the court of Common Pleas held, that the bail were entitled to have an *exoneretur* entered on the bail-piece; as the recognizance of bail still remained in that court, where the action was originally commenced; and that the defendant having been rendered to the King's Bench prison, the terms of the recognizance could not be complied with, as that court would not allow him to be delivered up or transferred to any other custody. (e) It was formerly usual to make an entry of the render in the marshal's book, kept in the King's Bench office; (f) but this is now holden to be unnecessary: (g) the practice being, when the bail bring the defendant to the judge's chambers to be rendered, for the judge to make out a *committitur*, which is delivered, together with the prisoner, to the tipstaff, who carries him to the King's Bench prison, and there delivers the prisoner, with the *committitur*, to the marshal or his officer; (h) and it is the duty of the clerk of the papers there, to make an entry in the marshal's book. (h)

The bail to the action are *excused* from the performance of the condition of the recognizance, by the act of *God*, as by the *death* of the principal before the return of the *capias ad satisfaciendum*; [A] or by act of *law*, as by his being made a *peer* of the realm, or *member* of the house of commons, or becoming *bankrupt* and obtaining his certificate, or being discharged under an *insolvent debtors'* act, or by his being under sentence of transportation, or impressed into the king's service, or sent out of the kingdom under the alien act, &c.; or by act or default of the *plaintiff*, as by his not proceeding in the action in due time, or proper manner, or by his taking a *cognovit*, and giving time thereby to the principal, without the consent of the bail.

*When the defendant *dies* before the return of the *capias ad* [*290] *satisfaciendum*, as it is impossible for the bail to render him,

(aa) R. E. 1 Ann. reg. 2, (a), K. B. 1 Salk. 98. 8 Mod. 282.

(bb) 8 Mod. 280. Barnes, 68, S. P.

(c) Say. Rep. 7, 8. 1 Bur. 409.

(d) Imp. C. P. 7 Ed. 528.

(e) 9 Moore, 65. 2 Bing. 18, S. C.

(f) R. T. 3 Ann. (a), K. B.; and see 1 Salk. 272, 3. 12 Mod. 583, S. C. 2 Str. 1215, 1226. 2 Bur. 1049. 2 Smith, R. 243. 1 Chit. Rep. 361.

(g) 2 Barn. & Ald. 607. 1 Chit. Rep. 359, S. C. (h) 1 Chit. Rep. 364.

[A] See *Arthur v. Antonio*, 1 Nott & M'Cord, 251. *Champion v. Noyes*, 2 Mass. 485. *White v. Cummins*, 1 Overt. 224. *Bank v. Pollock*, 1 Ham. 35. *Bulkeley v. Colton*, 1 Johns. 515. *Griffin v. Moor*, 2 Kelly, 331.

they are discharged from their recognizance: But if the death happen after the return of the *capias ad satisfaciendum*, and before it is filed, the bail are fixed.(a) And the courts, we have seen,(b) will not discharge them, on the ground of the *insanity* of their principal: although a commission of lunacy may have issued, under which he has been found a lunatic. In like manner, if the defendant be made a *peer* of the realm,(cc) or *member* of the house of commons,(dd) or become *bankrupt* and obtain his certificate,(ee) or be discharged under an insolvent debtors' act,(ff) &c., at any time before the bail are fixed, they are in consequence discharged: And, in any of the above cases, the courts, on motion, will order an *exoneretur* to be entered on the bail-piece, or in the filacer's book.

When the defendant has become bankrupt and obtained his certificate, before the expiration of the time allowed to the bail, by the indulgence of the court, for surrendering him, that is, (when the plaintiff proceeds by *scire facias*,) before the rising of the court on the return day of the second *scire facias*,(g) or of the first, when *scire feci* is returned, by *bill* in the King's Bench;(h) or by *original* in that court, as well as in the Common Pleas, before the rising of the court on the appearance day, or *quarto die post* of the return of the second *scire facias*, or of the first, when *scire feci* is returned;(i) or, when the plaintiff proceeds by action of *debt* on the recognizance in the King's Bench, within the space of *eight* entire days in full term next after the return of the *latitat* or other process against the bail,(j) or, in the Common Pleas, before the rising of the court on the *quarto die post* of the return of the process;(k) the court on motion, supported by an affidavit of the facts, will order an *exoneretur* to be entered on the bail-piece by *bill*, or in the filacer's book by *original*.(l) And, in the Exchequer, proceedings were stayed in an action against bail, and an *exoneretur* ordered to be entered on the bail-piece, after the defendant had obtained his certificate, on payment of the costs of the action, and of the application; although the recognizance had been entered into for his discharge out of custody, after final judgment, and the certificate had not been allowed by the chancellor, till after the expiration of the time stipulated for making the render.(m) But

the court of Common Pleas would not relieve the bail of a bank-
[*291] rupt, who were fixed after the appearance day *or *quarto die post* of the return of the second *scire facias*, which happened between the signature of the bankrupt's certificate by his creditors and the commissioners, and the time of its allowance by the Lord Chancellor.(aa) And, in that court, where an action was commenced, and the defendant became bankrupt and obtained his certificate, and afterwards permitted judgment to be signed for want of a plea, after which the plaintiff proceeded against the bail, the court of Common Pleas would not relieve the

(a) 6 Durnf. & East, 284.

(b) *Ante*, 216.

(cc) Doug. 45.

(dd) *Langridge, one, &c. v. Flood*, H. 26 Geo. III. K. B. 4 East, 190, S. C. cited.

(ee) 1 Ken. 594. 1 Bur. 244, 5, S. C. *Id.* 436. Cowp. 824.

(ff) 2 Chit. Rep. 105.

(g) 1 Barn. & Cres. 247. 2 Dowl. & Ryl. 385, S. C.

(h) *Ante*, 283.

(i) *Ante*, 283, 4.

(j) *Ante*, 284.

(l) *Cleveland v. Dickenson & another*, bail of *Tomkins*, E. 41 Geo. III. K. B. 2 Chit. Rep. 104. 14 East, 599. 1 Barn. & Ald. 332. 3 Barn. & Cres. 222. 5 Dowl. & Ryl. 258, S. C. K. B. 2 New Rep. C. P. 180, 190. 8 Taunt. 28. 1 Moore, 457, S. C. 7 Moore, 566. 1 Bing. 164, S. C. C. P. M'Clel. 310, 399. Excheq.

(m) M'Clel. 399.

(aa) 7 Taunt. 589.

bail on motion.(b) And it seems that in such case, they could in no way take advantage of the bankruptcy and certificate.(b)

The court of King's Bench would not relieve the bail, on the ground that the debt was contracted while the defendant was resident in a foreign country, and before he became a bankrupt by the laws of that country, though he might have obtained his certificate there.(c) And where the defendant became bankrupt, before the statute 49 Geo. III. c. 121, § 14, and the plaintiff proved his debt under the commission, but did not otherwise proceed under it, the court held that the bail were liable; though the plaintiff had lain by two years before he brought his *seire facias* against them.(d) But now, since the making of the above statute, if a plaintiff, after judgment obtained, prove his debt under a commission of bankrupt sued out against the defendant, and also proceed against the bail, the latter are thereby entitled to their discharge; and the court on motion will order an *exoneretur* to be entered on the bail-piece.(e) Bail to the sheriff however, we have seen,(f) were not considered as sureties, or liable for the debt of a bankrupt, within the meaning of the statute 49 Geo. III. c. 121, § 8. And therefore, where such bail, being fixed with the debt and having paid it, sued the principal and obtained judgment, after a commission of bankrupt had issued against him, but before he had obtained his certificate, and after he had obtained it the bail in the second action applied to be exonerated, on the ground that the plaintiffs, the bail in the original action, might prove their debt under the commission, by virtue of the last mentioned statute, the court of Common Pleas refused to interfere in a summary way, but left the bail to their writ of *audita querela*;(g) upon which the bail rendered the defendant, and the court, on a subsequent application, refused to discharge him.(h) But this case is now provided for; and the bail to the sheriff, having paid the debt, or part of it in discharge of the whole, are entitled to relief under the commission, by the statute 6 Geo. IV. c. 16, § 52.

The bail cannot plead the bankruptcy and certificate of their principal, in their own discharge; but must apply to the court on that ground, to *be relieved on motion.(a) And formerly, if the defendant had [*292] become bankrupt, and obtained his certificate, before the bail were fixed, the method was, for the bail to surrender him; and then for the defendant to apply to be discharged, upon an affidavit, stating his having become bankrupt since the cause of action arose, and obtained a certificate of his conformity under the commission.(bb) But of late, when a bankrupt is clearly entitled to his discharge, the court on motion, or a judge on summons, to avoid circuitry, have ordered an *exoneretur* to be entered on the bail-piece, or in the filacer's book, without the form of a regular surrender by his bail.(cc) And the court of King's Bench will relieve the bail on motion, without directing an issue to try the fact of the bankrupt's being a

(b) 3 Taunt. 46; and see 4 Dowl. & Ry1. 373, *accord*; but see 3 Barn. & Cres. 222. 5 Dowl. & Ry1. 258, S. C. *semb. contra*.

(c) 8 Durnf. & East, 609; and see 3 Moore, 244. 5 Moore, 331; but *vide ante*, 211, and the cases there cited.

(d) *Hill v. Simpson*, bail of *Jackson*, II. 26 Geo. III. K. B.; but see 2 Blac. Rep. 1317.

(e) 2 Taunt. 246; and see stat. 6 Geo. IV. c. 16, § 59. *Ante*, 202, 3. (f) *Ante*, 208.

(g) 6 Taunt. 329. 2 Marsh. 37, S. C. (h) 6 Taunt. 330. 2 Marsh. 192, S. C.

(a) 1 Bos. & Pul. 448, 450, (b). 2 Bos. & Pul. 45. (bb) Cowp. 824.

(cc) *Id. ibid.* Barnes, 104. 1 Bos. & Pul. 450, (b), *per Buller, J.*; and see the cases referred to, *ante*, 290, (l).

trader; the certificate, by the statute 6 Geo. IV. c. 16, (d) being made sufficient evidence of the trading, &c. (ee) But the court of Common Pleas would not exonerate the bail, upon the defendant's having become bankrupt and obtained his certificate, without giving the plaintiff an opportunity of trying, by an issue, whether the certificate were fairly obtained. (ff) If the bail do not apply to enter an *exoneretur* on the bail-piece, till after proceedings have been had against them, they can only be relieved on payment of costs. (gg)

Where the defendant was under sentence of transportation for a felony, the court permitted an *exoneretur* to be entered on the bail-piece. (hh) So, where the defendant being a seaman, and having been holden to bail on mesne process, for a debt under 20*l.*, was impressed into the king's service, the court, on application of the bail, ordered an *exoneretur* to be entered. (i) So, whilst the *alien act* (k) remained in force, if a defendant had been sent out of the kingdom under that act, the court of King's Bench would have ordered the bail bond to be delivered up to be cancelled, (l) or permitted the bail above to enter an *exoneretur*; unless they were indemnified, or had money in their hands belonging to the defendant, sufficient to answer the plaintiff's demand. (m) But where the defendant was in custody under a charge of murder committed in *Ireland*, where a bill was found by the grand jury against him, and application had been made to the secretary of state, to send him over there in order to take his trial; the court of King's Bench, though they granted a *habeas corpus* to bring him up, in order that

he might be surrendered by his bail, (n) would not, without an [*293] actual surrender, allow an *exoneretur* to be entered on the bail-piece. (a) So, where the defendant was in custody of a messenger under an order of the secretary of state, for the purpose of being sent out of the kingdom by virtue of the *alien act*, (b) the court of King's Bench refused to issue a *habeas corpus*, on the application of his bail, to bring him up, that they might render him in their own discharge, on account of the public inconvenience, and of the probable risk of his passage, which had been taken in a ship immediately about to sail to his destined port: and they also refused, while he was still in the kingdom, and might possibly be set at large again, to enter an *exoneretur* on the bail-piece; but they said that they would remember that the situation of the bail was without any fault of theirs, if any proceedings were taken against them in the meantime. (c)

The general rule by which the courts are governed, in the exercise of an equitable interference in these cases, is said to be this: that wherever by the act of the law, a total impossibility or temporary impracticability to render a defendant has been occasioned, the courts will relieve the bail from the unforeseen consequences of having become bound for a party

(d) § 126; and see stat. 5 Geo. II. c. 30, § 7, 13. *Ante*, 212.

(ee) 1 Barn. & Ald. 332. *Willison v. Smith*, E. 22 Geo. III. K. B. upon the authority of another case, which had been determined on the construction of the statute 5 Geo. II. c. 30, § 7, 13, after great argument, *contra*, see Ed. B. L. 415.

(ff) 6 Taunt. 75; and see 5 Moore, 331.

(gg) 2 Chit. Rep. 104. 14 East, 599. 1 Barn. & Ald. 332. 8 Taunt. 28. 1 Moore, 457, S. C. *Ante*, 288.

(hh) 6 Durnf. & East, 247.

(k) 33 Geo. III. c. 4. *Ante*, 215, 16.

(m) 6 Durnf. & East, 50, 52, 246.

(a) 7 Durnf. & East, 226. 15 East, 78.

(c) 13 East, 457. *Ante*, 287.

(i) 7 East, 405; and see 1 Bur. 339.

(l) 7 Durnf. & East, 517.

(n) *Ante*, 287.

(b) 43 Geo. III. c. 155.

whose condition has been so changed, by operation of law, as to put it out of their power to perform the alternative of their obligation, without any default, laches, or possible collusion on their part. *(d)* The practical modes of relief which the courts have adopted for that purpose, are these three: first, in cases of total impossibility, it is effected by ordering an *exoneretur* to be entered upon the bail-piece, on motion for that purpose; or, in the case of bail below, that the bail bond be delivered up to be cancelled: *(e)* That mode is consistent with the jurisdiction of all the three courts. A second mode, (which is necessarily confined to the court of King's Bench,) *(f)* has been, in cases of temporary impracticability arising from the defendant being, at the time when he should be rendered, in legal criminal custody, by ordering him to be brought up by *habeas corpus*, in order that he may be formally rendered in discharge of his bail. A third mode is, by the courts enlarging the time for making the render: This also is within the power, and may be resorted to by all the courts. *(g)* And the short result of all the determinations seems to be, that wherever the court cannot absolutely exonerate the bail, and, either from the constitution of the court itself or the circumstances of the particular case, cannot enable them at once to make a formal render, they will, in all practicable cases of a temporary impossibility occasioned by act of law, and even perhaps in other cases under special circumstances, enlarge the time for making the render, in order to give the bail an opportunity of rendering their principal, as soon as it shall be in their power to do so. *(h)*

It remains to be considered, in what cases the bail are excused from the performance of the condition of their recognizance, by the act or default of *the plaintiff. If the plaintiff do not declare against [*294] the defendant in due time, so that the cause is out of court, *(a)* his bail are discharged. And it seems, that where there has been a great and unnecessary delay in proceeding to trial, the bail may be relieved, on their own application; though the court will not discharge them, at the instance of the defendant. *(b)* So, where the plaintiff declares by *original*, in the King's Bench, in a different county from that where the action is brought, his bail are discharged: *(c)* But in the King's Bench by *bill*, or in the Common Pleas, *(dd)* the declaring in a different county from that in which the writ issued, is not deemed a waiver of bail. So, the bail are discharged, if the plaintiff declare against the defendant for a different cause of action from what is expressed in the process. *(ee)* But, in the Common Pleas, a variance between the writ and count, (the *ac etiam* being in *case on promises*, but the declaration in *debt*,) is not a ground for entering an *exoneretur* on the bail-piece, where the sum sworn to is under 40*l.* *(ff)* The *affidavit* to hold to bail must also correspond in substance with the process: *(gg)* and therefore, if the plaintiff declare against the defendant by a different name, 1 Moore & P. 24, or, for a different cause of action from what is expressed

(d) 13 Price, 525, *in notis.*

(e) 7 Durnf. & East, 517.

(g) 13 Price, 525, *in notis.*

(a) 2 New Rep. C. P. 404.

(c) 3 Lev. 235. R. E. 2 Geo. II. *(a)*, K. B. Barnes, 116.

(dd) R. II. 22 Geo. III. C. P.

(ee) *Per Cur.* M. 43 Geo. III. K. B. 3 Wils. 61. 2 H. Blac. 278. 2 Bos. & Pul. 358. 5 Moore, 483; and see 2 East, 305; but see 2 Moore, 301. 8 Taunt. 304, S. C. 7 Moore, 362. 1 Bing. 68, S. C. 8 Moore, 33. 1 Bing. 206, S. C.

(ff) 1 H. Blac. 310. *Ante*, 150.

(f) *Ante*, 287.

(h) *Id.* 532, 3, *in notis.*

(b) 1 Chit. Rep. 281.

(gg) 1 Chit. Rep. 659, *(a)*.

in the affidavit, his bail are discharged : *(hh)* But a trifling variance in the names of the parties is not material, provided there be no doubt as to their identity. *(i)* And it is too late to move to enter an *exoneretur* on the bail-piece, on the ground of a variance between the declaration and affidavit to hold to bail, after bail put in and justified, declaration delivered, plea demanded, and time allowed for pleading. *(k)* In the Common Pleas, bail are not liable, where the declaration consists of several counts, unless the plaintiff recover for the cause of action specified in the affidavit. *(l)* And, in that court, where the affidavit was for a certain sum, on a bill of exchange only, and the plaintiff recovered a greater sum, as well on the bill as for goods sold, the bail were holden to be liable only for so much as was recovered on the bill of exchange. *(m)* And it seems, that if the sum recovered be under a bailable amount, the bail are discharged. *(n)* But where the plaintiff, having filed a bill in equity, and arrested the defendant for the same cause of action, had, in consequence of an order out of Chancery, for that [*295] purpose elected to proceed in equity, the court refused * to discharge the bail, but left them to move to set aside any proceedings which might be taken against them. *(a)*

It was formerly holden, that a *cognovit* by the principal, without notice to the bail, did not discharge them : *(b)* And accordingly, where the defendant in the action gave a *cognovit* for the debt and costs, payable by seven instalments, and afterwards the principal was discharged under an insolvent debtor's act, which related to a certain day, when three only of the instalments were payable : it was holden that the bail who had been fixed before the passing of the act, though after the day to which it related, were liable for the whole condemnation money, the entire debt, *quà* debt, being due *instantanter* ; with a stay of execution only for certain portions, at certain times. *(c)* But where the plaintiff had taken a *cognovit* from the defendant, with an agreement to receive the debt by instalments, of which no notice was given to the bail, the court of King's Bench set aside an execution against them, sued out above a year after the judgment, without a *scire facias* to revive it : *(d)* And in general, although the bail are not discharged by the plaintiff's taking a *cognovit* from the principal without their consent, where judgment is to be entered up thereon *instantanter*, *(e)* or the debt is payable by instalments, within the time in which the plaintiff would have been entitled to judgment and execution, had he gone to trial in the original cause ; *(f)* yet where that is not the case, as where one or more of the instalments are not payable till after the expiration of that time, it is now settled, in both courts, that the bail are discharged. *(g)* This doctrine was first introduced in courts of equity ; and is founded on this principle, that every surety has a right to come into a court of equity, and require to be permitted to sue in the name of the original creditor : But if the creditor

(hh) 6 Durnf. & East, 363. 7 Durnf. & East, 80. 8 Durnf. & East, 27. 1 Chit. Rep. 659. 2 Taunt. 107. 5 Moore, 209. 3 Barn. & Cres. 1. 4 Dowl. & Ryl. 619, S. C.

(i) 1 Chit. Rep. 659, *(a)*.

(k) 3 Moore, 305. 1 Brod. & Bing. 48, S. C.

(l) 2 Taunt. 107 ; and see 4 Dowl. & Ryl. 245.

(m) 7 Taunt. 304. 1 Moore, 51, S. C.

(n) *Per* Lord Kenyon, in *Lavender v. Kilner*, at *Lancaster, May, 1797* ; but see 4 Dowl. & Ryl. 194.

(a) 7 Taunt. 235. 2 Marsh. 548, S. C.

(b) 5 Durnf. & East, 277.

(c) 8 East, 433.

(d) 15 East, 617.

(e) 1 Taunt. 161.

(f) 5 Taunt. 319. 1 Marsh. 59, S. C.

(g) 15 East, 617. 4 Taunt. 456. 5 Taunt. 319. 1 Marsh. 59, S. C. 2 Marsh. 83, S. P. 7 Taunt. 53. 2 Marsh. 383, S. C. ; and see 2 Blac. Rep. 1317. 1 Taunt. 159. 5 Barn. & Cres. 269. 8 Dowl. & Ryl. 22, S. C.

give time to the original debtor, he thereby prevents the surety from using his name with effect.*(gg)* In like manner, the courts of law have held, that the bail are entitled to surrender the principal at any time, whenever the plaintiff himself would not be precluded from taking a proceeding against him: But if the creditor give time to the principal, he cannot during that time take or proceed against him; neither during the same period can the bail, who are therefore discharged:*(h)* And this doctrine applies to bail to the sheriff, as well as bail above.*(i)* It is no ground however, for setting aside a judgment, which has been signed against bail, that the plaintiff has accepted a composition from the defendant, and suspended the execution of a *capias ad satisfaciendum* which had been issued against him, though it were without the knowledge or consent of the bail; *as they are not prevented thereby [*296] from surrendering their principal.*(aa)* So, where a plaintiff receives bills of exchange from a defendant, with an agreement that he shall not be precluded from proceeding while the bills are running, the bail are not thereby discharged.*(b)* It is not any defence at law, to an action on a bond against a surety, that by a parol agreement, time has been given to the principal:*(c)* And the sureties in a replevin bond are not discharged, by time being given to the plaintiff in *replevin*.*(d)*

*CHAPTER XIII.

[*297]

Of PROCEEDINGS against BAIL to the SHERIFF, upon the BAIL BOND; and against the SHERIFF, to compel him to return the WRIT, and bring in the BODY.

IF bail above, when necessary, be not put in and perfected in due time, the bail bond is forfeited: and the plaintiff may either take an *assignment* of it,*(a)* and proceed thereon against the defendant, and his bail to the sheriff; or he may proceed against the *sheriff* himself, to compel him to return the writ, and bring in the body of the defendant.*(bb)*

If the bail below be sufficient, it is usual for the plaintiff to take an assignment of the bail bond; which it seems he may do, even after service of the rule to bring in the body,*(cc)* or moving for an attachment; but after he has sued out an attachment against the sheriff, he has made his election, and

(gg) 6 Dow, 238. Moore & P. 393, S. C.

(h) Holt, Ni. Pri. 84. 7 Taunt. 126; and see 2 Bos. & Pul. 61. 1 Taunt. 159. 15 East, 617. 8 Taunt. 28. 1 Moore, 457, S. C. 7 Moore, 566. 1 Bing. 164, S. C. 5 Barn. & Cres. 269. 8 Dowl. & Ryl. 22, S. C. 18 Ves. 20. 3 Price, 216, 17. 1 Madd. Chan. 234, 5.

(i) 4 Barn. & Ald. 91.

(aa) 5 Taunt. 614. 1 Marsh. 250, S. C.

(b) 7 Taunt. 126. And see further, as to when, and in what cases, bail to the action are discharged, Petersd. Part I. Chap. XIV.

(c) 5 Barn. & Ald. 187. 2 Chit. Rep. 336, S. C.

(d) 6 Taunt. 379. 2 Marsh. 81, S. C. 3 Price, 214, S. C. in Error: and see 7 Taunt. 97. 2 Marsh. 392, S. C. 7 Price, 223, S. C. in Error.

(a) Append. Chap. XIII. § 1.

(bb) Gilb. C. P. 20; and see 2 Wms. Saund. 5 Ed. 60, *a. b. c.* 61, *a. b. & c.*

(cc) *Robinson, assignee, &c. v. Owen*, bail of *Dunkin*, M. 36 Geo. III. *Poidevin v. Harvey*, bail of *Martelli*, M. 51 Geo. III. K. B. 7 Barn. & Cres. 478. 1 Man. & Ryl. 298, S. C. 3 Bos. & Pul. 564, C. P. Wightw. 406. Man. Ex. Pr. 121. Excheq.

cannot afterwards, whilst the attachment remains in force, take an assignment of the bail bond: *(dd)* And, in the Common Pleas, if bail above be put in and justified in due time after the sheriff is ruled to bring in the body, the court will set aside the proceedings in an action upon the bail bond, commenced previous to the time of justification: *(e)* So that the plaintiff, in that court, is not at liberty to proceed on the bail bond, pending the rule to bring in the body. But where the sheriff's officer, on the attachment being lodged, prevailed on the plaintiffs to withdraw it, and take an assignment of the bail bond, which the plaintiffs, in order to relieve the sheriff, accordingly took, and commenced an action thereon, the court of King's Bench held, that the plaintiffs might abandon their attachment in this case, and then take an assignment, and proceed on the bail bond: *(f)* And, in the Exchequer, where the attachment against the sheriff has been set aside for irregularity, it is no bar to an assignment of the bail bond: *(g)*

Before the statute for the amendment of the law, *(h)* the sheriff was not compellable to assign the bail bond; *(i)* though if he had not assigned it, the court would have amerced him: *(a)* and the old way was, first to give a rule for the sheriff to bring in the body, before the plaintiff could take an assignment of the bail bond: *(b)* Another mischief at common law was, that after an assignment of the bail bond, the action thereupon must have been brought in the name of the sheriff, who might have released it, and thereby driven the plaintiff into a court of equity: *(c)* To remedy these inconveniences, it was enacted by the above statute, that "if any person or persons shall be arrested, by any writ, bill or process, issuing out of any of the courts of record at *Westminster*, at the suit of any common person, and the sheriff or other officer take bail from such person, against whom such writ, bill or process is taken out, the sheriff or other officer, at the request and costs of the plaintiff in such action or suit, or his lawful attorney, shall assign to the plaintiff in such action, the bail bond or other security taken from such bail, by indorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses, which may be done without any stamp: and if the said bail bond or assignment, or other security taken for bail, be forfeited, the plaintiff in such action, after such assignment made, may bring an action and suit thereupon in his own name; and the court where the action is brought may, by rule or rules of the same court, give such relief to the plaintiff and defendant in the original action, and to the bail, upon the said bond or other security taken from such bail, as is agreeable to justice and reason; and that such rule or rules of the said court shall have the nature and effect of a defeazance to such bail bond, or other security for bail." This act, and all the statutes of jeofails, are extended by the 24th section, to all courts of record in the counties palatine of *Lancaster*, *Chester*, and *Durham*, and the principality of *Wales*, and to all other courts of record within this kingdom: *(d)* And, by the statute 6

(dd) *Cunningham v. Chambers*, E. 45 Geo. III. K. B.; and see 1 Chit. Rep. 394, *in notis*.

(e) 3 Bos. & Pul. 564; and see 7 Moore, 600. 1 Bing. 181, S. C.

(f) 15 East, 215.

(g) Wightw. 406.

(h) 4 & 5 Ann. c. 16, § 20.

(i) 1 Mod. 228.

(a) 1 Sid. 23. 2 Mod. 84.

(b) 1 Salk. 99.

(c) Gilb. C. P. 2.

(d) And see the statute 22 Geo. II. c. 46, § 35, for the assignment of bail bonds, on process issuing out of the court of Session of *Chester*, and the court of Common Pleas at *Lancaster*, and the proceedings thereon.

Geo. IV. c. 108, § 99, where persons arrested by *capias*, at the king's suit, give bail, the sheriff is required to assign the bail bond to the king, at the request of the prosecutor.

The bail bond, it is said, may be assigned *before* it is forfeited, though it cannot be put in suit till afterwards.^(e)[A] And, in the King's Bench, if the bail do not justify in *four* days after exception, the plaintiff is at liberty to proceed upon the bail bond; although from the bail having been put in sooner than was necessary, the rule for bringing in the body has not expired, and the sheriff is not liable to an attachment:^(f) And, in that court, it has been holden, that if the *fourth* day for perfecting bail be the last day of term, and the bail be not perfected before the rising of the court on that day, an assignment of the bail bond to the plaintiff, in the evening of that day, is regular.^(g) In the Common Pleas it is a rule, that "no bail bond taken in *London* or *Middlesex*, by [*299] virtue of any process issuing out of that court, returnable on the *first* return of any term, shall be put in suit until after the *fifth* day in full term; and that no bail bond taken in any other city or county, by virtue of such process, shall be put in suit until after the *ninth* day in full term: and that no bail bond taken in *London* or *Middlesex*, by virtue of any process issuing out of that court, returnable on the *second* or any other subsequent return, shall be put in suit until after the end of *four* days exclusive of the day on which such process shall be expressed to be returnable; and that no bail bond taken in any other city or county, by virtue of such last-mentioned process, shall be put in suit until after the end of *eight* days exclusive of the day on which such last-mentioned process shall be expressed to be returnable; upon pain of having all proceedings upon such bail bonds to the contrary, set aside with costs."^(a) After default made in putting in special bail in time, it is not enough that bail are afterwards put in: but the plaintiff may take an assignment of the bail bond, and proceed thereon, unless the bail be also justified, though not before excepted to.^(b) And where the defendant had neglected to put in and perfect bail above, the court of King's Bench held that the plaintiff was not out of court, by omitting to declare in the original action, within two terms after the return of the writ; but he might still take an assignment of the bail bond:^(c) for he was not bound to declare *de bene esse*, within the time limited for the defendant's appearance, and after that time he could not declare, until the defendant had actually appeared. But where the plaintiff is completely out of court, by not declaring in the original action within a year after the return of the writ, or, in the Common Pleas, before the end of the vacation of the second term after it is returnable, it seems that he cannot afterwards regularly take an assignment of the bail bond:^(d) And in the latter court, though the assignment

(e) Barnes, 77.

(f) 4 Barn. & Cres. 864. 7 Dowl. & Ry. 374, S. C.

(g) 8 Durnf. & East, 4.

(a) R. T. 30 Geo. III. C. P. 1 H. Blac. 525, 6; and see a former rule of H. 9 Ann. reg. 4. C. P. 2 Blac. Rep. 1009.

(b) 7 East, 607.

(c) 2 Str. 1262. *Carmichael v. Chandler*, T. 24 Geo. III. K. B. Imp. K. B. 10 Ed. 149; and see 2 East, 442. Prac. Reg. 71. 3 Price, 259.

(d) 2 Blac. Rep. 876; and see 4 Taunt. 715. 5 Taunt. 649.

[A] Where the plaintiff takes an assignment of the bail bond from the sheriff, and sues the bail to insolvency, this is no discharge of the sheriff's liability for taking insufficient bail, nor an estoppel of the plaintiff's right of action against him. *Bennett v. Brown*, 1 Strobb. 303.

of the bail bond be regular, as being taken while the action was pending, yet if the plaintiff be afterwards guilty of laches, to the prejudice of the bail, the court will stay the proceedings thereon.^(e) The plaintiff, however, may proceed against the bail, although the action be out of court, if it do not appear that it was out of court before the plaintiff took an assignment of the bail bond.^(f) In the Exchequer, the court on motion will stay proceedings against bail, on payment of costs, although the plaintiff has neglected to proceed against them on the bond, as early as he might have done, if the bail had any reason to think that the plaintiff did not mean to proceed in the action, such as the bankruptcy of the [*300] defendant. But when a trial has been lost, the bail *bond will be ordered to stand as a security, if the bail have not applied to stay proceedings on the earliest opportunity.^(aa)

The assignment may be made by the high sheriff, or by the under-sheriff in *his* name, and even by the under-sheriff's clerk in his office:^(bb) And as the assignment may be made, so the action may be brought, in any county.^(cc) It was formerly usual for the plaintiff to bring several actions, against the principal and his bail, upon the bail bond; but this practice being considered unnecessary and oppressive, was discountenanced by the court of King's Bench in a recent case,^(dd) where the assignee of a bail bond brought separate actions thereon, without suggesting any sufficient reason for so doing; and the court, under the discretionary power vested in them by the statute 4 & 5 Ann. c. 16, § 20, stayed the proceedings in all the actions, upon payment of the costs of one of them. The action upon the bail bond must necessarily be brought in the *same* court whence the process issued, on which the bond was taken;^(ee) otherwise the parties could not have the relief intended by the statute. This rule applies, in the King's Bench, to actions brought on the bail bond by the *sheriff* himself, as well as his assignee:^(ff) but it is otherwise in the Common Pleas,^(g) and Exchequer,^(h) where the sheriff may sue on the bail bond in a different court: And although it be irregular to bring an action on the bail bond, in a different court from that in which the original action was commenced, yet the defendant cannot take advantage of this, under the plea of *non est factum*.⁽ⁱ⁾ When the plaintiff has taken an assignment of the bail bond, he cannot proceed in the original action, so long as he retains his right to sue upon it.^(k)

The proceedings on the bail bond may be *set aside*, with costs, if irregular; or *stayed*, if regular, upon terms, at the instance of the defendant,^(l)

(e) 3 Bos. & Pul. 221.

(f) 4 Taunt. 715. And see further, as to the forfeiture and assignment of the bail bond, Petersd. Part I. Chap. VI. § 3.

(aa) 3 Price, 257. And see 7 Price, 535. 13 Price, 115, 16. 1 Younge & J. 373, *post*, 302, 303, (l).

(bb) *Per* Lord Mansfield, in *Harris v. Ashley*, Sit. Mid. M. 30 Geo. II. *French v. Arnold*, T. 5 Geo. III. 1 Str. 60, (1). 4 Campb. 36; and see 5 Barn. & Ald. 243; but see *Kilton & Fagg*, 1 Str. 60. 10 Mod. 288, S. C. *contra*.

(cc) 2 Str. 727. 2 Ld. Raym. 1455, S. C.

(dd) 2 Barn. & Ald. 598. 1 Chit. Rep. 337, S. C.

(ee) 1 Bur. 642. 2 Ken. 369, S. C. 3 Bur. 1923. Barnes, 92, 117. 3 Wils. 348. 2 Blac. Rep. 833, S. C.

(ff) 8 Durnf. & East, 152; but the action in this case had been removed from an inferior court.

(g) 1 H. Blac. 631.

(h) 8 Price, 174.

(i) 2 Campb. 396.

(k) *Eaton v. Brattie*, E. 45 Geo. III. K. B. 2 Smith R. 489, S. C. 4 Taunt. 715. 1 Chit. Rep. 394. *in notis*. 9 Price, 407.

(l) Barnes, 74.

or of the sheriff or his bail, in order that there may be a trial in the original action. And the rule for staying the proceedings may be obtained on the same day that the bail justified.^(m) The causes of irregularity are as various as the different proceedings out of which they arise. In general, the irregularity is in the writ, as that it was returnable on a day out of term,⁽ⁿ⁾ &c.; or in the affidavit to hold to bail, arrest, bail bond, or exception to bail; or that the bond was put in suit before it was forfeited.

*When a bail bond has been improperly taken, the court will [*301] order it to be delivered up to be cancelled: And the assignment of a bail bond was set aside, as having been made pending a rule to set aside proceedings for irregularity, *and to stay proceedings in the mean time*; the proceedings being suspended thereby for all purposes, till the rule was discharged.^(a) So, the proceedings on the bail bond were set aside where the assignment was taken after the defendant had given a *cognovit*, without the knowledge of the bail, for payment of the debt and costs.^(b) But when a defendant obtains a rule which stays the plaintiff's proceedings, he is not entitled, after it is discharged, to the same time for the purpose of taking the next step, as he had when he obtained the rule; though the defendant in such case should have a reasonable time allowed him, for the purpose of taking his next proceeding; and it has been determined, that the whole of the day on which the rule is disposed of, is a reasonable time for that purpose.^(c) Where the plaintiff took an assignment of the bail bond, and afterwards gave notice of exception to the bail, without entering it, the court of King's Bench held that the plaintiff's irregularity, in not entering an exception, was not waived by the defendant's having given *two* notices of justification, under one of which the bail had justified, and therefore held that the proceedings should be stayed;^(d) but they would not order the bail bond to be delivered up to be cancelled.^(d)

When the defendant has been arrested by a wrong name, the courts will order the bail bond to be delivered up to be cancelled.^(e) But it cannot be cancelled, in the King's Bench, on the ground of the plaintiff's attorney having neglected to take out his certificate;^(f) or because the place where the affidavit to hold to bail was sworn, is not mentioned in the *jurat*.^(g) So, if a non-commissioned officer has been arrested and given bail, the court of Common Pleas will not, after judgment recovered against the bail, set aside the proceedings, and cancel the bail bond;^(h) And, in that court, if the plaintiff sue out writs into two counties, and arrest the defendant, who gives bail to the sheriff in both, the plaintiff may regularly proceed on the first bail bond.⁽ⁱ⁾ In the Exchequer, when the bail do not appear to justify on the day mentioned in the notice, but on a subsequent day according to further notice, and the plaintiff, on the morning of the latter day, take an assignment of the bail bond, and sue out process thereon, the proceedings are regular, although the rule for the allowance of bail be served on the

(m) 2 Chit. Rep. 108.

(n) 1 Str. 399.

(a) 4 Durnf. & East, 176.

(b) 4 Barn. & Ald. 91. *Ante*, 295. *Post*, 305.

(c) 5 Barn. & Cres. 771; and see 4 Barn. & Cres. 970. 7 Dowl. & Ryl. 458, S. C.

(d) 1 Chit. Rep. 174.

(e) 4 Maule & Sel. 360. 1 Chit. Rep. 282. 2 Chit. Rep. 357. 8 Moore, 526. 1 Bing. 424, S. C., though it was formerly otherwise: 3 Durnf. & East, 572. 2 Bos. & Pul. 109.

(f) 1 Dowl. & Ryl. 215. *Ante*, 77.

(g) 1 Bos. & Pul. 105.

(h) 4 Taunt. 557.

(i) 2 Taunt. 67; and see 1 Chit. Rep. 392.

same day: nor is it a waiver of the assignment, that the plaintiff attended to oppose the justification of bail.(k)

*In the King's Bench, by a modern rule of court,(a) "no rule [*302] can be drawn up for staying proceedings *regularly* commenced on the assignment of a bail bond, unless the application for such rule, if made on the part of the original defendant, be grounded upon an affidavit of merits;(b) or, if made on the part of the sheriff or bail,(c) or any officer of the sheriff,(dd) be grounded upon an affidavit, showing that such application is really and truly made on the part of the sheriff or bail, or officer of the sheriff, (as the case may be,) at his or their own expense, and for his or their only indemnity, and without collusion with the original defendant." This rule, it will be observed, only applies to staying proceedings *regularly* commenced on the assignment of a bail bond: And they cannot be stayed, where the motion is made on behalf of the defendant, without an affidavit of merits, although the plaintiff has opposed the justification of bail, and received the costs of opposition.(ee) The affidavit, if made on behalf of the *defendant*, must expressly state, that he has a good defence to the action *upon the merits*; an affidavit that he has a good defence to the action merely, not being sufficient:(ff) And if the application be made by the *bail*, after notice of render has been given, the affidavit must state that the application is made *bona fide*, on their behalf:(gg) But when an affidavit of merits is produced, it is not necessary to state on whose behalf the motion is made.(hh) In the Common Pleas, on motion by the bail to stay proceedings on the bail bond, or against the sheriff, on payment of costs, the court do not require the bail to swear to merits; nor is there any distinction in this respect, whether a trial has been lost or not.(ii) In the Exchequer, when a trial has not been lost, the court on motion will stay proceedings on an assignment of a bail bond, the defendant having since put in and perfected bail, without payment of costs, or any affidavit of merits, or that the application is made in ease of the sheriff, or bail;(kk) nor will they order the bail bond in such a case to stand as a security, but only require that the plaintiff shall be put in the same situation as if the bail had justified in due time.(l) And where an attorney has become bail to the sheriff, and the bail bond has been assigned, the court will upon the usual affidavit, stay the proceedings upon the bail bond, upon payment of the costs. 1 Younge & J. 367. And they refused to order a bail bond to stand as a security, where the plaintiff had lost a trial by his own conduct, in not accepting reasonable terms offered him by the defendant.(m) But when a trial has been lost, the bail bond must stand as a security.(n) And the court will not stay proceedings on a bail bond, upon the ground that the affidavit upon which the bail above were rejected was founded on perjury, except upon the usual terms of paying the costs incurred by the assignment and subsequent proceedings. 1 Younge & J. 403.

(k) 9 Price, 5, 9.

(a) R. M. 59 Geo. III. K. B. 2 Barn. & Ald. 240. 1 Chit. Rep. 348, (a), 572, 3, (a). 2 Chit. Rep. 373, 4.

(b) Append. Chap. XIII. § 3.

(dd) *Id.* § 5.

(ff) 5 Barn. & Ald. 703.

(hh) *Id.* 572.

(kk) 11 Price, 633, 636. 13 Price, 114. McClel. 44, S. C.

(l) 3 Price, 52. 13 Price, 114. McClel. 44, S. C.

(n) 13 Price, 115, 16. *Ante*, 299, 300.

(c) *Id.* § 4.

(ee) 1 Chit. Rep. 677.

(gg) 1 Chit. Rep. 127.

(ii) 1 New Rep. C. P. 123.

(m) 8 Price, 610.

When the proceedings on a bail bond are *irregular*, or against good faith, it is not necessary to put in and perfect bail in the original action, in order to set them aside: (o) And if the defendant be *surrendered* by his bail above, though without justifying, after the time allowed them for *justification has expired, the court of King's Bench, we [*303] have seen, will stay the proceedings on the bail bond, upon payment of costs. (a) But when the proceedings are regular, and the defendant, not having been surrendered by his bail above, applies to stay them upon terms, he must in general put in and perfect bail above, before the application is made: (b) Yet, upon particular occasions, the rule to stay the proceedings may be, upon condition that the defendant shall put in and perfect bail. (c) And, whenever the defendant is guilty of a neglect, in not putting in bail in due time, by which the bail bond becomes forfeited, the notice, in case the party mean to put in bail, (in order to stay the proceedings upon the bail bond,) should be, that he will put in and *perfect* bail on such a day; when the plaintiff may oppose them in court, without its being a waiver of the bail bond. (d)

Bail above, when necessary, being put in and perfected, the court should be moved in term time, or an application made to a judge in vacation, (e) for a rule or summons to stay the proceedings on the bail bond, on payment of costs, and that in the meantime all proceedings be stayed; and it is usual to draw up the rule for the allowance of bail, with the rule or summons for staying the proceedings, and serve them both together. In the Common Pleas, notice of the intended motion should be given to the plaintiff's attorney, and "why in the meantime all proceedings should not be stayed;" otherwise the court will not add these words to the rule. (f) When the plaintiff has not lost a trial, the court in term time, or a judge in vacation, will stay the proceedings on the bail bond, upon putting in and perfecting bail above, and paying the costs incurred by the assignment of the bail bond, to be taxed by the master in the King's Bench, or prothonotaries in the Common Pleas: and also, if necessary, or the cause require it, (g) upon receiving a declaration in the original action, pleading issuably, and taking short notice of trial, so that the cause may be tried the same term. (h) But if the plaintiff has lost a trial, the court or a judge will further require the bail to consent, that the bail bond shall stand as a security, even when the defendant has been surrendered by his bail. (i) By *losing a trial* is meant, that the plaintiff has been prevented, by the neglect of the defendant to put in or perfect bail in due time, from trying his cause in, and obtaining judgment of the same term in which the writ was returnable. (k) This of course can only happen in *town* causes, or where the venue is laid in *London* or *Middlesex*; (l) and depends on the *state of [*304]

(o) 4 Moore, 149.

(a) 5 Durnf. & East, 401, 534. 7 Durnf. & East, 297, 529; and see 8 Durnf. & East, 222. *Ante*, 282.

(b) 4 Moore, 149.

(c) Cowp. 769.

(f) Imp. C. P. 7 Ed. 142.

(h) R. M. 8 Ann, *reg.* 1, (c), K. B. Cowp. 71. 1 Bos. & Pul. 334.

(i) 2 Barn. & Ald. 585. 1 Chit. Rep. 270, S. C.

(k) 1 Chit. Rep. 270, (a), 357, (a); and see 1 Dowl. & Ryl. 450. 8 Dowl. & Ryl. 140. 9 Moore, 422. 2 Bing. 227, S. C.

(l) In *country* causes, it has not been usual, on staying proceedings on the bail bond, when a trial has been lost, to require the bail to consent that the bond shall stand as a security; though there seems to be the same reason for it, as in *town* causes: and see 7

(e) *Per Buller*, J. H. 20 Geo. III. K. B.

(g) 1 Sel. Pr. 2 Ed. 188,

(y) 2 Smith, R. 13.

the proceedings, as when the writ was returnable, and declaration delivered, and whether the defendant lives more than *forty* miles from *London*; for if he do, he is entitled to *fourteen* days' notice of trial.(a) The plaintiff therefore, in opposing the rule for setting aside the proceedings on the bail bond, or for an attachment against the sheriff, must show distinctly in his affidavit, the time when his writ was returnable, and declaration delivered,(b) or filed, &c. And it is observable, that there is a difference in this respect, between actions by *bill*, and by *original* writ: In the former, the jury process being returnable on a day *certain*, the plaintiff may obtain judgment of the term, when the cause is tried at the last sitting; but in the latter, the jury process can only be made returnable on a *general* return; and therefore, when the cause is tried at the last sitting, which happens after the last general return, the plaintiff cannot have judgment till the following term.(c)

In the King's Bench, when the application is to set aside the proceedings upon the bail bond, for an irregularity, in assigning it, or, if regular, to stay them upon terms, the rule or summons and affidavit should it is said be entitled in the original cause:(d) but when the application is to stay the proceedings, for some irregularity in the process in the action upon the bail bond, the rule or summons and affidavit ought to be entitled in that action, and not in the original cause.(e) So, in the Common Pleas, the true and proper distinction seems to be, that if a bail bond has been irregularly assigned, the affidavit to set aside the proceedings upon it must be entitled in the original action; but if it has been assigned regularly, then in the action on the bail bond:(f) And, in that court, the judgment in the original action, as well as the judgments in the actions against the bail, may be set aside upon one motion and affidavit, entitled in the original action.(g) When the rule for staying the proceedings is made absolute, or a judge's order obtained upon the summons, it is incumbent on the defendant immediately to get an appointment thereon from the master in the King's Bench, or prothonotaries in the Common Pleas, to tax the costs, and to serve a copy of it upon the plaintiff's attorney; and when the costs are taxed, to pay the same without delay,(h) otherwise the rule or order will not operate as a stay of proceedings. After the proceedings have been stayed on the bail bond, the defendant cannot plead in abatement in the original action;(i) nor a plea of bankruptcy *puis darrein continuance*.(k) But, in the Common Pleas, though it was formerly usual to give judgment, on staying proceedings in an action on the bail bond, when *the
[*305] bail consented that it should stand as a security, and execution only was stayed,(aa) yet it is now holden, that the bail in such

Price, 535. 1 Younge & J. 373, by which latter case it appears that in a country cause, where the plaintiff has lost a trial, the court of Exchequer will not stay proceedings upon a bail bond, unless upon the terms of its standing as a security.

(a) Chit. Rep. 357, (a).

(b) *Id.* 271, *in notis.* Append. Chap. XIII. § 6.

(c) 1 Chit. Rep. 271.

(d) *Webb v. Mitchell*, M. 48 Geo. III. K. B.; and see 4 Durnf. & East, 689. 8 Durnf. & East, 456. *Kettle v. Woodfield*, T. 40 Geo. III. K. B.; but see 2 Chit. Rep. 109, by which it seems, that the affidavit may be entitled, either in the original cause or in the action on the bail bond.

(e) *Webb v. Mitchell*, M. 48 Geo. III. K. B.

(f) 7 Moore, 521. 1 Bing. 142, S. C.; and see Willes, 461. Barnes, 94, S. C. 1 Bos. & Pul. 337. 7 Moore, 600.

(g) 3 Bos. & Pul. 118.

(h) Imp. K. B. 10 Ed. 149. 1 Sel. Pr. 201.

(i) 2 Salk. 519. *Goss v. Harrison*, T. 44 Geo. III. K. B. 2 Bos. & Pul. 465.

(k) 4 Barn. & Ald. 249.

(aa) Barnes, 85.

case are at liberty to plead to the action on the bail bond; and consequently are entitled to a rule to plead, and demand of a plea, before judgment can be signed against them.(b)

The sheriff's bail are liable to pay what is really due to the plaintiff, though beyond the sum sworn to and costs, to the full extent of the penalty of the bond:(c) and they are liable for their own costs, as well as those of the original action. And where *several* actions are brought upon the bail bond, it is usual, in suing out execution, to apportion the debt and costs in the original action, amongst the different defendants, so as to levy a part on each, together with his own costs.(d) But the bail, it seems, are not liable beyond the penalty of the bond, where they are let in upon terms to try the cause, the bail bond standing as security; although the debt and costs exceed the penalty after the trial.(e) If the *plaintiff* die after the arrest, and before the return of the writ, the court will set aside proceedings on the bail bond.(f) And where the *defendant* dies, before the plaintiff could have had judgment against him, if there had been no delay in putting in and perfecting bail, the courts will stay proceedings on the bail bond, upon payment of costs only:(gg) But they will not relieve the sheriff's bail, upon the death of the defendant, where the plaintiff might have had judgment against him, if bail above had been put in and perfected in time.(hh) The bail cannot avail themselves of the *bankruptcy* of the defendant:(ii) And it seems, that rendering the defendant to the King's Bench prison, before the return of the writ, will not discharge his bail to the sheriff.(kk) But if the defendant or his bail become bankrupt, after the bond is forfeited, the plaintiff's demand, being proveable under the commission, is barred by the certificate.(l) The bail to the sheriff are discharged by the defendant's giving a *cognovit* without the knowledge of the bail, for payment of debt and costs.(m) And, in the case of a render in discharge of bail, the court will stay the proceedings on a bail bond without costs, if the notice of render be given before the assignment;(n) otherwise not.(o)

*If there be no bail bond, or the plaintiff be dissatisfied with the bail taken by the sheriff, it is usual to rule him to return the [*306] writ;(a)[A] and in the King's Bench, we have seen,(bb) if the bail

(b) 1 New Rep. C. P. 63.

(c) *Savage v. West*, 9 Geo. III. cited in Cowp. 71. 8 Durnf. & East, 28. 1 East, 91, *in notis*. K. B. 2 Blac. Rep. 816. 1 H. Blac. 76, C. P.

(d) It is not in general necessary, however, to bring several actions on the bail bond; and, if brought without sufficient reason, the court of King's Bench, we have seen, will only allow the costs of one action. *Ante*, 300.

(e) 2 Smith R. 354.

(f) 8 Mod. 240.

(gg) Cowp. 71. Barnes, 61, 70, 99.

(hh) R. M. 8 Ann. reg. 1, (c), K. B. Gilb. K. B. 362. Cowp. 71. Barnes, 99, 112.

(ii) 1 Ken. 504. 1 Bur. 244, S. C. *Id.* 436. *Carmichael v. Chandler*, Imp. K. B. 10 Ed. 149. 2 East, 442; but see Barnes, 105.

(kk) *Forster v. Hyde*, M. 41 Geo. III. K. B.; but see 3 Bos. & Pul. 232. *Ante*, 226.

(l) Cowp. 25; and see 4 Moore, 350. 2 Brod. & Bing. 8, S. C.

(m) 4 Barn. & Ald. 91. *Ante*, 295, 301.

(n) 2 Chit. Rep. 103; and see 2 New Rep. C. P. 85.

(o) 5 Durnf. & East, 401, 534. 7 Durnf. & East, 297, 529; and see 8 Durnf. & East, 222. *Ante*, 282.

(a) Gilb. C. P. 21. R. M. 6 Geo. II. (a), K. B. 2 Wms. Saund. 5 Ed. 61, c, (7); and see Append. Chap. XIII. § 7, 8, 9.

(bb) *Ante*, 255.

[A] In Pennsylvania, since the act of 1836, the plaintiff excepting to the bail taken by the

to the sheriff become bail above, the plaintiff cannot except to them, after he has taken an assignment of the bail bond; though it is otherwise in the Common Pleas: In the King's Bench therefore, if the plaintiff be dissatisfied with the bail taken by the sheriff, he can only proceed by ruling him to return the writ, and bring in the body; for if he were to take an assignment of the bail bond he would admit the sufficiency of the bail to the sheriff, and if they were afterwards put in as bail above, he could not except to them. But a rule to return the writ cannot be had, after the plaintiff has taken an assignment of the bail bond, if valid; for, by taking such assignment, he discharges the sheriff; (c) though if the bail bond be void, it is otherwise. (d) And where there were three defendants, two of whom were arrested and bailed, and the plaintiff took assignments of the bail bonds, and as to the third, the sheriff returned *non est inventus*, the court, under these circumstances, discharged the rule to bring in the body. (e) So it has been holden, that if the sheriff appoint a special bail to arrest the defendant, at the request of the plaintiff or his agent, he cannot be ruled to return the writ: (f) but he is notwithstanding responsible for the safe custody of the defendant after the arrest made. (g) The proper course seems to be for the sheriff, when ruled to return the writ

(c) Gilb. C. P. 21. 1 Salk. 99. 3 Bos. & Pul. 564; and see 2 Chit. Rep. 391.

(d) 1 Wils. 223. *Williams v. Jacques*, M. 24 Geo. III. K. B.

(e) 2 Chit. Rep. 391.

(f) 2 Blac. Rep. 952. 4 Durnf. & East, 119. 1 Chit. Rep. 613, 14. (a).

(g) 8 Durnf. & East, 505; and see 2 Esp. Rep. 591. 1 Chit. Rep. 614, *in notis*. 9 Moore, 71. 2 Bing. 65, S. C.

sheriff, may rule him to bring in the body, and the court can compel obedience to the rule by attachment. *White v. Filler*, 7 Barr, 533. "At the common law," says Chief Justice Gibson in this case, p. 534, "the sheriff's return to a *capias ad respondendum*, was that he had taken the defendant, and had him ready in court at the return day of the writ; and it continued to be so after the enactment of the statute 23 Hen. VI., only because it was at first supposed to be a private one, and the bond was consequently supposed to be the sheriff's private security against the consequences of setting the prisoner at large, while he was supposed to be potentially within the officer's grasp, though he would have been a trespasser had he laid a finger on him. It was, therefore thought, that as the court could not take notice of the statute where it was not pleaded, it could not recognize the validity of a return exclusively grounded upon it. Hence the form of the return has continued to be the same in England perhaps to this day, notwithstanding the grumbling of the judges at the earlier decisions, and their entire overthrow in *Samuel v. Evans*, 2 Term Rep. 569, by which the statute of the 23 H. VI. was declared, as it ought to have been at first, a public one. The history of the subject is condensed in a note to *Benson v. Welby*, 2 Saund. 155. What might have been the effect of a modification of the return on a question like the present in the English courts, it is impossible to say; but, in Pennsylvania, where the statute was always held to be a public one, the return in use, perhaps from the foundation of the province, has been '*cepi corpus* and bail bond,' and yet no one ever doubted the power of the court to rule the sheriff to bring in the body. It was put exactly on a footing with the return *paratum habeo*, which every one knew to be a fiction where the defendant was at large. Had the sheriff not produced him, he could not have been successfully sued for a false return in even the English courts; for, in *Laughton v. Gardner*, Moor, 428, in which it was held that, had he pleaded the statute as a justification, instead of confessing the falsity of his return by a demurrer, he would have had judgment. He would have it now without pleading. Under the practice in Pennsylvania, however, the return being adapted to the truth of the case on the admitted basis that the statute was a public one, there was no discrepancy. The return on the 23 H. VI. here was, as it is now, on the statute of 1836, that the sheriff had taken the defendant and a bail-bond, which differed from the one at present in use only in the form of the condition. This return to be sure, showed no compliance with the command of the writ, which was to have the defendant in court; but it showed a compliance with the legal effect of it as modified by the statute which authorized him to dispense with the letter of the mandate, and sustained the return just as an appearance within six weeks after the return of the writ, was held in *Lynn v. McMillen*, 3 Penna. Rep. 170, to sustain by force of, 4 Anne, c. 16, s. 20, the plea of *comperuit ad diem* in an action on a bail bond."

after a special bailiff has been appointed, instead of making a return, to move the court to set aside the rule to return it.(h)

The rule to return the writ is a side-bar or treasury rule. In the King's Bench, it is obtained from the clerk of the rules; and usually taken out on the return day of the writ by *bill*, or *quarto die post* by *original*, in order that it may keep pace with the time to put in bail: But it cannot regularly be taken out *before*, though dated *on* the return day,(i) or *quarto die post* by *original*.(k) In the Common Pleas, the rule to return the writ is obtained from the secondaries, and usually taken out on the first day of term, when the process is returnable on the first return; or if returnable on the second, or any subsequent return, it may be taken out on the return day of the process; being the periods from which the time for putting in bail is reckoned. But by statute 20 Geo. II. c. 37, § 2, "no sheriff shall be liable to be called upon to make a return of any writ or process, unless he be required so to do, within *six* months after the expiration of his office." Upon which statute it has been holden, in case of sheriffs, that the months are *lunar* months,(l) that the day of the *sheriff's quitting his [*307] office is to be reckoned as one;(a) and that the sheriff cannot be ruled to return the writ, after the expiration of *six* months, though requested *before*.(b) In the courts of Great Sessions in *Wales*, the prothonotaries are authorized, by a late act of parliament,(c) to grant rules for sheriffs to return writs in vacation.

The rule to return the writ, being intended to bring the sheriff into contempt must be personally served on the sheriff himself, or his under-sheriff;(d) except in *London*, *Middlesex*, and *Surrey*, where service on the deputy secondary of the compters, sheriff's deputy, or under-sheriff's agent in town, is deemed sufficient;(e) for as *six* days only are allowed, after service of the rule, to return the writ, it might otherwise be impossible to obey the rule in distant countries. In the King's Bench, the rule to return the writ expires in *four* days after service, in *London*, or *Middlesex*;(f) and in *six* days, in any other city or county.(g) And the writ should regularly be returned by the sheriff, on the day on which the rule for returning it expires, if in term: but when the rule expires in vacation, the sheriff need not return it till the first day of the ensuing term, and has the whole of that day to file his return.(hh) In the Common Pleas, the sheriff had formerly in all cases *six* days after service of the rule, to return the writ;(ii) but the time for returning it, in *town* causes, was afterwards reduced to *four* days;(kk) so that now it is the same in both courts. But, in the Common Pleas, when the rule to return a writ expires in vacation, the sheriff must file it at the return, and cannot wait till the ensuing term; the Common Pleas office being open during vacation:(ll) And this is also the practice in the Exchequer.(mm)

The sheriff being ruled to return the writ, either does, or does not return it. And where the writ is executed by the *old* sheriff while in office,

(h) 1 Chit. Rep. 614, *in notis*.

(i) 1 Durnf. & East, 552. 2 East, 242.

(l) Doug. 463. 2 Wms. Saund. 5 Ed. 47, m.

(a) Doug. 463. 2 Wms. Saund. 5 Ed. 47, q.

(c) Stat. 5 Geo. IV. c. 106, § 7.

(e) Doug. 420. 3 Durnf. & East, 351.

(g) Notice, M. 6 Geo. II. K. B.

(ii) R. H. 8 Geo. I. C. P.

(ll) Taunt. 647. 1 Marsh. 270, S. C.

(k) Per Cur. M. 42 Geo. III. K. B.

(b) 2 Durnf. & East, 1.

(d) Cas. Pr. C. P. 123. Pr. Reg. 381, S. C.

(f) R. T. 6 Geo. III. K. B. 3 Bur. 1921.

(hh) 5 East, 336. 1 Smith, R. 427, S. C.

(kk) R. H. 7 Geo. III. C. P. Barnes, 494.

(m) 9 Price, 255.

he ought to make his return to the same, and hand such writ and return over to the *new* sheriff, who comes into office before the return day; and such new sheriff will return the writ, with the old sheriff's return thereon: and if the old sheriff, after arresting a defendant, suffer him to escape, and go out of office before the return day, he is answerable for the escape.(*n*) The new sheriff, however, is not answerable for the escape of a debtor taken in execution in the time of his predecessor, and not delivered over to him by indenture, 1 Moody & M. 34. If there be no return, it is a contempt; for which the court, on a proper *affidavit*, (*o*) will grant a rule for an attachment: (*p*) and this is the constant mode of proceeding against the *late* sheriff, (*q*) as well as the *present* one; for, as to the former, he ought in strictness to have returned the writ before he was out of office, and therefore the contempt was actually committed whilst

[*308] he was a servant of the court. (*q*) But where the sheriff, on *being ruled to return a writ, gave notice to the plaintiff that the writ was lost, and that the defendant was in custody, the plaintiff should have proceeded as if the sheriff had returned *cepi corpus*; and the court of Common Pleas set aside an attachment issued against the sheriff, for not returning the writ. (*a*) The writ should regularly be returned, by the sheriff, on the day on which the rule for returning it expires; and in default thereof, the plaintiff may move for an attachment on the next day: (*b*) or, if the rule expire on the last day of term, he may move for an attachment at the rising of the court on that day; (*c*) and the rule for the attachment is regular, though the sheriff make his return on a subsequent day in vacation, before he is actually served with the rule. (*c*) In order to ascertain the time of making the return, in the King's Bench the *custos brevirum* is required to indorse on every writ, on what day, and at what hour the same was filed. (*d*)

The sheriff's return to a *capias ad respondendum* is either that the defendant is *not found* in his bailiwick, (*e*) or that he has *taken* him; and, in the latter case, it is either that he has him *ready*, (*f*) or in *custody*, (*g*) to answer the plaintiff; or, by way of excuse, that he is *sick*, (*h*) (*languidus est*), or has *escaped*, or been *rescued*; (*i*) or that the sheriff has *discharged* him, or *delivered* him over to another custody, by direction of the plaintiff, (*k*) or by order of the court; (*l*) or that he has been discharged from the arrest, under the statute 43 Geo. III. c. 46, § 2, on depositing in the sheriff's hands, the sum indorsed on the writ, with *ten* pounds in addition to answer costs, &c. And where the return to a writ of *latitat* stated, that the defendant was insane, and could not be removed without great danger, and continued so till the return of the writ to court, we have seen, (*m*) refused an attachment against the sheriff. But where the return to a writ of *latitat*

(*n*) 4 East, 604; and see 6 Taunt. 231. 1 Marsh. 554, S. C.

(*o*) Append. Chap. XIII. § 10, 11.

(*p*) N. M. 6 Geo. II. R. T. 17 Geo. III. K. B. Append. Chap. XIII. § 12, 13.

(*q*) Doug. 464.

(*a*) 1 Marsh. 289.

(*b*) R. M. 32 Geo. III. K. B. 4 Durnf. & East, 496; and see 1 Price, 338. 1 Chit. Rep. 356, (*a*).

(*c*) 11 East, 591. 1 Chit. Rep. 356, (*a*). R. T. 38 Geo. III. C. P. Post, 312.

(*d*) R. T. 30 Geo. III. K. B. 3 Durnf. & East, 787.

(*e*) Append. Chap. XIII. § 14, 17.

(*f*) *Id.* § 15, 17.

(*g*) *Id.* § 16.

(*h*) *Id.* § 21. But it does not seem to be a good return to a *capias*, that the defendant is dead. O. Bridg. 469.

(*i*) Append. Chap. XIII. § 18.

(*k*) 6 Moore, 497.

(*l*) Append. Chap. XIII. § 19, 20.

(*m*) *Ante*, 216.

stated that the defendant, upon being arrested in his own house, was confined to his bed by illness, and could not be removed without danger to his life, and continued so ill at and after the return of the writ, and for such cause the custody of the defendant was relinquished; the court were of opinion that this return was bad, though they allowed the sheriff time to amend it upon payment of costs.(n) And where the sheriff returned as follows, "I have taken the body of M. N., and kept and detained her in custody, till it appeared to me, that she had surrendered, in discharge of her bail, into the custody of the marshal, and was in his custody, to all intents and purposes, by virtue of the act for indemnifying the marshal for escapes in consequence of prisons being burnt,"(o) the court quashed the *return as bad, and would not give leave to [*309] amend it.(aa) So, where the sheriff had untruly returned to a *capias*, that he had taken the defendant, whose body remained in prison under his custody, the court of Common Pleas refused to allow him to amend his return, by striking it out, and making another, according to the fact.(b) If the sheriff return *non est inventus*, where he has or might have taken the defendant, he is liable to an action for a false return;(c) and if he return *cepi corpus, et paratum habeo*, where he has taken the defendant, and let him go at large without bail, he is liable to an action, if the defendant be not in custody, or bail above be not put in and perfected, at the return of the writ.(d) But when the sheriff has taken bail, he is not liable to an action, upon the return of *cepi corpus et paratum habeo*;(e) for it was his duty to take bail: and though the latter part of the return be not strictly true, yet this, which was the ancient return, is not altered by the statute 23 Hen. VI. c. 9. Still, however, he might have been *amerced* by the courts, upon such return, for not bringing in the body, or putting in and perfecting bail above;(f) and in the beginning of the reign of George the Second, the practice of amercing the sheriff appears to have given way to the proceeding by attachment.(g)

If the defendant reside within a *liberty*, the bailiff of which has the execution and return of writs, it is usual for the sheriff to return, that he has made his *mandate* to the bailiff of the liberty, who has given him no answer, or has returned that the defendant is not found in his bailiwick, or that he has taken the defendant and has him ready.(h) In the first case, the plaintiff is entitled to a *non omittas*, by the statute Westm. 2, c. 39:(i) In the second, if the return be false, the bailiff is liable to an action; the sheriff not being answerable at common law, for the *false* return of the bailiff:(k) In the last case, the ancient mode of proceeding was by *distringas*;(l) but it seems that the bailiff may now be called upon by *rule*,

(n) 8 Dowl. & Ry. 606.

(o) Stat. 21 Geo. III. c. 1.

(aa) *Per Cur.* T. 21 Geo. III. K. B.

(b) 7 Moore, 552. 1 Bing. 156, S. C., and see 8 Moore, 518. 1 Bing. 423, S. C.

(c) 2 Esp. Rep. 475.

(d) Gilb. C. P. 22. Noy. 39. 1 Mod. 228. 2 Mod. 178, S. C.

(e) Cro. Eliz. 624, 808, 852. Noy, 39, S. C. 1 Sid. 22, 439. 1 Vent. 55, 85. 2 Wms. Saund. 5 Ed. 60, 154. 1 Mod. 35, 57, 227. 2 Mod. 83, 177. 3 Salk. 314, 15. *Ante*, 235.

(f) Same cases as in the preceding note; and R. M. 6 Geo. II., (a), K. B. 1 Wils. 262. 1 H. Blac. 233, 4.

(g) 2 H. Blac. 434, (a); and see 2 Wms. Saund. 5 Ed. 58, (2).

(h) *Off Brev.* 216. *Ret. Brev.* 168, 9. Append. Chap. XIII. § 22.

(i) Gilb. C. P. 26. 1 Barnard. K. B. 282. 9 East, 330.

(k) Gilb. C. P. 30.

(l) *Id.* 31. Brownl. *Brev. Jud.* 35, &c. Append. Chap. XIII. § 23, 4.

to bring in the body.(*m*) If the bailiff make an *insufficient* return, he is liable to be amerced for it, and not the sheriff, by the statute 27 Hen. VIII. c. 24, § 9.(*n*)

Upon the sheriff's return of *cepi corpus, et paratum habeo*, if bail above be not duly put in, or, if put in and excepted to, they do not justify in due time, the plaintiff has his election, either to take an *assignment* of the bail bond, or to proceed against the *sheriff*, by ruling him to [*310] bring in the body ;(*o*)*and if there be no bail bond, or the plaintiff be dissatisfied with the bail taken by the sheriff, it is usual, and necessary in the King's Bench, for the plaintiff to rule him to bring in the body.(*a*) But where, on the return of *cepi corpus*, the plaintiff brought an action against the sheriff for an escape, and recovered damages, the court of King's Bench held, that he could not afterwards rule the sheriff to bring in the body, with a view to proceed in the original action for costs.(*bb*) The rule to bring in the body is a *four* day rule in *London* or *Middlesex*, and a *six* day rule in any other city or county ;(*cc*) and should be served in like manner as the rule to return the writ. In the King's Bench, it is a side bar rule, and obtained from the clerk of the rules ;(*d*) but, in the Common Pleas, it is given by the filacer who issued the process,(*e*) on a note or extract of the writ and return from the *custos brevium*, after which the rule is drawn up by the secondaries,(*f*) and served.(*g*) And there should be no delay in giving the rule : for where the sheriff had returned *cepi corpus* to a bailable writ in *Hilary* term, upon which the plaintiff proceeded no further till *Michaelmas* term following, and in the mean time the bail became insolvent, and the defendant absconded, the court of King's Bench thought it unreasonable that the sheriff should be called upon to bring in the body after such delay : and they set aside an attachment which had issued against him for not doing it.(*h*)

The intent of this rule, when the defendant is not in custody, is to compel the sheriff to put in and perfect bail above ;(*i*) And it cannot in general, be taken out until the time for putting in bail has expired ;(*k*) for it is necessary that the proceedings against the sheriff should keep pace with the times allowed for putting in and perfecting bail ; otherwise this inconvenience might ensue, that the sheriff might be fixed with the payment of the debt and costs, and upon his bringing an action against the defendant or his bail, upon the bail bond, they might plead *comperuit ad diem*. In the King's Bench, where the rule to return the writ is given on the return day, a rule to bring in the body, dated on the day of the return by the sheriff of *cepi corpus*, though issuing afterwards in the vacation, is irregular.(*l*) But where the writ, in a country cause, was returnable on the *first*

(*m*) 2 Durnf. & East, 5.

(*n*) Gilb. C. P. 30.

(*o*) *Ante*, 297.

(*a*) Wms. Saund. 5 Ed. 61, (*d*).

(*bb*) 2 Barn. & Ald. 623. 1 Chit. Rep. 393, S. C.

(*cc*) N. M. 6 Geo. II. R. T. 6 Geo. III. 3 Bur. 1921, K. B. N. H. 7 Geo. III. C. P.

(*d*) Append. Chap. XIII. § 25.

(*e*) R. T. 2 W. & M. *reg.* 1, C. P. Append. Chap. XIII. § 26.

(*f*) Append. Chap. XIII. § 27. And for the form of the rule in the Exchequer, see *id.* § 28.

(*g*) Imp. C. P. 7 Ed. 149, 155.

(*h*) 7 Durnf. & East, 452 ; and see 3 Bos. & Pul. 151. 9 East, 467.

(*i*) R. M. 6 Geo. II. (*a*), K. B. 1 Wils. 262. 1 H. Blac. 233, 4.

(*k*) 5 Duruf. & East, 479. 8 East, 525. *Spicer v. Linnel*, E. 23 Geo. III. C. P. Imp. C. P. 7 Ed. 212. 2 H. Blac. 276. 1 Price, 3, 103.

(*l*) 2 East, 241.

of June, and the sheriff was ruled to return it on the *second*, and on the *eighth* he returned *cepi corpus*, upon which the plaintiff, on the *same* day, served him with a rule to bring in the body, and on the *fifteenth* obtained an attachment, the court held the proceedings to be regular; although it was objected, that the sheriff had all the *eighth* to [*311] return the writ, and *consequently, that the rule to bring in the body should not have been served till the *ninth*: for in this case, the time for putting in bail had expired, before the service of the rule to bring in the body: (a) Agreeably to which it is now settled, that in all cases where the time for putting in bail has expired, the sheriff may be ruled to bring in the body, on the *same* day that he returns *cepi corpus*. (b)

When the sheriff is called upon to bring in the body, he must either bring it into court, (c) or put in and perfect bail above, within the time allowed him by the rule: (dd) otherwise it is a contempt, for which the court will grant an *attachment*, on an *affidavit* of the service of the rule, (ee) and that no bail has been put in; or that bail has been put in, but not perfected. (ff) an affidavit that the plaintiff's attorney had received notice of bail, not being sufficient: (g) And where, on a just cause of action against two defendants, the sheriff was served with two different rules to bring in the bodies; the court of Common Pleas held, that two writs of attachment should be issued against the sheriff, on his non-compliance with such rules. (h) But the contempt is not incurred till the day is past, on which the rule to bring in the body expires; for the sheriff has the whole of that day to bring it in, and therefore an attachment cannot be moved for till the next day: (i) And, in the King's Bench, the sheriff, we have seen, (k) is not liable to an attachment, where the defendant is rendered at any time before the expiration of the day allowed for bringing in the body; or even after the rule for bringing it in has expired. The sheriff, however, is not entitled, in that court, to the benefit of a render made after the original time for putting in bail has expired: (k) And where *two* days' time to justify is given, if bail are not justified on the last of the two days, an attachment may issue on that day. (l)

In the King's Bench, the plaintiff may move for an attachment against the sheriff, at any time after the expiration of the rule to bring in the body; and if it be obtained before the service of the rule for the allowance of bail, the sheriff is fixed. But an attachment obtained after a summons to attend before a judge, for payment of debt and costs, which was not attended by the plaintiff's attorney, is irregular: (m) And, in the Common Pleas, though the rule to bring in the body has expired, yet if the defendant justify bail *before the attachment against the [*312]

(a) *Parker & Wall*, M. 26 Geo. III. K. B. *Goodwin v. Montague*, E. 23 Geo. III. K. B. S. P.

(b) 4 Maule & Sel. 427.

(c) *Barnes*, 392.

(dd) 1 Wils. 262. R. M. 6 Geo. II. (a), K. B. 2 Wms. Saund. 5 Ed. 61, c.

(ee) 2 Marsh. 251.

(ff) Append. Chap. XIII. § 29, 30. And for the form of the rule for an attachment in K. B. see *id.* § 32, and in C. P. *id.* § 33. The affidavit upon which a motion for an attachment is founded, in the Common Pleas, must not merely state, that the officer of the sheriff was served with a copy of the rule to bring in the body, but must likewise add, that the original rule was at the same time shown to him. 1 New Rep. C. P. 121.

(g) 2 Ken. 467.

(h) 8 Moore, 162.

(i) *Rec. v. Sheriff of Essex*, H. 36 Geo. III. K. B., cited in 7 Durnf. & East, 528. 8 Durnf. & East, 464. 1 Price, 338. 1 Chit. Rep. 356.

(k) *Ante*, 282.

(l) 1 Chit. Rep. 356; and see 2 Dowl. & Ryl. 225.

(m) 5 Barn. & Ald. 746.

sheriff is moved for, it is in time to prevent the attachment.(a) And the former court will never allow any advantage to be taken of the priority of motion on the same day:(a) Therefore, if bail be brought up on the same day on which an attachment has been obtained against the sheriff, the court will permit them to justify, and set it aside.(b) But the plaintiff, in such case is entitled to the costs of moving for the attachment.(c) So, if the plaintiff has incurred the costs of instructing counsel to move for an attachment, before the defendant gives notice of his render, though he render before it is actually obtained, the Court of Common Pleas will order the costs of those instructions to be paid by the defendant, upon setting aside the attachment.(d) When a rule to bring in the body expires on the last day of term, the plaintiff is at liberty, at the rising of the court on that day, to move for an attachment in the King's Bench,(e) as well as in the Common Pleas,(f) for not bringing into court the body of the defendant: and such attachment may be accordingly issued on the following day, provided bail shall not then be perfected, or the defendant rendered in their discharge. In the Exchequer, as in the Common Pleas, though the rule to bring in the body has expired, yet if the defendant justify bail before the attachment against the sheriff is moved for, it is in time to prevent the attachment.(gg) But where bail was put in and perfected *on the same day*, but *after* an attachment had been granted against the sheriff for not bringing in the body, that court refused to set aside the attachment on payment of costs, except on the terms of the defendant pleading issuably *instantly*; taking short notice of trial, for the sittings after term; giving judgment as of the term, and letting the attachment stand as a security to the plaintiff, in the event of his obtaining a verdict.(h)

In counties *palatine*, the attachment, or other process of contempt,(i) issues against the party who is in fault; as against the chancellor of *Lancaster*, the bishop of *Durham*,(k) or the chamberlain of *Chester*, or their officers,(l) if they refuse to make a mandate to the sheriff, or to return the writ into court, after he has made his return to them; or against the sheriff, if he will not return his mandate, or bring in the body of the defendant, pursuant to his return of *cepi corpus*, &c.; for though the sheriff is not the immediate officer of the court above, he is answerable to it for contempts.

It was formerly usual, in the King's Bench, to proceed against the *late* sheriff, for not bringing in the body, by *distringas*(m) where the [*313] rule to *bring in the body had not expired before he went out of office. If it had, the contempt being then complete, an attachment was deemed the proper process:(aa) But now, by rule of that court,(bb)

(a) 1 H. Blac. 9, C. P.; and see 1 Bos. & Pul. 325. 9 East, 468. 8 Dowl. & Ryl. 137.

(b) 2 Bos. & Pul. 38; and see 1 Bos. & Pul. 334.

(c) 2 Bos. & Pul. 38, (a). 3 Bos. & Pul. 603.

(e) 11 East, 591. 1 Chit. Rep. 356, (a).

(gg) 1 Price, 103, 338.

(d) 1 Taunt. 656. *Ante*, 305.

(f) R. T. 38 Geo. III. C. P.

(h) McClell. 83. 13 Price, 262, S. C.

(i) *Flight and others v. Stanley*, M. 44 Geo. III. K. B. In this case, a *distringas* issued against the bishop of *Durham*, being a peer, instead of an attachment, for not returning a writ.

(k) 1 Sid. 92.

(l) Andr. 191; and see Doug. 749. 3 East, 131.

(m) Trye, 144, 5. 2 Lil. P. R. 510. 5 Bur. 2726. Doug. 464. For the form of a *distringas* against the constable of *Dover* Castle, being a peer, to compel him to bring in the body, see Append. Chap. XIII. § 31.

(aa) *Skcat v. Scrivens*, M. 31 Geo. III. K. B.

(bb) R. T. 31 Geo. III. K. B. 4 Durnf. & East, 379; and see 2 Wms. Saund. 5 Ed. 61, e.

“where any sheriff, before his going out of office, shall arrest any defendant, and a *cepi corpus* shall afterwards be returned, he shall and may, within the time allowed by law, be called upon to bring in the body, by a rule for that purpose, notwithstanding he may be out of office, before such rule shall be granted.” A similar practice has also prevailed in the Common Pleas: (c) And in that court, a sheriff who is ruled on the last day of term, but goes out of office before the next term, is liable to an attachment, for not bringing in the body. (d)

The *distringas* against the *late* sheriff was a judicial writ, issuing out of the King’s Bench office by *bill*, or filacer’s office by *original*, and directed to his successor; commanding him to *distrain* the *late* sheriff, by all his lands, &c., so that he might have the defendant’s body in court, to answer the plaintiff. (e) This writ must have been made returnable on a day *certain* or *general* return, according to the former proceedings; (f) and must have lain four days *exclusive* in the sheriff’s office: but it need not have been left there *before* the return, it being deemed sufficient to leave it *on* the return day. (g) Upon the first *distringas*, the sheriff, to whom it was directed, levied issues to the amount of forty shillings, which the plaintiff moved to increase; and if the debt were small, the court would order the whole of it to be levied, with costs, upon an *alias distringas*; but otherwise the plaintiff moved again to increase the issues, and sued out a *pluries distringas*, &c.: and when issues were returned, to the amount of the debt and costs, the plaintiff moved for a sale of them, under the statute 10 Geo. III. c. 50 § 3. (h)

By the statute 3 Geo. I. c. 15, § 8, it is enacted, that “if any high sheriff of any county of *England* or *Wales*, shall happen to die before the expiration or determination of his year, or before he be lawfully superseded, in such case the under-sheriff, or deputy-sheriff by him appointed, shall nevertheless continue in his office, and shall execute the same, and all things belonging thereunto, in the name of the deceased sheriff, until another sheriff be appointed for the said county and sworn, in manner as therein is directed; and the said under-sheriff, or deputy-sheriff, shall be answerable for the execution of the said office in all *things, and to all respects [*314] intents and purposes whatsoever, during such interval, as the high sheriff so deceased would by law have been, if he had been living; and the security given to the high sheriff so deceased, by the said under-sheriff and his pledges, shall stand, remain and be a security to the king, his heirs and successors, and to all persons whatsoever, for such under-sheriff’s due performance of his office, during such interval.” On this statute, a rule for an attachment against an under-sheriff, on the death of the sheriff during his year, is not absolute in the first instance. (a) And where two sheriffs had been ruled to bring in the body, and then one of them died, the court granted an attachment against the surviving sheriff only. (b) Before the making of the statute 7 Geo. IV. c. 17, the office of sheriff in the county palatine of

(c) Barnes, 102.

(d) 1 H. Blac. 629.

(e) Brownl. *Brev. Jud. Thes. Brev. and Off. Brev. tit. Distringas*: and see Append. Chap. XIII. § 23, 4.

(f) Trye, 144, 5.

(g) *Per Cur.* II. 23 Geo. III. K. B.

(h) 5 Bur. 2726, 7. The mode of proceeding by *distringas* against the *late* sheriff, on *mesne* process, is obsolete, in consequence of the rule and practice before stated; but it may still, it seems, be used against the *bailliff* of a liberty, for not bringing in the body. *Ante*, 309.

(a) 2 Chit. Rep. 389.

(b) *Willie v. Benwell*, T. 25 Geo. III. K. B.

Durham, being held by grant of the bishop of *Durham* for the time being, during the pleasure of the same bishop, became vacant upon his decease: But now, by that statute,^(c) “no grant or appointment of or to any office or employment, concerning the administration of justice in the said county palatine, shall cease, determine or be void, by reason of the death of any such bishop; but every such grant and appointment shall continue in full force, for the term of *six* calendar months after any such death, unless in the mean time determined by any succeeding bishop of the said see.”

The attachment^(d) is a criminal process, directed to the *coroner*, when it issues against the *present* sheriff; or when against the *late* one, to his successor: and, in the King's Bench, it must be made returnable on a *general* return, though the original process was at a day *certain*.^(e) The attachment may be moved for on the *last* day of term;^(f) and until it be granted, the proceedings, in the King's Bench, are on the *plea* side of the court, and must be entitled with the names of the parties: But as soon as the attachment is granted, the proceedings are on the *crown* side, and from that time the king is to be named as the prosecutor.^(g) If the coroner or sheriff, being called upon by rule,^(hh) neglect to return the attachment, he may be attached himself; and the attachment against the *coroner* should be directed to *elisors*, named by the master in the King's Bench, or prothonotaries in the Common Pleas.⁽ⁱ⁾ If *cepi corpora* be returned to the attachment, the mode of proceeding, for obtaining payment of the debt and costs, is by moving the court for writs of *habeas corpora*,^(k) to bring up the bodies of the sheriffs, before one of the judges at chambers, to answer to such matters as shall be there alleged against them;^(l) which is

a motion of course, and may be made without an affidavit.^(l)

[*315] *When the sheriff is fixed for a contempt, he is liable, in like manner as his bail upon the bail bond, to the payment of what is really due to the plaintiff, though beyond the sum sworn to and costs, to the full extent of the penalty of the bond:^(a) And he cannot relieve himself, by payment of the debt sworn to and indorsed on the writ, since the statute 43 Geo. III. c. 46, § 2, having neglected to take the money at the time of the arrest, as directed by that act; but must pay the whole debt and costs:^(b) neither can he be relieved on the ground of the defendant's *death*, after the contempt was incurred, and before the attachment issued.^(cc) But he is not liable beyond the penalty of the bond:^(dd) And where an attachment issues in an action against the acceptor of a bill of exchange, the sheriff is not liable thereon, to pay the costs in actions against the drawer or indorsers.^(ee)

If a party has a right to enforce payment of his debt against the sheriff, he

(c) § 2.

(e) 1 Str. 624.

(g) 3 Durnf. & East, 133, 253. 7 Durnf. & East, 439, 528. 2 East, 182. 12 East, 165; and see 5 Barn. & Cres. 389. 8 Dowl. & Ryl. 149, S. C. 2 Bos. & Pul. 517, (a), C. P.

(hh) Append. Chap. XIII. § 37, 8.

(i) 2 Blac. Rep. 911, 1218. Append. Chap. XIII. § 42.

(k) Append. Chap. XIII. § 43, 4.

(l) 1 Chit. Rep. 249.

(a) 7 Durnf. & East, 370. 8 Durnf. & East, 28. 1 H. Blac. 233, 543, C. P.

(b) 9 East, 316.

(cc) 3 Durnf. & East, 133.

(dd) 3 East, 604; and see Doug. 464. *Starkey v. Poole*, E. 25 Geo. III. K. B. *Eyre v. Bull*, same term, K. B. See also, 4 Durnf. & East, 433. 2 H. Blac. 36, 547. 1 Taunt. 218. 3 Stark. N. Pri. 168. 8 Moore, 27. 3 Bing. 56. 10 Moore 324, S. C. 1 Younge & J. 285, as to the liability of the sheriff, in an action on the case, for taking insufficient pledges in *replevin*.

(ee) 2 Barn. & Ald. 192.

must pursue it within a reasonable time, and not lay by so long as that by his laches the sheriff shall be deprived of his remedy over against the debtor: Therefore, where the rule for an attachment against the sheriff, for not bringing in the body, was obtained on the 11th of *February*, which attachment was returnable on the 4th of *May*, and the plaintiff did not issue the attachment till the 3d of *May*, and in the mean time the defendant became bankrupt on the 19th of *March*, by which means the sheriff lost his opportunity of paying the debt, and proving it under the commission, the attachment was set aside for such laches: (f) And on a similar ground, it is holden that a *cognovit*, for payment of the debt and costs by instalments, discharges the sheriff: although it was agreed that the right of moving for an attachment against him should remain with the plaintiff as a security, in case any of the instalments should not be paid. (g) But where the plaintiff, at the desire of the sheriff's officer, forbore to enforce an attachment in the first instance, and two days afterwards applied to the sheriff for the debt and costs; the court of Common Pleas held, that the sheriff was not discharged by the indulgence given to the officer. (h) So, where the rule to bring in the body, served on the 5th *July*, expired on the second day of *Michaelmas* term, two judges of that court held that the sheriff was not discharged, by the plaintiff's having, on the 7th *July* preceding, and previously to the justification of bail, consented to an order to stay proceedings, on payment of debt and costs within a month. (i) *And in general, [*316] the court will not set aside an attachment against the sheriff on the ground of delay, unless there have been gross laches on the part of the plaintiff, to the prejudice of the sheriff. (a)

If the proceedings against the sheriff are *irregular*, they may be set aside, with costs; (b) or, if *regular*, may be set aside or stayed upon terms, by the favour and indulgence of the court, in order to let in a trial of the merits, for the benefit of the sheriff, (c) or of the defendant, or his bail. (d) But, in the King's Bench, by a late rule of court, (e) "no rule can be drawn up for setting aside an attachment regularly obtained against a sheriff, for not bringing in the body, unless the application for such rule, if made on the part of the original defendant, be grounded upon an affidavit of merits; (ff) or, if made on the part of the sheriff or bail, (gg) or any officer of the sheriff, (g) be grounded upon an affidavit, showing that such application is really and truly made on the part of the sheriff or bail, or officer of the sheriff, (as the case may be,) at his or their own expense, and for his or their only indemnity, and without collusion with the original defendant;" which rule was adopted, in a late case, by the court of Common Pleas. 1 Moore & P. 177, 4 Bing. 427, S. C. This rule applies only to motions

(f) 9 East, 467. 3 Bos. & Pul. 151. 1 Taunt. 111, *accord*. and *vide ante*, 310.

(g) 1 Taunt. 159; and see 4 Taunt. 456. 5 Taunt. 319. 1 Marsh. 59, S. C. Wightw. 121. 4 Barn. & Ald. 91. 1 Dowl. & Ryl. 163. 9 Moore, 695. 2 Bing. 366, S. C. *Ante*, 295, 301, 305.

(h) 1 Taunt. 489; and see 1 Dowl. & Ryl. 388.

(i) *Per Best*, Ch. J. & *Gaselee*, J. *dissentientibus Park & Burrough*, Justices, 2 Bing. 366. But on a subsequent day, it appears, *Best*, C. J. said, that upon payment of costs, the court would consent to make the rule absolute, for setting aside the proceedings. *Id.* 369.

(a) 2 Chit. Rep. 58.

(b) *Ante*, 257, 310, 312, 315.

(c) 2 H. Blac. 235.

(d) *Goodwin v. Montague*, E. 23 Geo. III. K. B. 1 Chit. Rep. 237; and see 2 Wms. Saund. 5 Ed. 61, f.

(e) R. M. 59 Geo. III. K. B. 2 Barn. & Ald. 240. 1 Chit. Rep. 348, (a), 572, 3, (a). 2 Chit. Rep. 373, 4; and see 7 Durnf. & East, 239. 3 Maule & Sel. 299. 1 New Rep. C. P. 123.

(ff) Append. Chap. XIII. § 45.

(gg) *Id.* § 46.

for setting aside attachments *regularly* obtained: *(h)* And if the affidavit be made on behalf of the sheriff or bail, it must comply with the terms of the rule: Therefore, an affidavit which did not state that the application was made at the expense of the bail, and for their *only* indemnity, was deemed insufficient. *(i)* The affidavit in such case should regularly be made by the defendant himself. *(k)* And, the court will not set aside an attachment against the sheriff, for not bringing in the body, on payment of costs, upon an affidavit that the plaintiff purposely prevented the defendant's being retaken after a rescue, and that the application was by the sheriff himself, without negating the fact of his having an indemnity. *(l)* If an affidavit of merits however be produced, it is not necessary to state on whose behalf the motion is made. *(m)*

The practice, when the sheriff has been fixed, is to move for a rule to show cause why, on putting in bail, the proceedings against him should not be set aside; and to have the bail ready to justify, when the rule is disposed of. *(n)* If the plaintiff has not lost a trial, the court will set aside the proceedings, upon putting in and perfecting bail above, and [*317] payment of costs: *(aa)* But if a trial has been lost, the court will further require, that the attachment shall remain in the office, and stand as a security to the plaintiff for the sum recovered: *(bb)* And it seems, that the attachment shall stand as a security, as well as the bail bond, where a trial has been lost, although the defendant has been surrendered in discharge of his bail. *(cc)* On setting aside a regular attachment, on payment of costs, the question whether or not the attachment shall stand as a security, depending upon the fact whether a trial has been lost, it is for the plaintiff, who seeks to qualify the rule, to show by his affidavit the necessary facts, such as the day of the delivery of the declaration, &c. which may entitle him so to do: *(d)* And where the court ordered an attachment against the sheriff, of which he had regular notice, to stand as a security to the plaintiff for the debt and costs, and the sheriff, in the next term, applied to discharge that part of the rule which related to the attachment standing as a security, urging that he was no party to the rule, the court held the application to be too late. *(e)*

When the sheriff has been guilty of a breach of duty, in discharging the defendant out of custody, without the plaintiff's assent, upon his *own* undertaking to appear and put in bail, or by taking money from him, instead of a bail bond, the court will not assist the sheriff, by staying the proceedings in an action for an escape, or by setting aside the attachment upon an affidavit of merits, and payment of costs; *(f)* and it is now decided,

(h) 1 Chit. Rep. 446. *Ante*, 302.

(k) *Id.* 722.

(m) 1 Chit. Rep. 572; and see *id.* 720, 21. *Ante*, 302.

(n) 1 Bos. & Pul. 334, *per Buller, J.*

(aa) 4 Durnf. & East, 352. 2 H. Blac. 235. *Ante*, 303.

(bb) *Gravett v. Williams*, T. 15 Geo. III. K. B., cited in 4 Durnf. & East, 352. 1 Chit. Rep. 237, 270, 357.

(cc) 1 Chit. Rep. 270, *(a)*. *Nias v. Gray*, M. 57 Geo. III. K. B. there cited, *contra*: and see 8 Dowl. & Ryl. 137.

(d) 5 Taunt. 606. 1 Chit. Rep. 271, *in notis.* *Ante*, 304. And for what is meant by losing a trial, see *id. ibid.*

(e) 1 Chit. Rep. 180.

(f) 7 Durnf. & East, 109, 239. 2 Barn. & Ald. 354. 1 Chit. Rep. 68, S. C.; and see 1 Chit. Rep. 567, *(a)*, 721. 2 Chit. Rep. 93. 4 Dowl. & Ryl. 155. 1 Bos. & Pul. 225. 1 Taunt. 119. 6 Taunt. 554. 2 Marsh. 261, S. C. 6 Moore, 111. 7 Moore, 552. 1 Bing. 156, S. C.; but see 1 Price, 103. 5 Barn. & Cres. 244, *contra.* *Ante*, 236, 282, 3.

(i) 1 Chit. Rep. 347.

(l) 1 Barn. & Ald. 192.

that he cannot, after paying the debt and costs, maintain an action against the defendant, for money paid.(g) But, if he has taken a bail bond, he may resort to the defendant or his bail, by putting it in suit against them: though, in general, the money is paid by the officer, on issuing the attachment, and he brings the action on the bail bond, in the sheriff's name.(h) In an action on a bail bond, if the issue depend on the date of the appearance, the court of Common Pleas, upon an application by the plaintiff, will order the *day* of the appearance, to be entered in the filacer's book; although, before the application to the court, issue has been joined on the plea of *comperuit ad diem*:(i) And where bail above were put in but not justified, and the sheriff being fixed, brought an action on the bail bond, *to which the defendant pleaded *comperuit ad diem*, that court, [*318] on motion by the sheriff, ordered the recognizance of bail in the original action to be taken off the file; though the defendant alleged, that the sheriff was fixed through his own negligence: for that should have been the subject of a motion to stay proceedings on the bail bond.(a)

*CHAPTER XIV.

[*319]

Of the PROCEEDINGS in ACTIONS, by and against ATTORNEYS and OFFICERS, in the COURTS of KING'S BENCH, COMMON PLEAS and EXCHEQUER; and of the RECOVERY and TAXATION of their COSTS.

THE proceedings in actions against defendants when at large, and mode of bringing them into court, in *ordinary* cases, having already been considered; I shall next proceed to show whatever is *peculiar* to the proceedings in actions by and against *attorneys*, who are supposed to be already in court, and against *prisoners* in the actual custody of the *sheriff*, &c. or of the *marshal* of the King's Bench, or *warden* of the Fleet prison.

Attorneys, we have seen, may sue by *attachment* of privilege, and must be sued by *bill*.(aa)[A] In the King's Bench, the *attachment* of privilege,

(g) 8 East, 171.

(h) 2 Wms. Saund. 61, f. And see Petersd. Part I. Chap. XV. as to the right of the bail against their principal, and against each other; and a surety's right against the bail.

(i) 1 Taunt. 23. Ante, 236; and see 9 Price, 406.

(a) 6 Taunt. 167. 1 Marsh. 520, S. C.

(aa) Ante, 80.

[A] By the common law, attorneys are privileged from arrest on mesne process, and are entitled to be proceeded against by bill. *Scott v. Alstyn*, 9 Johns. 216. And this privilege continues, unless it be taken away by rule, though the attorney do not show that he has acted as such within a year. *Ogden v. Hughes*, 2 South. 718. If an attorney or counsellor be taken on a *ca. sa.* during his attendance in court, having business to transact there, he may be discharged on motion and affidavit, &c. *Secor v. Bell*, 18 Johns. 52. A judge, at the circuit, may also discharge him, under the like circumstances. *Ib.* So also a counsellor of the Supreme Court is privileged from arrest during the sitting of the court, though not in actual attendance. *Sperry v. Willard*, 1 Wend. 32. *Commonwealth v. Ronald*, 4 Call, 97. But a counsellor is not privileged from arrest while attending a master, examiner, or judge, out of court. *Cole v. McLellan*, 4 Hill, 59; nor while he remains at home, though such arrest prevents his contemplated attendance at court. *Cory v. Russell*, 4 Wend. 204.

Where an attorney on being arrested, does not mention his privilege, but requests the officer to obtain a bail bond, and executes it, he waives his privilege. *Cole v. McLellan*, 4

at the suit of an attorney, is in nature of a *latitat*:(b) therefore, in replying it to a plea of the statute of limitations, the plaintiff must set forth the continuances.(c) And an attachment of privilege is not a continuance of a bill of *Middlesex*, so as to avoid the statute of limitations.(d) In the King's Bench, it is a rule, that "every attorney shall leave a *præcipe*(e) with the signer of the writs, containing the defendant's names, not exceed-four in each writ, with the return, and day of signing such writ, and the agent's or attorney's name who sued out the same: and that all such *præcipes* shall be entered on the roll, where the *præcipes* of *latitats*, and all other writs issuing out of this court, are entered; and the officer that signs the writs in this court, shall not sign such attachment, till a *præcipe* be left with him for that purpose."(f) But when an attorney sues by attachment of privilege, his name need not be indorsed on the writ: for the 2 Geo. II. c. 23, § 22, which requires the name of the plaintiff's attorney to be indorsed on the writ, only extends to cases where the attorney sues for another person.(g) And an attorney, plaintiff, may sue by common process, and indorse his own name on the copy as the

[*320] *attorney, and may afterwards declare by another attorney.(aa) If an attorney sue by attachment of privilege, for words spoken in *Wales*, and the venue be laid there, and the plaintiff do not recover a verdict for ten pounds, it may be suggested on the roll, that the defendant was resident in *Wales*, &c. in order to entitle the defendant to enter a nonsuit, under the statute 13 Geo. III. c. 51, § 1, 2:(bb) but if the venue had been laid in *Middlesex*, it might have made a difference.(bb)

In the Common Pleas, an attachment of privilege is in nature of an original writ;(cc) and must have fifteen days between the *teste* and return.(dd) This writ should regularly be returnable on a day certain, in full term:(ee) But where it was made returnable after the *essoins* day, and before the *quarto die post*, the court allowed it to be amended, on payment of costs.(ee) And, being in nature of an original writ, it is sufficient, when replied to a plea of the statute of limitations, to show the *teste* of it, without the continuances.(ff) It is a rule in this court,(gg) that "no

(b) 1 Show, 367; and see Append. Chap. XIV. § 2, 4, 6.

(c) Carth. 144. 1 Show. 366, 7. 2 Salk. 430, S. C.

(d) 3 Durnf. & East, 662; but see Willes, 259, (a). And for the entry of an attachment of privilege on the roll, to save the statute, in K. B., see Append. Chap. XIV. § 7.

(e) Append. Chap. XIV. § 1, 3.

(f) R. H. 20 Geo. II. K. B.; and see 1 Ken. 394.

(g) 4 Durnf. & East, 275.

(aa) 7 Durnf. & East, 35.

(bb) 6 Durnf. & East, 500. This determination was before the stat. 5 Geo. IV. c. 106, § 19, 20, by which the above act of parliament was repealed, and other provisions substituted in lieu thereof.

(cc) Append. Chap. XIV. § 10.

(dd) Barnes, 410. Cas. Pr. C. P. 149, S. C.

(ee) 6 Moore, 113. 3 Brod. & Bing. 25, S. C.

(ff) 1 Wils. 167.

(gg) R. T. 9 W. III. C. P.; and see R. T. 29 Car. II. reg. 3, C. P.

Hill, 59. The sheriff cannot take notice of his privilege, nor can he discharge him from his custody under process of the court, on his producing a writ of privilege; and if he do so, he is liable, as for an escape for the amount of the debt, and interest, and also for the poundage, if the plaintiff has paid any. *Secor v. Bell*, 18 Johns. 52. *Sperry v. Willard*, 1 Wend. 33.

Since the passing of the statute of New York, of April, 1813, all officers of the Supreme Court, courts of Common Pleas and Chancery, are liable (except during the actual sitting of such courts,) to arrest on mesne process, and may be held to bail like other persons. *Secor v. Bell*, 18 Johns. 52. And they now stand on the same ground as other persons, with respect to costs; and if sued by bill during term, and less than fifty dollars is recovered, they are not liable for costs. *Foster v. Gurnsey*, 13 Johns. 465.

attorney shall sue out an attachment of privilege at his own suit, nor shall the same be sealed, unless it be first stamped or signed by the clerk of the warrants or his deputy, for which no fee is to be paid, to the intent to show that such person is an attorney of this court duly entered and continued on the roll of attorneys." And there is another rule,^(h) similar to that in the King's Bench, that "every attorney, who shall sue out a writ of privilege against any defendant, shall leave a *præcipe*⁽ⁱ⁾ at the prothonotaries' office, with the defendant's names, not exceeding *four* in the whole, and the return day thereto, and the day of signing the same, together with the agent's or attorney's name who sues out the same; and that such *præcipe* shall be entered by the prothonotaries upon a remembrance roll, in their respective offices, to be kept for that purpose, without fee or reward; and that the prothonotaries do not sign any attachment of privilege, without such *præcipe* be left in the office, at the time of signing thereof." The practice therefore, as governed by these rules, is to take the *præcipe* and writ to the prothonotaries' clerk, who will sign the writ *gratis*, keping the *præcipe*; after which the writ is marked by the clerk of the warrants, and then sealed.

An attorney was formerly permitted to hold the defendant to special bail, upon an attachment of privilege, for fees or disbursements, however trifling.^(k) But now, since the statutes for preventing frivolous and vexatious arrests, the defendant cannot be arrested and holden to special bail, upon an attachment of privilege, or any other process, unless the cause of action amount to *twenty* pounds or upwards. Where it is under that amount, *the defendant must be served with a copy of the [*321] process, and notice to appear, as in other cases.

In the King's Bench, the time allowed for declaring upon an attachment of privilege, is the same as upon a bill of *Middlesex* or *latitat*, &c. And if an attorney sue out an attachment of privilege, and deliver or file his declaration,^(a) and give notice thereof, *four* days exclusive before the end of the term wherein the attachment is returnable, the defendant must plead as of that term; the plaintiff having entered a rule to plead, and demanded a plea: but if he do not declare within that time, the defendant may imparl to the next term; and if he do not declare before the essoin day, the defendant will have an imparlance to the term following.^(b) In the Common Pleas, if the attachment of privilege require only a common appearance, it must be entered, on a proper *præcipe*,^(c) with the prothonotaries; and if it require special bail, the clerk of the dockets prepares the bail-piece,^(d) and attends the court or a judge when the recognizance is entered into, as the filacer does in other cases, and the bail justify, or fresh bail is added, in the same manner.^(e) In the Exchequer, the declaration, at the suit of an attorney or side clerk, begins by stating the character in which he sues; and omits the *quo minus* clause, in the conclusion.^(f)

In proceeding against attorneys and officers of the court, the *bill*, which

(h) R. H. 11 Geo. II. *reg.* 2, C. P. 2 Blac. Rep. 919.

(i) Append. Chap. XIV. § 9.

(k) R. M. 1654, § 9, K. B. R. M. 1654, § 12, C. P. Gilb. K. B. 246. Gilb. C. P. 36.

(a) For the beginning of a declaration, at the suit of an attorney, in K. B., see Append. Chap. XIV. § 8. In C. P. *id.* § 14.

(b) R. M. 5 Ann. *reg.* 3, a. K. B. Gilb. K. B. 346.

(c) Append. Chap. XIV. § 12.

(e) Imp. C. P. 7 Ed, 541.

(d) *Id.* § 13.

(f) Append. Chap. XIV. § 17.

is the foundation of the action, is a complaint in writing, describing the defendant as being *present in court*; (g) and generally concludes with a *prayer of relief*, though the declaration upon the bill is not demurrable for want of it. (hh) In the King's Bench, the bill against an attorney could formerly have been filed in term time only, *sedente curiâ*, and not in vacation. (i) But now it may be filed in vacation, as well as in term time: (k) And where the cause of action arises after term, there should be a special *memorandum*, stating the day of bringing the bill into the office of the clerk of the declarations. (l) If a bill however, filed against an attorney of that court in vacation, be entitled of the preceding term, and the defendant plead the statute of limitations, he may show when it was in fact filed. (m) The filing of a bill is considered as the commencement of an action against an attorney without notice being served upon him. [A] And where, in an action against an attorney for goods sold, the plaintiff proved that he filed his bill at a certain time in the forenoon, and the [*322] defendant gave in *evidence a receipt for the sum demanded, dated the same day; the judge at *nisi prius*, held that this was no answer to the action, without proof that the payment was made before the filing of the bill. (a) Where the bill against an attorney was entitled of the term generally, being before the cause of action accrued, the court of King's Bench on motion allowed it to be amended, after a writ of error brought, by inserting a special *memorandum* of the day of filing the same; and gave the plaintiff leave to carry in a new roll, agreeably to the amended bill, and to make the transcript conformable to such new roll, on payment of costs. (b) But such an amendment cannot be made, after the proceedings are entered on record, without leave of the court: (c) and in one case, they gave the defendant leave to plead *de novo*, upon terms. (d)

In the King's Bench, it is usual in practice to file the bill with the clerk of the declarations, (e) in the King's Bench office; and to deliver a copy of it, to the defendant, or his known agent, (f) with notice thereon to

(g) 1 Wms. Saund. 5 Ed. 28, c. 202. 2 Wms. Saund. 5 Ed. 415, b; and see Append. Chap. XIV. § 18, 19.

(hh) Andr. 247.

(i) 2 Salk. 544. 12 Mod. 163. Gilb. K. B. 346.

(k) Doug. 313. *Law, administrator, v. Wheat*, M. 23 Geo. III. K. B. 5 Durnf. & East, 173; and see 8 Durnf. & East, 643, 4. 2 H. Blac. 608. 1 Taunt. 126. 2 Wms. Saund. 5 Ed. 1, (1).

(l) 5 Durnf. & East, 325; and see 7 Barn. & Cres. 406. Append. Chap. XIV. § 21.

(m) Peake's Cas. Ni. Pri. 3 Ed. 275.

(a) 3 Campb. 331.

(b) 7 Durnf. & East, 474.

(c) *Id. ibid.* 1 Chit. Rep. 336; but see 1 Maule & Sel. 232. 2 Barn. & Ald. 472. 1 Chit. Rep. 277, S. C. 10 Moore, 194. 2 Bing. 469. 1 McClell. & Y. 202, S. C.

(d) 1 Chit. Rep. 45.

(e) This officer is appointed to receive and make an entry of declarations and bills filed in this court; to deliver out the former, and to file and keep the latter; for which he is entitled to a fee of two shillings *per term*, from every attorney. R. M. 15 Car. II. reg. 3. R. E. 19 Car. II. K. B.

(f) Imp. K. B. 10 Ed. 501. But such agent is not bound to accept it. *Per Cur.* E. 39, Geo. III. K. B.

[A] Whether an attorney is sued by writ or by bill in New York, he was formerly equally entitled to personal service of the declaration, and notices of all subsequent proceedings. *Bridgeport Bank v. Sherwood*, 16 Johns. 43. *New York State Bank v. Wood*, 10 Wend. 594. *Brown v. Childs*, 17 Johns. 1. *Lawrence v. Warner*, 1 Cow. 198. *Aliter*, when a counsellor is sued. *Sperry v. Willard*, 1 Wend. 32. But if an attorney be sued with another person, he is not entitled to be served with the papers in the cause, if he do not give notice of defending. *Chenango Bank v. Root*, 4 Cow. 126. *Stewart v. Salter*, 1 Halst. Dig. p. 97, 2d Ed.

plead in *four* days;(*g*) which notice has been deemed sufficient, though he reside more than *twenty* miles from *London*:(*h*) Or, if the defendant's name and place of abode be not entered in the master's book kept for that purpose, a copy of the bill may be stuck up in the office; although his name and place of abode be entered in the book containing a list of certificates.(*ii*) And if the bill be filed, and a copy thereof delivered, *four* days exclusive before the end of the term, including *Sunday*,[A] the defendant must plead as of that term; the plaintiff having entered a rule to plead, and demanded a plea: but if the bill be not filed, and copy delivered, within that time, the defendant is entitled to an imparlance:(*kk*) and where the defendant was served with a copy of the bill, before the bill itself was filed, the proceedings were set aside for irregularity.(*ll*) The bill and copy were required, by the general stamp acts,(*mm*) to be written in the *usual* and accustomed manner: and therefore, the copy of a bill filed against an attorney, partly printed and partly written, on one sheet of paper, stamped with a *four*-penny stamp, which contained several printed counts, two of them being struck out, and was otherwise obliterated, and exceeded seventeen common law folios, was held to be irregular; and it appearing that the bill was framed in the same manner, with the same obliterations, *the court set aside the proceedings alto- [*323]
gether.(*a*) The rest of the proceedings, by and against attorneys of the King's Bench, are the same as in other cases.

In the Common Pleas, a bill may it seems be filed against an attorney, to avoid the statute of limitations, in *vacation*, as well as in term time:(*b*) And after it is filed, if the defendant do not, on being publicly called in court, appear thereto, judgment is given against him, that he stand forejudged from exercising his office of attorney, for his contumacy:(*c*) upon which he is struck off the roll of attorneys; and being no longer entitled to his privilege, he may be proceeded against as a common person. Formerly, no bill could have been filed against an attorney or officer of the Common Pleas, to be called in court, in order to a forejudger, until the bill was actually entered upon record, and a number roll put thereon.(*d*) This rule however appears to be disused:(*e*) and at present, the practice is to prepare a bill(*f*) against the defendant, which is delivered to one of the criers, by whom the defendant is to be thrice called in open court, with an intimation that he will be forejudged, if he do not appear: after which, the bill is entered with the prothonotaries: and a rule being given thereon by the secondaries, for the defendant's appearance, the bill should be filed in the prothonotaries' office till the rule is out, and afterwards with the *custos breviarum*.(*gg*) And it is a rule, that "where any bill shall be filed against an attorney of this court, no forejudger shall be entered against

(*g*) Append. Chap. XIV. § 20.

(*h*) 5 Durnf. & East, 369.

(*ii*) ——— v. *Hough*, one, §c. T. 42 Geo. III. K. B.

(*kk*) R. M. 5 Ann. reg. 3 a. K. B. Gilb. K. B. 346.

(*ll*) *Constable v. Edwards*, E. 40 Geo. III. K. B.

(*mm*) 18 Geo. III. c. 149. *Sched.* Part II. 55 Geo. III. c. 184. *Sched.* Part II. in *principio*. But the stamp duties imposed by these acts, were repealed by the statute 5 Geo. IV. c. 41.

(*a*) 1 Maule & Sel. 709; and see 12 East, 294. 1 Dowl. & Ry1. 562.

(*b*) *Ante*, 27. 6 Taunt. 347, 8, 355. 2 Marsh. 50, 52, 56, S. C.

(*c*) For the *form* of the entry of this judgment, see Append. Chap. XIV. § 27.

(*d*) R. T. 21 Car. II. reg. 2, C. P.

(*e*) Imp. C. P. 7 Ed. 547.

(*f*) Append. Chap. XIV. § 24.

(*gg*) Cas. Pr. C. P. 4.

[A] See *Anony.*, 2 Hill's N. Y. Rep. 376, note by reporter. Woolrich on Legal Time, p. 66, 71, 89.

him upon such bill, for want of appearance, if the action be laid in *London* or *Middlesex*, and such attorney reside within *twenty* miles of *London*, until *four* days after notice in writing, of filing such bill, be given to such attorney or his agent, or left at his usual place of abode, and a rule given for such appearance; and if such attorney reside above *twenty* miles from *London*, or the action be laid in any other county than *London* or *Middlesex*, then no forejudger shall be entered, till *eight* days after such notice shall be given, in such manner as aforesaid, and a rule to appear as aforesaid: the said days to be *exclusive* of the day of giving such notice.”(h) The notice of filing the bill ought to be given *four* days exclusive before the end of the term, or the defendant will be entitled to an imparlance, and need not plead till the first four days of the next term.(i) If the defendant appear, on being called in court, he enters his appearance with the prothonotaries; and the proceedings against him are the same as in common cases.(k)

[*324] *If the defendant do not appear in due time, the proceedings are entered on a roll, which is obtained from the prothonotaries, and their clerk will sign the judgment of forejudger, on an *ineipitur* being first made thereon. The roll is then taken to the clerk of the warrants, who will strike the defendant off the roll of attorneys; after which he may be proceeded against by the plaintiff, or any one else,(a) as a common person: and he cannot be restored, unless he pay the debt and costs: But when he has made satisfaction to the plaintiff, he may obtain a rule of court in term time, or judge’s summons in vacation, to show cause why he should not be restored; and if it appear that the plaintiff has been satisfied, a rule or order will be made, for the clerk of the warrants to restore him.(b)

It was formerly holden, that a bill could not be filed in *vacation*, against the warden of the *Fleet*, for an escape.(c) But now, by the statute 59 Geo. III. c. 64, “it shall and may be lawful for any person or persons, having cause of action against the warden of the said prison, for or in respect of the escape of any person or persons in his custody, from and out of the said custody, to commence his or their action against the said warden, by filing his or their bill against him, at any time in *vacation*, in the office of the prothonotaries of the court of Common Pleas, or with the clerk or deputy clerk of the pleas in the office of Pleas in the court of Exchequer, for or in respect of such escape, and to entitle such bill as of the preceding term; a copy of which bill so filed shall, within twenty-four hours after the filing thereof, unless a *Sunday* or public holyday intervene, and in that case on the next day after such *Sunday* or public holyday, be delivered to the said warden or his deputy, or to the turnkey or porter of the said prison; and the said warden shall appear and plead to the said bill, within the first four days of the following term; otherwise it shall be lawful for such person or persons, having such cause of action as aforesaid, to sign judgment against him in such action. And, for the better

(h) R. II. 11 Geo. II. *reg.* 3, C. P. And for the *form* of notice of a bill filed against an attorney see N. T. 13 Geo. II. 3, C. P. Append. Chap. XIV. § 26.

(i) *Morgan v. Belts, one, &c.* T. 33 Geo. III. C. P. Imp. C. P. 7 Ed. 546.

(k) For the beginning of a declaration against an attorney, after appearance, by *bill* in C. P. see Append. Chap. XIV. § 28.

(a) *Barnes*, 43.

(b) Imp. C. P. 6 Ed. 523.

(c) 6 Taunt. 347, 352. 2 Marsh. 49, 54, S. C.; and see the preamble to the statute 59 Geo. III. c. 64. For the beginning of a bill against the warden of the *Fleet*, see Append. Chap. XIV. § 25.

ascertaining as well the time of filing such bill, as of delivering such copy thereof as aforesaid, the proper officer of the court in which such bill shall be filed, or his lawful deputy, shall, at the time of filing the same, indorse thereon a *memorandum* of the time of filing such bill; and the said warden or his deputy, or the turnkey or porter of the said prison, shall, at the time of receiving such copy of the said bill, indorse upon such copy a *memorandum* of the time of receiving the same." In the construction of this statute it has been holden, that the interval between the *essoin* day and first day of the court's actually sitting, must be taken as part of the term: and therefore, a bill may be filed against the warden of the *Fleet* for an escape, on the day after the *essoin* day, entitled as of the term generally; and if the plaintiff give a rule to plead on the first day the court sits, he will substantially comply with the requisition of the statute 8 & 9 W. III. c. 27, *§ 12, provided he do not [*325] sign judgment within *eleven* days after the filing of the bill. (*aa*)

In the Exchequer, the bill against an attorney, or side clerk, begins by stating the character in which he is sued: (*bb*) and the proceedings thereon are similar to those against an attorney of the King's Bench.

As between attorney and client, the remedy given by law to an attorney, for recovery of his bill of costs, in an action of *assumpsit*. [A] This action

(*aa*) 4 Moore, 425. 2 Brod. & Bing. 51, S. C.

(*bb*) Append. Chap. XIV. § 29, 30.

[A] An attorney or solicitor is entitled to have allowed to him, for his professional services, what he reasonably deserves to have, with a proper reference to the nature of the business performed by him for his client, and his own standing in his profession for learning and skill, whereby the value of his services is enhanced to his client. *Vilas v. Downer*, 6 Washb. 419. *Webb v. Browning*, 14 Missouri, 353. For the purpose of aiding in determining this, it is proper to receive evidence as to the prices usually charged and received for similar services by other persons of the same profession, in the same vicinity, and practising in the same court. *Ib.* And it has been held, that when an attorney, or solicitor, is employed by a person who has full knowledge of his rate of charges, without stipulating as to price, it may perhaps be fairly inferred, that he expected to pay at such rates, and be equivalent to an express contract to that effect. But when the client is informed, during the pendency of a suit, of the prices which his attorney is charging for his services, his neglect to express dissatisfaction with the prices, or to dismiss the attorney from his employment, cannot be held as an acquiescence in those prices, or as binding him to pay after the same rate for future services in the same suit. *Ib.* But he cannot recover more than he has agreed to receive by proof that his services were worth more. *Coopwood v. Wallace*, 12 Ala. 790.

On the other hand, where a contract between an attorney and his client, by which the attorney received a certain portion of a tract of land in litigation, as his fee for conducting the suit, had been acted upon by the parties for nearly twenty years, the court refused to disturb it, although, by reason of the enhanced value of the land, it appeared unreasonable. *Smith v. Thompson*, 7 B. Mon. 305. He cannot, however, recover for his services without proving a retainer; and proof of the actual performance of the services is not sufficient where there is no proof of a knowledge or recognition of the services by the client. *Burghart v. Gardner*, 3 Barb. Sup. Ct. R. 64. The law implies a promise on the part of the client, to pay his attorney, for his services, the statute rate of compensation. The burden of proving that the attorney undertook to perform the services for a less rate, or without charge, rests upon the client, and such an agreement should be made out by evidence equal to a positive stipulation. *Brady v. Mayor, &c., of New York*, 1 Sandf. Sup. Ct. R. 569.

In Pennsylvania and Delaware, an action can be supported by an attorney, or counsellor at law, against his client, for advice and services in the trial of a cause, over and above the attorney's fees allowed by act of assembly. *Breckenridge v. McFarlane*, Addis. 49. *Gray v. Brackenridge*, 2 Pennsylv. 75, overruling *Mooney v. Loyd*, 5 S. & R. 412, S. P. *Foster v. Jack*, 4 Watts, 334. *Stevens v. Monges*, 1 Harring. 127.

lies for business done in other courts, as well as in the court of which the plaintiff is an attorney.^(c) But an attorney cannot recover a charge for conducting a suit, in which the party charged has not had the benefit of

(c) Cro. Car. 159, 60.

The remarks of *Gibson*, Ch. J., in *Foster v. Jack*, page 337, deserve consideration:—“Though dissatisfied with the decision of *Mooney v. Loyd*, on principle and for its consequences, I did not dissent. On principle, because I was unable to comprehend why a valuable consideration might not raise an implied promise as well as support an express one; and for its consequences, because I felt assured it would be found entirely incompatible with the business and necessities of both counsel and client here. As anticipated, it was received with almost universal disapprobation by the profession, not from the impulse of interest, but a conviction of its artificial structure and practical injustice. Its principle, if it can be said to have one, had its origin in the Roman law, when the practice of forensic oratory was so elevated as to be fancifully thought to be incapable of stooping to mercenary considerations without debasement. And the dignity of the robe, instead of any principle of policy, furnishes all the argument that can be brought to the support of it at the present day; for it is hard to imagine a principle of policy, that would forbid compensation for services in a profession which is now as purely a calling as any mechanical art. The English courts adopted it practically and professedly on the foundation of dignity. They studiously restricted it to advocates, properly so called; for actions for attorney's fees are of daily occurrence. But the decision in *Mooney v. Loyd* descended a step lower, and, abandoning the ground of dignity altogether, gave the rule a much wider sweep than it has in England. Though it might appear from the report that the cause of action was compensation for services in the trial of a cause, it is an undeniable truth that all preparatory services were included, though these are such as are rendered in England by the class called attorneys in the strictest sense. No discrimination was made in the expressions of the court, the rule of the decision being predicated of professional services generally. It is known to every member of the bar, how narrow is the compass of his duties as an advocate. His most constant and effective efforts are made in the preparatory stages; and his agency in directing the process of execution is an invaluable one. In fact, a substantial, if not a preponderating portion of professional business never finds its way to the ear of the judges at all; and there are many gentlemen in honorable and lucrative practice who are seldom heard at the bar. They practice strictly as attorneys, and to apply the rule of the Roman law to them, would be a perversion of it. Yet *Mooney v. Loyd* would have done it; and the decision in *Gray v. Brackenridge*, by which it was overruled, seems to be as deeply seated in justice as it is in legal analogy. It was held in the latter, that an attorney's action may be maintained on an implied assumpsit, and without regard to the quality of the services. The English rule was abolished by it without distinction between advocates and attorneys, as its analogue had been abolished by universal practice and without distinction between physicians and apothecaries. The subject was not susceptible of distinction; nor would there be the same propriety in it where the habits and circumstances of the client require indulgence, as there is in England, where the barrister's fee is handed to him with his brief.”

“Whether it was originally wise,” says Judge *Kane*, “to invest the due compensation of counsel with the incidents of a legal demand, and whether the dignity, and with it the usefulness of the profession, might not have been better secured by leaving its members to a merely honorary recourse, has divided the opinions of intelligent and honest thinkers. But the question is now, and has long been, a merely speculative one in Pennsylvania; and our courts have either to remodel the law, or to enforce it as it stands, by admitting the lawyer to sue for his *quantum meruit*.”

“So, too, of the practice, which has obtained to a considerable extent, of stipulating beforehand for professional fees, contingent on the result of the litigation. It is not a practice to be generally commended, exposing honorable men not unfrequently to misapprehension and illiberal remark, and giving the apparent sanction of their example to conduct, which they would be among the foremost to reprehend. Such contracts may sometimes be necessary in a community such as that of Pennsylvania has been, and perhaps as it is yet; and where they have been made in abundant good faith—*uberimma fide*—without suppression or reserve of fact, or exaggeration of apprehended difficulties, or undue influence in any sort or degree; and where the compensation bargained for is absolutely just and fair, so that the transaction is characterized throughout by ‘all good fidelity to the client;’ the court will hold such contracts to be valid. But it is unnecessary to say, that such contracts, as they, can scarcely be excepted from the general rule, which denounces as suspicious the dealings of fiduciaries with those under their protection, must undergo the most exact and jealous scrutiny before they can expect the judicial ratification.” *Ex parte Plitt*, 2 Wall. Junr. 479.

the attorney's judgment and superintendence.(d) It is also said, that an attorney ought not to prosecute an action, to be paid in gross; for that will be champerty:(e) And an undertaking by a third person, to pay an attorney the further expenses of business already commenced, must be in writing, by the statute of frauds.(f)

By the statute 3 Jac. I. c. 7, § 1, "all attorneys and solicitors shall give a true bill unto their masters or clients, or their assigns, of all charges concerning the suits which they have for them, subscribed with their hands and names, before such time as they, or any of them, shall charge their clients with any the same fees or charges." Upon this statute it was a good plea, to an action brought by an attorney for his fees, that no bill had been delivered to the defendant;(g) or the statute might have been given in evidence, on *non assumpsit*.(h) But if an attorney had delivered his bill to the defendant, after the arrest and before the bill filed, it was well enough:(i) and this statute did not extend to attorneys in *inferior* courts, but only to those in the courts at *Westminster*.(k) It should also seem, that an attorney's bill could not have been taxed, unless an action was depending thereon,(l) nor without bringing the amount of it into court.(m)

To remedy these manifold inconveniences, it was enacted by the statute 2 Geo. II. c. 23, § 23, (made perpetual by the 30 Geo. II. c. 19, § 75,) that "no attorney of his majesty's court of King's Bench, Common Pleas, or Exchequer, or duchy of *Lancaster*, or of any of his majesty's courts of Great Sessions in *Wales*, or any of the courts of the counties palatine of *Chester*, *Lancaster*, and *Durham*, or any other court of record in that part of *Great Britain* called *England*, wherein attorneys have been *accustomably admitted and sworn; nor any solicitor in any [*326] court of equity, either in his majesty's high court of Chancery, court of equity in the Exchequer chamber, court of the duchy chamber of *Lancaster*, at *Westminster*, or courts of the counties palatine of *Chester*, *Lancaster*, or *Durham*, or of the Great Sessions in *Wales*, or in any other inferior court of equity, in that part of *Great Britain* called *England*, shall commence or maintain any action or suit, for the recovery of any fees, charges, or disbursements, at law or in Equity, until the expiration of one month or more, after such attorney or solicitor respectively shall have delivered unto the party or parties to be charged therewith, or left for him, her or them, at his, her or their dwelling-house or last place of abode, a bill of such fees, charges and disbursements,(a) written in a common legible hand, and in the *English* tongue, except law terms and names of writs, and in words at length, except times and sums; which bill shall

(d) 1 Bing. 13. 7 Moore, 237, S. C.; and see 3 Campb. 451. 3 Stark. Ni. Pri. 75. 1 Man. & Ryl. 228. 7 Barn. & Cres. 419. 1 Man. & Ryl. 238, S. C. 7 Barn. & Cres. 441. 1 Man. & Ryl. 241, S. C.

(e) Com. Dig. tit. *Attorney*, (B. 14,) Hob. 117; and see 2 Atk. 298. 4 Bro. Chan. Cas. 350. 18. Ves. 313, in Chan. 2 Marsh. 273.

(f) 1 Stark. Ni. Pri. 270.

(g) 3 Keb. 118, 514. T. Raym. 245. 3 Salk. 19, S. C.; but see Carth. 57. 1 Show. 48. Comb. 126, S. C.

(h) 1 Show. 338. Bul. Ni. Pri. 145.

(i) 1 Lil. P. R. 145; but see 1 Str. 633. Cas. Pr. C. P. 27, S. C.

(k) Carth. 147. 1 Show. 96. 1 Salk. 86, S. C.

(l) 1 Salk. 332; but see 2 Chit. Rep. 155.

(m) 2 Ves. 451, 2.

(a) Barnes, 243. *Id.* 123.

be subscribed with the proper hand of such attorney or solicitor respectively.

“And, upon application of the party or parties chargeable by such bill, or of any other person in that behalf authorized, unto the Lord High Chancellor or Master of the Rolls, or unto any of the courts aforesaid, or unto a judge or baron of any of the said courts respectively, in which the business contained in such bill, or the greatest part thereof in amount or value, shall have been transacted; (b) and upon the submission of the said party or parties, or such other person authorized as aforesaid, to pay the whole sum that upon taxation of the said bill shall appear to be due to the said attorney or solicitor respectively: it shall and may be lawful for the said Lord High Chancellor, Master of the Rolls, or any of the courts aforesaid, or for any judge or baron of any of the said courts respectively, and they are thereby required, to refer the said bill, and the said attorney's or solicitor's demand thereupon, although no action or suit shall be then depending in such court touching the same, to be taxed and settled by the proper officer of such court, without any money being brought into the said court for that purpose: and if the said attorney or solicitor, or the party or parties chargeable by such bill respectively, having due notice, shall refuse or neglect to attend such taxation, the said officer may proceed to tax the said bill *ex parte*: pending which reference and taxation, no action shall be commenced or prosecuted, touching the said demand.

“And, upon the taxation and settlement of such bill and demand, the said party or parties shall forthwith pay to the said attorney or solicitor respectively, or to any person by him authorized to receive the same, that shall be present at the said taxation, or otherwise unto such other person or persons, or in such manner, as the respective courts aforesaid shall direct, the whole sum that shall be found to be or remain due thereon; which payment shall be a full discharge of the said bill and demand: [*327] and in default thereof, the said party or parties shall be liable *to attachment or process of contempt, or to such other proceedings, at the election of the said attorney or solicitor, as such party or parties was or were before liable unto.

“And if, upon the said taxation and settlement, it shall be found that such attorney or solicitor shall happen to have been overpaid, then the said attorney or solicitor respectively shall forthwith refund and pay unto the party or parties entitled thereunto, or to any person by him, her or them authorized to receive the same, if present at the settling thereof, or otherwise unto such other person or persons, or in such manner, as the respective courts aforesaid shall direct, all such money as the said officer shall certify to have been so overpaid; and in default thereof, the said attorney or solicitor respectively shall, in like manner, be liable to an attachment or process of contempt, or to such other proceedings, at the election of the said party or parties, as he would have been subject unto, if that act had not been made.

“And the said respective courts are thereby authorized to award the costs of such taxations to be paid by the parties, according to the event of the taxation of the bill, that is to say, if the bill taxed be less, by a *sixth* part, than the bill delivered, then the attorney or solicitor is to pay the costs of the taxation; but if it shall not be less, the court, in their discre-

(b) 1 Salk. 89; but see 2 Barnard, K. B. 182. Barnes, 122.

tion, shall charge the attorney or client, in regard to the reasonableness or unreasonableness of such bill."

The provisions of the above statute are confined to actions for the recovery of fees, charges or disbursements, at law or in equity. But though the statute applies only to particular cases, and to bills of a particular description, yet the court it seems still retains, and has always exercised, a right, as at common law, to direct the taxation of other bills of costs; and such is said to be the constant practice.(a) In making out an attorney's bill on this statute, it is not sufficient to charge the costs of an action brought by the attorney for his client, at one sum in the aggregate, although the costs in that action had been taxed at that sum, as between party and party:(b) But the plaintiff may nevertheless recover the residue of his bill, as to which the provisions of the statute had been complied with.(c)

It having been doubted, whether an attorney's bill could be delivered with *abbreviations*(d) it was enacted by the statute 12 Geo. II. c. 13,(e) that it shall and may be lawful to and for every attorney, clerk in court, and solicitor, to write his bill of fees, charges and disbursements, with such *abbreviations* as are now commonly used in the *English* language; any thing in any former law to the contrary notwithstanding." On this statute it has been holden, that an attorney may deliver a bill of costs, containing such abbreviations of *English* words, as are usual and intelligible.(f) And by § 6, "the said act of the second year of *George* the Second for the better regulation of attorneys and solicitors, or any clause, matter or *thing therein contained, shall not extend to any bill of fees, [*328] charges and disbursements, due from any attorney or solicitor, to any other attorney or solicitor, or clerk in court; but every such attorney, solicitor, or clerk in court, may use such remedies, for the recovery of his fees, charges and disbursements, against such other attorney or solicitor, as he might have done before the making of the said act."

If the whole bill be for *conveyancing*,(aa) it cannot be taxed. But if any part of an attorney's bill, which has been delivered, be for business done in court, the bill must be delivered a month before the action is brought otherwise the plaintiff cannot recover.(bb) And a *warrant of attorney*,(cc) or *dedimus potestatem*,(dd) charged in an attorney's bill, is a sufficient item to enable the court to refer the bill for taxation; though, with this exception, it be entirely for conveyancing. So, where one of the charges was for drawing and engrossing an affidavit of debt, in order to hold a party to bail, which appeared to have been sworn, the court of King's Bench held this to be a charge for business done in court, which made the bill taxable.(cc) And a charge in an attorney's bill, for attending at a lock-up house, and obtaining the defendant's release, and filling up a bail bond, will render the bill

(a) 2 Chit. Rep. 155; and see 9 Price, 349. *Post*, 329, 30.

(b) 2 Car. & P. 69. 1 Ry. & Mo. 280, S. C.

(c) 1 Ry. & Mo. 286.

(d) § 5.

(d) Pr. Reg. 37.

(f) 4 Taunt. 193.

(aa) M. 12 Geo. II. *Anon.* K. B. Barnes, 41, 2, C. P.; and see Bul. Ni. Pri. 145.
(bb) 6 Durnf. & East, 645; and see Peake's Cas. Ni. Pri. 138. 3 Esp. Rep. 149. 2 Bos. & Pul. 343. 1 Camp. 437. 3 Bro. Chan. Cas. 233. 1 Ry. & Mo. 284. 2 Car. & P. 71, 2, S. C.

(cc) 4 Campb. 68. 2 Stark. Ni. Pri. 538. 3 Barn. & Cres. 157. 4 Dowl. & Ry. 736, S. C. *accord*; but see 3 Barn. & Ald. 488, 9, where the propriety of this decision was questioned.

(dd) 1 New Rep. C. P. 266. 4 Campb. 69, n.

(cc) 6 Durnf. & East, 645.

subject to taxation.^(ff) But a charge for preparing an affidavit of the petitioning creditor's debt and bond to the Chancellor, in order to obtain a commission of bankruptcy, was holden not to be a taxable *item* within the statute, as being a charge at law or in equity, the affidavit not having been sworn, nor a commission issued.^(g) So, charges for searching to see whether satisfaction of a judgment was entered, or whether an issue was entered and docketed, will not constitute taxable *items* in an attorney's bill, so as to make it necessary to deliver it signed before action brought.^(h) And where an attorney had paid money, in consequence of his undertaking to pay the debt and costs, this was holden not to be a *disbursement*, by him as an attorney, within the meaning of the statute.⁽ⁱ⁾

It has been made a question, whether an attorney may recover for charges or disbursements not taxable when part of his demand is for business done in court; and the distinction that has been taken is, that he may, where he has delivered no bill at all;^(k) but that where he has delivered a bill irregularly, he cannot.^(l) And accordingly, in a modern case,^(m)

[*329] an attorney not having delivered any bill to his client before action brought, *but having afterwards delivered a bill of particulars under a judge's order, was held to be entitled to recover charges for money paid for his client's use, having no reference to his business of an attorney, although other *items* in the bill of particulars were taxable. An attorney having delivered two separate bills, one of which was for fees and disbursements in causes, and the other for making conveyances, a rule was made, in the King's Bench, for taxing both.^(a) And so, where it was moved that the master might be directed to tax those articles in an attorney's bill which related to conveyancing and parliamentary business, the rest being for management of causes in the court of King's Bench, Lord *Mansfield* said, "there was no doubt but the master might tax the whole; that he recollected a case, where the fees paid to a proctor, for business done in the ecclesiastical court, made part of the bill; and it was determined, that as the whole bill had been referred to the master, he might tax that part of it."^(b) So, where an attorney had delivered three several bills, one for business done as an attorney, another as agent, and a third for fees due to him as steward of a manor, for admittances and holding courts, the court held, that the taxable *items* in the bill, for business done as an attorney, would draw after them the fees due to him as steward of the manor, so as to subject all the bills to taxation.^(c)

The court of King's Bench will refer an attorney's bill to be taxed, though all the business was done at the Quarter Sessions,^(d) or in the insolvent debtors' court;^(e) and in these cases, an action cannot be maintained for the amount of the bill, unless it be signed, and delivered a month before the bringing of the action.^(f) And a bill was referred to

(ff) 6 Barn. & Cres. 86.

(h) 2 Car. & P. 45. 1 Ry. & Mo. 262, S. C.

(g) 3 Barn. & Ald. 486.

(i) 6 Taunt. 196. 1 Marsh. 539, S. C.

(k) Peake's Cas. Ni. Pri. 1 Ed. 102. 2 Bos. & Pul. 345. 11 East, 285; but see 3 Esp. Rep. 149. 1 Campb. 437.

(l) 6 Durnf. & East, 645. 2 Bos. & Pul. 343. 1 Campb. 439, n.

(m) 11 East, 285.

(a) Say. Rep. 233. Say. Costs, 320, S. C.

(b) Doug. 199, *in notis*.

(c) 5 Barn. & Ald. 898. 1 Dowl. & Ryl. 511, S. C.

(d) 4 Durnf. & East, 496; but see *id.* 124. Barnes, 122, *contra*.

(e) 1 Car. & P. 615. 4 Barn. & Cres. 364. 6 Dowl. & Ryl. 510, S. C.

(f) 5 Durnf. & East, 694. 1 Esp. Rep. 137, S. C.

be taxed, for business done in a criminal suit, in the court of Great Sessions at *Carmarthen*: and though it was objected that it would be impossible for the master to tax the costs in *Wales*, not knowing the practice there, yet the court held that he could as well tax these costs, as costs in the spiritual court; and if he were at a loss, he might call in assistance. *(g)* In the Exchequer, a crown solicitor's bill of costs, for business done under an extent, is taxable: *(h)* And if, on the taxation of his bill, a considerable sum be disallowed, the court will not only order the costs of the taxation to be paid to the defendant by the solicitor, but, if he have received the whole amount of his bill by sums paid him on account, they will order him to pay interest on the balance reported to be due from him. *(i)* But the court cannot order a solicitor's bill of costs, for business wholly done in the House of Lords, in the prosecution of an appeal, to be referred for taxation; because their officer has no means whereby he may be enabled to tax such a bill: *(k)* and great difficulty is said *to have [*330] frequently occurred in the House of Lords, in not knowing how directly to tax a solicitor's bill. This however has been done, under the recognizance; and the house has called in the assistance of a master, to determine what the amount ought to be: but that has been considered only as putting the recognizance in force, not as a taxation independent of it, by virtue of any inherent authority possessed by the House. *(a)* For establishing a taxation of costs on private bills in the House of Lords, it is enacted, by the statute 7 & 8 Geo. IV. c. 64, § 1, 2, that on application made to the clerk of the parliaments, as to the costs and expenses of such bills, he shall direct the same to be taxed, by such persons as he shall appoint; and in actions against persons liable to pay the costs, the speaker's certificate shall have the effect of a warrant to confess judgment. And there is a similar provision for the taxation of costs on private bills, &c. in the House of Commons, by the statute 6 Geo. IV. c. 123, § 1, 2.

In Chancery, an order for taxing a bill of costs, entitled in the cause, if obtained by a party to the cause, is regular, under the general jurisdiction; but a person not a party to the cause must apply *ex parte*, under the statute 2 Geo. II. c. 23, § 23. *(b)* Whether a party, having obtained such an order in a cause, may pursue it under the statute, is questionable; but if the order be acted upon, the irregularity is waived. *(b)* An order has been made in bankruptcy, for taxing a solicitor's bill, for striking the docket, and previous business relating to the bankruptcy; *(c)* and also, for business done in bankruptcy and otherwise. *(d)* But it has been decided, that a solicitor's bill of fees, for business done for a royal foundation, the office of visitor being exercised by the Lord Chancellor, is not within the statute 2 Geo. II. c. 23, § 23; it not being for proceedings in law or equity, and it is not in the court of Chancery that the king's visitatorial power is to be exercised, but by the Lord Chancellor. *(e)* It has also been decided, that the jurisdiction of the court of Chancery does not extend to taxing a solicitor's bill of costs, for obtaining an act of parliament. *(f)* Where the plaintiff was employed as a solicitor, to carry on proceedings in Chancery, after which the defendant married one of the parties to the suit, and

(g) *Lloyd v. Maund*, T. 25 Geo. III. K. B.; but see 2 Meriv. 500, in Chan.

(h) *Rex v. Partridge*, T. 56 Geo. III. in *Scac.* 3 Price, 280. West on Extents, 230, S. C.

(i) 9 Price, 349.

(k) 4 Price, 279.

(a) 3 Ves. & Beam. 21.

(b) 11 Ves. 328.

(c) 5 Ves. 706.

(d) 13 Ves. 124.

(e) 9 Ves. 547.

(f) 3 Ves. & Beam. 21

eventually received a proportionate part of the property in dispute, in right of his wife, under an order of that court; the court of Common Pleas held, that he was liable to pay the plaintiff his proportion of his bill of costs, after taxation by the master, although there had been no retainer of the plaintiff by the defendant, and although the bill had not been delivered to the latter, but to a co-defendant, who had suffered judgment by default.(g)

By the statute 6 Geo. IV. c. 16, § 14,(h) “the petitioning creditor or creditors shall, at his or their own costs, sue forth and prosecute the commission, until the choice of assignees; and the commissioners shall, at the meeting for such choice, ascertain such costs, and by writing under their hands, direct the assignees, (who are thereby thereto required,) [*331] to *reimburse such petitioning creditor or creditors such costs, out of the first money that shall be got under the commission; and all bills of fees or disbursements of any solicitor or attorney employed under any commission, for business done after the choice of assignees, shall be settled by the commissioners, except that so much of such bills as contain any charge respecting any action at law or suit in equity, shall be settled by the proper officer of the court in which such business shall have been transacted; and the same, so settled, shall be paid by the assignees to such solicitor or attorney: Provided, that any creditor who shall have proved to the amount of *twenty* pounds or upwards, if he be dissatisfied with such settlement by the commissioners, may have any such costs and bills settled by a master in Chancery: who shall receive for such settlement, and the certificate thereof, *twenty* shillings, and no more.” The former part of this clause appears to have been taken from the statute 5 Geo. II. c. 30, § 25, upon which it has been holden, that the petitioning creditor is liable to the solicitor, for the expense of conducting the commission, up to the choice of assignees.(a) But, as between the solicitor and messenger, there is no implied contract on the part of the former, to pay him his expenses.(b) The solicitor is an agent merely, and is not to be regarded as a principal, as respects the messenger; and although he make himself responsible to the messenger, the petitioning creditor will not therefore be exonerated, without the express consent of the messenger to discharge him.(c) And the messenger under a commission of bankrupt, may recover from the petitioning creditor, his fees for his services before the party be declared a bankrupt; although the party was duly declared a bankrupt, and the messenger’s bill ordered by the commissioners to be paid by the assignee out of the estate.(d) The latter part of the above clause of the statute 6 Geo. IV. c. 16, § 14, appears to have been taken from the statute 5 Geo. II. c. 30, § 47, upon which it has been determined, that the bill of costs of a solicitor, under a commission of bankruptcy, is taxable, though approved by the commissioners, and stated and allowed in the accounts of the assignees.(e) And an attorney’s bill, for obtaining a bankrupt’s certificate, must be signed and delivered a month before he

(g) 7 Moore, 467.

(h) And see stat. 5 Geo. II. c. 30, § 25, 47.

(a) 1 Rose, 449; and see Holt, Ni. Pri. 235, 376. 5 Moore, 290. 2 Brod. & Bing. 457, S. C. 3 Barn. & Cres. 43. 4 Dowl. & Ryl. 62f, S. C.

(b) Holt, Ni. Pri. 247, *in notis*; and see 2 Maule & Sel. 438. 2 Car. & P. 124. 5 Barn. & Cres. 330. 8 Dowl. & Ryl. 52, S. C.

(c) Holt, Ni. Pri. 376. And for the messenger’s remedy against the assignees, see *id.* 247, *in notis*.

(d) 2 Car. & P. 123.

(e) 3 Madd. Rep. 49.

can sue thereon.(f) But an action may be maintained by a solicitor against an assignee, for business done under a commission of bankrupt, one month after he has delivered a copy of his bill, although it has not been taxed by a master in Chancery.(g)

The statute 2 Geo. II. c. 23, § 23, does not, we have not seen,(hh) extend "to any bill of fees, &c., due from any attorney [*332] or solicitor, to any other *attorney or solicitor, or clerk in court; but every such attorney, solicitor or clerk in court, may use such remedies, for the recovery of his fees, &c., against such other attorney or solicitor, as he might have done before the making of the said act." And there is a case in *Wilson's Reports*,(a) where a judge of the King's Bench having made an order to refer an agent's bill to be taxed, and the master not having obeyed it, the court was applied to, and held that the order was irregular; the master declaring, that he had never taxed a bill for agency. It is now the uniform practice, however, of all the courts,(b) to refer an agent's bill to be taxed, on the application of his employer, and upon his bringing into court the sum claimed by the plaintiff. But the bill of an agent to the attorney employed by the party, in respect of whose business the agency charges have been incurred, cannot be taxed, on the application of the client.(c) It is not necessary that an agent's bill should be signed or delivered, before the commencement of an action(d) And where business has been done by an attorney, for a client who afterwards becomes himself an attorney, the former need not deliver a bill signed, in order to recover his costs.(e)

It is not necessary for the *executor* or *administrator* of an attorney to deliver a bill of costs, for business done by his testator or intestate, before the commencement of an action;(ff) the statute 2 Geo. II. c. 23, § 23, being confined to actions brought by the attorney himself, and not extending to his personal representatives: But such a bill may be referred to be taxed, on the defendant's undertaking to pay what is due.(gg) An attorney delivered his bill, and after his death application was made to tax it, and above a sixth part was taken off; it was moved that the executrix might pay the costs; but the court of King's Bench held that she should not: for the words of the act, 2 Geo. II. c. 23, § 23, impose them upon the attorney or solicitor only, and the executrix is not to blame, if she stand upon his bill, or make out one from his books.(h)

Before an attorney's bill has been settled and paid, it may be taxed as a matter of course, at any distance of time.(i) But after it has been settled and paid, and the payment has been long acquiesced under, the courts will not refer it to be taxed *as a matter of course*; nor, as it seems, unless a

(f) 2 Taunt. 321. 1 Rose, 119, S. C.

(g) 1 Stark. Ni. Pri. 278; and see 2 Campb. 278. 2 Stark. Ni. Pri. 59. 3 Barn. & Ald. 486. *Ante*, 323.

(hh) *Ante*, 327, 8; and see Dick. 112. 1 Cox, 49, in Chan.

(a) 1 Wils. 266.

(b) Doug. 199, 200, and the cases there cited, *in notis*. *Groome v. Symonds*, E. 35 Geo. III. K. B.; and see Dick. 285, in Chan.

(c) 8 Price, 677.

(d) Doug. 199, *in notis*. Peake's Cas. Ni. Pri. 3 Ed. 1, 2; and see the case of *Jones, one, &c.*, v. *Price*, *id.* 2, (u). 1 Esp. Rep. 221.

(e) 1 Esp. 420. 2 H. Blac. 589, S. C.

(ff) 1 Barnard. K. B. 433. Andr. 276. Cas. Pr. C. P. 58. 1 Car. & P. 3.

(gg) 1 Salk. 89. 2 Str. 1056. Say. Costs, 324, 5. 4 Taunt. 724; but see Cas. Pr. C. P. 58. Barnes, 119, 122, *contra*.

(h) 2 Str. 1056. Say. Costs, 327.

(i) *Per Cur.* T. 34 Geo. III. K. B.

gross error or imposition be pointed out. *(k)* So, where a bond had been given for the debt five years before, and the vouchers had been delivered up, the court of Common Pleas would not refer the bill to be taxed; saying, an attorney at this rate could never be safe. *(l)* But though an [*333] *attorney's bill has been settled and paid, yet the courts, *under special circumstances*, will refer it to be taxed; for the client may by affidavit show that the business charged was never performed, or that the charges are fraudulent: and where that is the case, neither payment, nor a release, nor a judgment for the money due, will preclude the court from having the bill taxed. *(a)* But overcharges alone, without circumstances showing fraud, do not seem to be sufficient. *(b)* An attorney's bill may also be taxed, though there was a special agreement, between the attorney and his client, that the former should be paid for his time, at a certain rate by the day, besides his expenses: *(c)* or though he has obtained a warrant of attorney from his client, for confessing judgment for the money due upon his bill, and has entered up judgment thereupon. *(d)* But the plaintiff, having paid to an attorney the amount of his bill, cannot, after a reduction of the bill by taxation, maintain an action for the difference. *(e)* And when a rule has been served for taxing an attorney's bill, the court of King's Bench will not grant an attachment against the attorney, for not paying the balance due to his client, until the costs have been taxed, though the balance is admitted, and it has been agreed to dispense with the taxation. *(f)*

Where an action is brought on an attorney's bill, the court will order it to be taxed, at any time before trial, though after pleaded, and issue joined. *(g)* But it is a general rule, that an attorney's bill cannot be taxed, at the trial of an action brought upon it; *(h)* nor after judgment by default, and a writ of inquiry executed: *(i)* for if the business was really done, (which must be proved at the trial,) the delay of the defendant for more than a month, in objecting to the *quantum*, is an admission that he thinks it to be reasonable. In a modern case however, an attorney's bill was referred to the master for taxation, after an action had been brought upon it and a verdict recovered on a suggestion that some of the *items* in the bill would not have been allowed by the master, had it been originally referred to him for taxation; but upon the terms of the defendant paying the costs of the application, and of the taxation, with the costs of the cause as between attorney and client, the plaintiff being at liberty to take out the money forthwith, which had been paid into court. *(kk)*

The statute 2 Geo. II. c. 23, § 23, only requires the delivery of a bill, for the *bringing* of an action; and therefore, though an attorney cannot bring an action on his bill, till it has been delivered a month, that circumstance is not necessary to enable him to *set it off*. But he must not pro-

(k) Say. Costs, 323. Doug. 199; and see 14 Ves. 262. 1 Ves. & Beam. 126. 3 Ves. & Beam. 174, 5, in Chan. 7 Moore, 496. 6 Dowl. & Ryl. 339.

(l) Cas. Pr. C. P. 109. Pr. Reg. 37, S. C.; but see 1 Barnard, K. B. 144, 5.

(a) Say. Costs, 323. Doug. 199, S. P.; and see 2 Atk. 295. Dick. 403. 14 Ves. 262. 3 Meriv. 285. Buck. 111, in Chan. 5 Price, 42, *in Scac*.

(b) 14 Ves. 262. 3 Ves. & Beam. 174; and see 1 Anstr. 186.

(c) Say. Costs, 321; and see 4 Bro. Chan. Cas. 350; but see 2 Barnard, K. B. 164, *contra*.

(d) Say. Costs, 322.

(e) 2 Stark. Ni. Pri. 85.

(f) 2 Chit. Rep. 68.

(g) *Per Cur.* T. 21 Geo. III. K. B.

(h) Dougl. 199; and see 2 Bos. & Pul. 237. 7 Price, 234. 2 Chit. Rep. 65. 1 Car. & P. 627.

(i) Barnes, 124.

(kk) 2 Chit. Rep. 63; and see 3 Dowl. & Ryl. 33.

duce it at the trial by surprise: It is sufficient in such case, to deliver *the bill time enough for the plaintiff to have it taxed [*334] before the trial.(aa) The delivery of a former bill is conclusive evidence against an increase of charge in a subsequent bill, on any of the *items* contained in it, and strong presumptive evidence against any additional *items*; but if there were any real errors or omissions in the former bill, they may be rectified.(bb) And a mistake in the date of *items* in an attorney's bill, which does not mislead, will not vitiate the delivery.(cc) If a defendant be arrested by an attorney for fees, after a bill of costs has been delivered to him, without being signed, he cannot be discharged out of custody on entering a common appearance, in the Common Pleas; as the want of such signature will be a defence to the action, on producing the bill at the trial.(d)

The statute requires the bill to be delivered one *month* or more before the commencement of the action; which is construed to be a *lunar* month.(e) And where a bill of costs is delivered to the party, it must be left with him, and not taken back again.(f) When two persons are liable to an attorney, for business done on their joint retainer, it is sufficient for him to deliver a copy of his bill to one of them, from whom he received his instructions, and to whom the management of the business was left by the other:(g) but it seems, that the delivery of a copy of the bill in such case, to the one who did not intermeddle, would not be sufficient; for he cannot be considered as having authority to receive it for both, nor is he likely to know what foundation there is for the charges in the bill.(h) And where a party in a cause having changed his attorney in the progress of it, a judge's order was afterwards obtained by the second attorney, for the delivery of a bill signed by the first, of his fees and disbursements, which delivery was accordingly made to the second attorney, this was holden, by a majority of the judges of the King's Bench, to be a sufficient delivery of the bill, *to the party to be charged therewith*, within the words and meaning of the statute, so as to enable the first attorney to bring his action against the client, for the amount of such bill.(i) So, the delivery of a bill to the attorney of the party to be charged, is deemed sufficient, if the party himself attend the taxation, or the bill be shown to have come to his hands.(k) If the bill be not delivered to the party, it must be left for him at his dwelling house, or last place of abode; leaving it at the compting house not being deemed sufficient.(l)

In an action on an attorney's bill, it is sufficient to give in evidence a judge's order to tax the bill, the defendants undertaking to pay what should appear to be due, and the master's *allocatur* thereupon;(m) and the defendant will not be permitted to question the reasonableness of the **items* before a jury.(a) In such an action, the [*335] *nisi prius* record is good *primâ facie* evidence, to show that the action was not commenced till the expiration of a month after the delivery

(aa) Doug. 199, *in notis. Martin & Wife, administratrix, v. Winder, one, &c.*, E. 23 Geo. III. K. B. there cited. 1 Esp. Rep. 449, S. P.

(bb) 1 Bos. & Pul. 49.

(cc) 4 Taunt. 806.

(d) 4 Moore, 4.

(e) 5 Esp. Rep. 168.

(f) 1 H. Blac. 290.

(g) 2 Campb. 277; and see 1 Campb. 437. 2 Dowl. & Ry. 461.

(h) 2 Campb. 277.

(i) 12 East, 372.

(k) 1 Gow, 71.

(l) 2 Bos. & Pul. 343; but see 1 Stark. Ni. Pri. 324. 1 Gow, 73, n.

(m) 2 Campb. 496.

(a) Doug. 199. *Ante*, 333.

of the bill.(b) And where it is material for the defendant to show that the action was commenced earlier than it appears to have been by the *nisi prius* record, the declaration delivered by the plaintiff is admissible evidence.(c) When an attorney has regularly delivered a bill signed, he may give a copy of it in evidence, without proof of notice to produce the original.(dd) It may indeed be inferred from one case,(ee) that unless a duplicate of the bill be kept, the plaintiff cannot give parol evidence of its contents, without a notice to produce it: But in a subsequent case it was decided, that a copy of an attorney's bill, not signed by the attorney, the original of which, duly signed, has been delivered to the defendant, is admissible in evidence, without proof of notice to produce the original.(ff)

If an attorney refuse to deliver a signed bill to his client, the latter may compel him, by taking out a summons before a judge, entitled in one of the causes in which he was concerned; and, in the King's Bench, if the attorney, on being served therewith, do not attend, an order will be made for delivering it within a reasonable time. In the Common Pleas, *three* summonses are necessary, in case of non-attendance, before an order can be obtained.(g) And, in either court, if the attorney still neglect to deliver it, the order should be made a rule of court; and on *personal* service of the rule,(h) and making affidavit thereof, the court on motion will grant an attachment. The bill being delivered, a judge's summons may be obtained for the attorney to show cause, why it should not be referred to the master in the King's Bench, or one of the prothonotaries in the Common Pleas, to be taxed; upon which, if the attorney attend, and the judge think it reasonable, he will make an order of course for taxing it, on an undertaking signed by the client or his attorney, in the judges book, to pay what shall appear to be due upon such taxation:(i) And, in the King's Bench, a peremptory order will be made in like manner, upon the first summons, in case of non-attendance;(k) but, in the Common Pleas, if the attorney do not attend, there must be *three* summonses taken out, and an affidavit made of the service and attendance thereon, before the judge will make an order *ex parte*.(l) But in neither court can the client have a summons for delivery of the bill, and taxing it together.(m) In the Exchequer, the rule for an attachment against an attorney, for not delivering his bill of costs, is not absolute in the first instance, [*336] but only a rule *nisi*:(n) *and where it appeared, on showing cause, that the bill had been delivered since the rule was served, and illness was assigned in the affidavit, as the cause of not obeying the order, the rule was discharged, without costs.(a)

When the order is made, a copy of it should be served, with the master's or prothonotary's appointment thereon, to tax the costs; and there is a rule in the King's Bench,(bb) that "on every appointment to be made

(b) 1 Bos. & Pul. 263.

(c) 2 Campb. 497, n.

(dd) 2 Bos. & Pul. 237. 3 Esp. Rep. 167, S. C. Peake's Evid. 5 Ed. 104, 261. *Ante*, 35.

(ee) 2 Campb. 110.

(g) 6 Barn. & Cres. 394; and see 7 Moore, 112. 3 Brod. & Bing. 288, S. C.

(h) Imp. C. P. 7 Ed. 556. Append. Chap. XIV. § 31, 2.

(i) 2 Chit. Rep. 66.

(j) For the form of an undertaking to pay an attorney's bill on taxation, in the Exchequer, see Append. Chap. XIV. § 33.

(k) Imp. K. B. 10 Ed. 506.

(l) Imp. C. P. 7 Ed. 556, 7.

(m) Imp. K. B. 10 Ed. 506. Barnes, 126.

(n) 11 Price, 593.

(a) 11 Price, 593.

(bb) R. H. 32 Geo. III. K. B. 4 Durnf. & East, 580.

by the master, the party on whom the same is served, shall attend such appointment, without waiting for a second; or in default thereof, the master shall proceed *ex parte*, on the first appointment." But, in the Common Pleas, it is said there must be *three* appointments, in case of non-attendance, before the prothonotary can proceed *ex parte*.^(c) And that court will not stay proceedings, in an action on an attorney's bill, brought subsequent to the order of the judge of another court for its taxation, but previous to its being taxed:^(d) Nor will they require the attendance of a third person before the prothonotary, on the taxation of a bill of costs, which had been referred to him in aid of a master in Chancery, to whom the reference had been previously made.^(e) And where, more than one *sixth* part of the attorney's bill having been taken off on taxation, the defendant presented a petition to the Vice Chancellor, to allow the costs of taxation, and, pending this proceeding, the attorney brought his action for the residue of his bill, the court of King's Bench held, that the action was well brought; the statute 2 Geo. II. c. 23, § 23, having only prohibited an action being brought pending the reference and taxation.^(f)

If a *sixth* part of the bill be taken off, the attorney is to pay the costs of taxation; but if less, the costs are in the discretion of the court.^(g) In the exercise of this discretion however, the courts are governed by the statute: and accordingly, the costs of taxation have been always reciprocally given to the client or attorney, as a sixth part has, or has not been taken off.^(h) But, in the Common Pleas, an attorney is not liable to pay the costs of taxing his bill, where the deduction of one-sixth is occasioned, not by the particular *items* being taxed, but by a whole branch of it being disallowed.⁽ⁱ⁾ And where an attorney is entitled to the costs occasioned by the taxation of his bill, he ought to apply for them at the time; and cannot recover them by motion, after making a subsequent settlement.^(k) If a client, in the course of a cause, advance money to his attorney, for specific disbursements in the cause, those disbursements must nevertheless be included in the bill of costs: There- [*337] fore, where a sum was deducted *upon taxation, less than one-sixth of the amount of the bill delivered, including those disbursements, the court of Common Pleas ordered the client to pay the costs of the taxation.^(a) And in that court, where an order is obtained for taxing an attorney's bill, and delivering up all papers, &c. upon the back of which the prothonotary, according to the usual practice, indorses his *allocatur*, the attorney is entitled in the first instance to the possession of it, for the purpose of enforcing payment of his bill.^(b) In the Exchequer, where a solicitor engaged in various suits obtained payment out of court of a sum of money standing in trust in the cause, and retained it towards his costs, and upon a subsequent taxation of his bill, it appeared that at the time he obtained payment of the money, he had in fact been already overpaid; the court refused, upon a motion for that purpose, to charge him with interest, the parties having made considerable delay before they taxed the

(c) Imp. C. P. 7 Ed. 557.

(d) 1 Bos. & Pul. 365.

(e) 8 Taunt. 670. 3 Moore, 3, S. C.

(f) 2 Barn. & Ald. 745.

(g) See the statute, *ante*, 327; and Dick. 322, in Chan.

(h) 5 Barn. & Cres. 760. 8 Dowl. & Ryd. 589, S. C. K. B. Cas. Pr. C. P. 78. Pr. Reg. 36. Barnes, 118, S. C. *Id.* 147, 8, C. P. 1 M'Clel. & Y. 354, Excheq.; and see 14 Ves. 154. 3 Ves. & Beaum. 141. 2 Madd. Rep. 329. Buck, 129, in Chan.

(i) 2 H. Blac. 357.

(a) 1 Taunt. 536; but see Buck, 129, in Chan.

(k) 1 Bing. 207. 8 Moore, 40, S. C.

(b) 1 Taunt. 38.

costs, and there being no fraud or laches imputable to the solicitor. 1 *Younge & J.* 527.

To assist the attorney in recovering his costs, he has a *lien* for the amount of his bill upon the deeds, papers and writings of his client, which come to his hands in the course of his professional employment;[A] and until his

[A] The attorney has a lien on a judgment recovered by his client, for his costs, and if the defendant, after notice from the attorney, pay the amount of the judgment to the plaintiff without satisfying the attorney for his costs, it is in his own wrong, and he is liable to the attorney for the amount of his bill. *Pindar v. Morris*, 3 Caines, 165. *Ten Broeck v. De Witt*, 10 Wend. 617. *Martin v. Hawks*, 15 Johns. 405. *Power v. Kent*, 1 Cow. 172. *Sweet v. Bartlett*, 4 Sandf. Sup. Ct. R. 661. *Smith v. Lowden*, 1 *Ib.* 696. *Gyon v. Fryatt*, 2 *Id.* 638. But he has no lien until judgment is entered. *Potter v. Mayo*, 3 Greenl. 34. *Hobson v. Watson*, 4 Red. 20. Before judgment the client may settle the action, and discharge the other party without the attorney's consent, or reference to his claim for fees, &c. *Ib.* *Getchell v. Clark*, 5 Mass. 309. *Foot v. Tewksbury*, 2 Verm. 97. *The People v. Hardenburg*, 8 Johns. 335. *Pindar v. Morris*, 3 Caines, 165. In Massachusetts and Maine, an attorney's lien on a judgment is given by statute only. *Baker v. Cook*, 11 Mass. 236. *Hobson v. Watson*, *sup.* Where the defendant settles with the plaintiff without notice from the attorney of his claim, the court will not interfere in the absence of collusion. *Grant v. Hazletine*, 2 N. Hamp. 541. But the notice need not be personal; any notice, credible in ordinary circumstances, that the lien will be insisted on, is sufficient. *Lake v. Ingham*, 3 Verm. 149. *Heartt v. Chipman*, 2 Aik. 162.

The attorney has a lien upon an award of arbitrators, where a pending suit is referred, to the full extent of all his just claims as attorney in the suit. *Hutchinson v. Howard*, 15 Verm. 544. Nor can this lien be defeated by attachment under the trustee process. *Ib.*

In Maine, under the statute of 1821, c. 60, an attorney has a lien for his costs, upon the judgment recovered in a suit conducted by him, which the creditor cannot discharge. *Stone v. Hyde*, 9 Shep. 318. *Potter v. Mayo*, 3 Greenl. R. 34. *Gammon v. Chandler*, 17 Shep. 152. And such lien is not discharged by a delay of several years to collect the demand, if there is no negligence on the part of the attorney, and the debtor has notice of the claim. *Ib.*

The lien of an attorney for advances made for his client, in the progress of the cause, on the judgment recovered, cannot be defeated by a judgment which the defendant has in set-off. But the lien cannot extend beyond the fees legally accruing, and advances for accruing costs. *Hooper v. Brundage*, 9 Shep. 460. Neither can it affect pre-existing rights of third persons. *Walker v. Sergeant*, 14 Verm. 247. *Scharlach v. Bland*, 1 Rich. 207. An attorney has, as against his client, a lien for his general balance, upon a note deposited with him by his client for collection. *Dennett v. Cutts*, 11 N. Hamp. 163. *Pope v. Armstrong*, 3 Smedes & Marsh. 214. *Cage v. Wilkinson*, 3 Smedes & Marsh. 223. And where the client gave the attorney a note, for the amount of such balance, it was held, that the lien was not discharged, as it did not appear that the note was given or received in payment of the balance. *Ib.* Though an attorney may have a lien for costs, &c., which the court, after notice, might protect, yet, where he sues his client, and obtains judgment therefor, and assigns the judgment, the lien does not attach to the claim in the hands of such assignee. *Beech v. Canaan*, 14 Verm. 485.

An attorney has no lien for his fees on money in the hands of the sheriff; and payment by the sheriff to him, after notice that his authority is revoked, will not avail the sheriff. *Irwin v. Workman*, 3 Watts, 357. *Walton v. Dickerson*, 7 Barr, 376. But he has a lien upon the debt which he has prosecuted to judgment, for his fees, viz., for the term, attorney, and travel fees, and for all moneys expended by him in prosecuting the suit. *Heartt v. Chipman*, 2 Aik. 162. Although it has been held, that his lien on a judgment cannot vary or affect the rights of a stranger. *Rumrill v. Huntington*, 5 Day, 163. *Francis v. Rand*, 7 Conn. 221.

The court will protect the attorney's lien for costs to the same extent as they would the rights of an assignee. *Bradt v. Koon*, 4 Cow. 416. And whoever receives by the client's assignment, the attorney's costs, &c., is liable therefor to the attorney in an action for money had and received. *Heartt v. Chipman*, 2 Aik. 162. *Sexton v. Pike*, 8 Eng. Arkansas, 193. He has however no lien, on damages recovered, before they come to his hands, though he have a claim against his client equal to the amount; and where the plaintiff has discharged the defendant from payment of the damages, and the costs and officer's fees are offered to be paid, the execution will be ordered to be returned satisfied. *St. John v. Dieffen-dorf*, 12 Wend. 261. He has a lien on his client's papers in his possession, but not any thing belonging to his client, till it is in his possession. *Ib.* But the Supreme Court of Pennsylvania, in *Walton v. Dickerson*, 7 Barr, 378, held, that an attorney has no lien either on the papers of his client, or the money collected for him, for his fees, and that the English rule is changed, inasmuch as the right is given him to recover for his services.

bill be paid, the court will not order them to be delivered up: (c) nor can an action of *trover* or *detinue* be maintained for them. Therefore, where A. gave his attorney a specific sum, for the purpose of satisfying a debt, for which an execution had issued against his goods, at the suit of B., and the attorney paid the money to B., who thereupon delivered to him a lease which had been deposited by A. with B. as a security for the debt, the court held, that the attorney had a lien on it for his general balance due from A.; and that such lien was not extinguished, by his having taken acceptances from A. for the amount of that balance, before the lease came to his hands, some of those acceptances having been previously dishonoured, and one of them taken up by the attorney. (d) An attorney has a lien upon papers belonging to a *bankrupt*, not only for his bill for business done but for the costs of an action brought against the bankrupt, subsequently to the issuing of the commission, to recover the amount of his bill. (e) And an agent for an attorney dying intestate and insolvent, pending a suit wherein he was plaintiff, has a lien for his costs upon a *postea*, of which the agent has obtained possession after the death of the intestate. (f) But the lien which an attorney has on the papers in his hands, is only commensurate with the right which the party delivering them has therein: and therefore, where the delivery is unauthorized, the attorney cannot detain them. (g) And a solicitor has no lien in equity against a remainder-man, on deeds put into his hands by tenant for life. (h)

An attorney has also a lien on the money recovered by his client, for his bill of costs. (i) If the money come to his hands, he may retain it to the amount of his bill: he may stop it *in transitu*, if he can lay

(c) 1 Lil. P. R. 142. 3 Durnf. & East, 275.

(d) 1 Maule & Sel. 535.

(e) 2 Barn. & Cres. 616. 4 Dowl. & Ryl. 125, S. C.

(f) 6 Dowl. & Ryl. 384.

(g) 4 Taunt. 807.

(h) 2 Scho. & Lef. 279; and see 13 Ves. 161, 2. 16 Ves. 258, 275. 18 Ves. 282, 294. 2 Scho. & Lef. 279; as to the lien of a solicitor in equity, on papers in his possession. *Ante*, 87.

(i) 3 Atk. 720. 4 Durnf. & East, 124; and see 2 P. Wms. 460. 2 Vez. 25. 2 Str. 1126. 3 Bur. 1313. 8 Moore, 229. 1 Bing. 277, S. C., as to the lien of *officers* of the court, and their remedy for the recovery of their fees.

In England, an attorney has a general lien for the amount of his bill upon the deeds, papers, and writings of his client, which come to his hands in the course of his professional employment, although his demand does not arise from services in relation to those papers. This lien is, however, only commensurate with the right which the party delivering the papers has in them. He has also a special lien upon the money of his client, which may come into his hands, and upon a judgment procured by him for his client. If the money is in his hands, he may retain it; and if in the hands of the officers of the court, the court will hold it until his lien is satisfied. *MacDonald v. Napier*, 14 Geo. 89. Attorneys and counsellors at law in Missouri, unlike attorneys and solicitors in England, are allowed no fees which are taxed as costs, but look solely to their clients for remuneration, the English doctrine of lien on papers and judgments having an extremely limited application. A defendant will be protected in paying the money to the plaintiff in the judgment, notwithstanding he may have notice that the fees of the attorneys are unpaid. *Frissell v. Haile*, 18 Mis. (3 Bennett), 18.

And it has been held in Connecticut, that the lien of an attorney for his fees and expenses upon the judgment recovered, is subject to the judgment debtor's right of set-off. *Benjamin v. Benjamin*, 17 Conn. 110. And an assignment of a judgment, by the judgment creditor, to his attorney, in payment of his fees and disbursements in the suit, is effectual to prevent a set-off against such judgment, of another judgment previously recovered by the judgment debtor against such judgment creditor. *Ib.* [Church and Waite, J. J., dissenting.] This decision is founded on the authority of *Rumrill v. Huntington*, 5 Day, 163, which conflicts with the uniform course of more modern decisions elsewhere, and makes an exception to the well-established general principle, that a chose in action, not negotiable, is subject, in the hands of the assignee, to all the equities which existed against it between the original parties, at the time of the assignment. *Ib.*

hold of it: *If he apply to the court, they will prevent its being [*338] paid over, till his demand be satisfied.(a) And Lord *Mansfield* declared he was inclined to go still further; and to hold, that if the attorney give notice to the defendant, not to pay the money recovered by his client, till his bill be satisfied, a payment by the defendant after such notice, would be in his own wrong, and like paying a debt which has been assigned after notice.(b) Accordingly it has been holden, that if the defendant's attorney pay to the plaintiff the debt and costs recovered, after notice from the plaintiff's attorney not to do so, till his bill has been first satisfied, the former is liable to pay over again to the latter, the amount of his lien on such debt and costs of the suit.(c) An attorney has also a lien upon a sum awarded in favour of his client, as well as if recovered by judgment: and if, after notice to the defendant, the latter pay it over to the plaintiff, the plaintiff's attorney may compel a repayment of it to himself; and he will not be prejudiced by a collusive release from the plaintiff to the defendant.(d) But the courts will not go beyond these limits: and therefore, where the defendant, not having had any notice to the contrary, compromised the debt and costs with the plaintiff, before his attorney had been paid, the court of King's Bench would not oblige the defendant to pay.(ee) In the Common Pleas, if the defendant, after action brought, pay the debt to the plaintiff, without knowledge of the attorney, and without discharging the costs, the plaintiff has a right to proceed in the action for the recovery of them.(ff) And if a plaintiff collude with the defendant's bail and attorney, to deprive the plaintiff's attorney of his costs, by settling the debt and accepting a part payment, without the intervention of the latter, the court of Common Pleas will not restrain him from proceeding against the bail, in order to recover such costs.(gg) But where there is no fraud, the plaintiff is allowed to compromise the action with the defendant, in that court, as well as in the King's Bench, without consulting his attorney.(hh) And if the plaintiff and defendant collusively settle the debt and costs upon an execution, in order to defraud the plaintiff's attorney of his costs, the latter cannot sue out a second execution on the same judgment, to levy his costs, but must apply to the court.(i) So, where the defendant had been discharged out of custody of the sheriff, with the consent of the plaintiff, notwithstanding a notice from the plaintiff's attorney to the sheriff's officer, not to release the defendant, until the costs were paid, the court held, that the sheriff was not liable to pay those costs, nor bound to retain the defendant, after the plaintiff was satisfied.(k) So where an attorney, without a regular authority from the plaintiff, commenced an action of *replevin*, and [*339] the plaintiff, knowing of the proceedings, suffered the cause *to be carried down to trial, but afterwards, concerting with the defendant, entered up satisfaction on the record, without securing the attorney his costs; the court to refused to vacate the entry of satisfaction.(a) And where the plaintiff's attorney was indebted to the plaintiff,

(a) Doug. 104. 1 H. Blac. 122.

(b) Doug. 238.

(c) 6 Durnf. & East, 361.

(d) 1 East, 464; and see 2 Rose, 237. 1 Madd. Rep. 49, in Chan.

(ee) Doug. 238.

(gg) 2 New Rep. C. P. 99.

(ff) 6 Esp. Rep. 40. 6 Price, 15.

(hh) 1 Taunt. 341.

(i) 5 Taunt. 429. 1 Marsh. 113, S. C.

(k) 2 Barn. & Ald. 402. 1 Chit. Rep. 241, S. C.

(a) 3 Bing. 132.

in a greater sum than the amount of the attorney's costs in the cause, the court of Common Pleas held that the agent, to whom the plaintiff's attorney was indebted on a general account, in a sum greater than the amount of such costs, could not, as against the plaintiff, retain out of the sum recovered by the latter, more than the charge for agency in that particular cause. *(b)* As a further security to the attorney, he cannot be *changed* by his client, without leave of the court, or order of a judge, on payment of his bill, to be taxed by the proper officer. *(c)*

In the King's Bench, when the defendant applies to set off the debt and costs in one action, against those in another, the court in general will not suffer it to be done, until the attorney's bill, for business done in the cause wherein he was concerned, be first discharged; *(d)* But it is otherwise in the Common Pleas; where the attorney's lien for his costs is held to be subject to the equitable claims that exists between the parties in the cause. *(e)* And, in the King's Bench, it has been holden, that an attorney has a lien on the judgment obtained by his client against the opposite party, to the extent of his costs of that cause only; *(f)* and the plaintiff, in that court, may set off interlocutory costs in the *same* cause, payable by him to the defendant, against the debt and costs recovered by him on the final result of the cause; notwithstanding the objection of the defendant's attorney, on the ground of his lien, which only attaches on the general result of the costs, &c., of the cause. *(g)* So where a defendant, being sued by bill as an attorney of that court, pleaded by an attorney or agent who had not filed any warrant to defend, and the plaintiff, being nonsuited, moved to stay the proceedings in the action, undertaking to set off the defendant's costs against a judgment debt due from him to the plaintiff, the court held, that the defendant's attorney or agent had no lien upon the costs, for his own costs in defending the suit. *(h)* Where the plaintiff, having charged the defendant in execution, died, and the defendant's wife took out administration to the plaintiff, the court of King's Bench ordered the defendant to be discharged out of custody; saying, that the plaintiff's attorney had no lien [*340] on the judgment for his costs. *(a)* And where the plaintiff, after judgment recovered, settled the action with the defendant, and employed a new attorney to enter up satisfaction on the record, the court held that the defendant was entitled to be discharged out of custody; although the lien of the plaintiff's attorney for the costs had not been satisfied. *(bb)*

(b) 1 Bing. 20. 7 Moore, 249, S. C.; and see 6 Price, 203. 2 Dowl. & Ryl. 6. 6 Dowl. & Ryl. 384. *Ante*, 97.

(c) 1 Lil. P. R. 141. Doug. 217. *Ante*, 94.

(d) 4 Durnf. & East, 123, 4. 6 Durnf. & East, 456. 8 Durnf. & East, 70. 1 Maule & Sel. 240. 8 Taunt. 526.

(e) 2 Blac. Rep. 826. Say. Costs, 254, S. C. 1 H. Blac. 23, 217. 2 H. Blac. 440, 587. 2 Bos. & Pul. 28. 1 New Rep. C. P. 22. 4 Taunt. 320. 8 Taunt. 526. 95 Moore, 5. 4 Bing. 16. 1 Price, 376; and see Lee's Prac. Dic. 1 Ed. 108, 9, 340, 41. 15 Ves. 72, 539. 2 Ball & Beat. 34, in Chan.

(f) 3 Barn. & Cres. 535. 5 Dowl. & Ryl. 399, S. C. 4 Bing. 17, S. C. cited.

(g) 8 East, 362. 1 Price, 375.

(h) 1 Dowl. & Ryl. 168.

(a) 8 Durnf. & East, 407; but see 8 Moore, 145, 529. 1 Bing. 431, S. C.

(bb) 4 Barn. & Ald. 466.

*CHAPTER XV.

Of the PROCEEDINGS in ACTIONS against PRISONERS, in CUSTODY of the SHERIFF, &c. ; and of the MARSHAL of the KING'S BENCH, or WARDEN of the FLEET PRISON : with the RELIEF they are entitled to, under the LORDS' ACT, &c.

PRISONERS in general may be considered as they are in custody on a *civil* or *criminal* account; and on a *civil* account, they are either taken or detained in custody of the *sheriff*, &c. on *mesne* process before, or *final* process after judgment; or they are committed to the custody of the *marshal* of the King's Bench, or *warden* of the Fleet prison, on a *cepi corpus*,^(aa) or *habeas corpus*, or surrender in discharge of bail.

In treating of prisoners, I shall consider, first, the mode of proceeding in actions against them, when in actual custody of the *sheriff*, &c. previous to the plea; secondly, the writ of *habeas corpus*, and manner of removing prisoners under it, into the custody of the *marshal* of the King's Bench, or *warden* of the Fleet prison; thirdly, the *bill* against prisoners, in the actual or supposed custody of the *marshal*, and how far it is considered as the commencement of the suit; fourthly, the proceedings in actions against prisoners, in the actual custody of the *marshal* or *warden*, previous to the plea; fifthly, the proceedings in actions against them, when in actual custody of the *sheriff*, &c. or of the *marshal* or *warden*, subsequent to the plea; and lastly, the *relief* they are entitled to under the Lords' act, and other acts for the discharge of insolvent debtors.

It has already been seen,^(bb) that when the defendant is arrested, he is either let out of custody, upon giving bail to the sheriff, or an attorney's undertaking for his appearance, or depositing in the sheriff's hands, the sum indorsed on the writ, with 10*l.* in addition to answer costs, &c.; or he remains in custody, or escapes, or is rescued, &c. And when he remains in custody of the *sheriff*, the plaintiff in due time should declare against him in such custody, unless he be removed by *habeas corpus*, to the custody of the marshal of the King's Bench, or warden of the Fleet prison.

Before the making of the statute 4 & 5 W. & M. c. 21, there could have been no declaration in either court, against a defendant in custody of the *sheriff*, or other officer by whom he was arrested; but the plaintiff [*342] was *obliged to bring a *habeas corpus cum causâ*, and so turn him over to the custody of the marshal or warden, in order to charge him with a declaration.^(a) But now, by the above statute,^(b) which was passed to relieve plaintiffs from the trouble and expense of bringing up prisoners by *habeas corpus*,^(c) "if any defendant be taken or charged in custody, at the suit of any person, upon any writ out of any of the courts at Westminster, and imprisoned for want of sureties for his appearance, the plaintiff in such writ may, before the end of the *next* term after such writ is returnable, declare against such prisoner, in the court out of which the writ issued, whereupon the said prisoner was taken and imprisoned, or charged

(aa) Barnes, 392.

(bb) *Ante*, 221.

(a) See the preamble to the statute. R. M. 1654, § 11. R. E. 5 W. & M. reg. 3, § 1, (a), K. B. 1 Wils. 120. 2 Bur. 1051. 1 Durnf. & East. 192.

(b) § 2.

(c) 1 Wils. 120. 1 Durnf. & East, 192.

in custody; and may cause a true copy thereof to be delivered to such prisoner, or to the gaoler or keeper of the prison or gaol in whose custody such prisoner shall be or remain; to which declaration the said prisoner shall appear and plead; and if such prisoner shall not appear and plead to the same, the plaintiff in such case shall have judgment, in such manner as if the prisoner had appeared, and refused to answer or plead to such declaration."

And, by the same statute, § 3, "in all declarations against any prisoner detained in prison, by virtue of any writ or process issued out of the court of King's Bench, it shall be alleged in custody of what sheriff, bailiff, or steward of any franchise, or other person having the return and execution of writs, such prisoner shall be, at the time of such declaration, by virtue of the proces of the said court, at the suit of the plaintiffs: *(d)* which allegation shall be as good and effectual, to all intents and purposes, as if such prisoner or prisoners were in the custody of the marshal." If the declaration therefore do not allege, either expressly or by implication, in what custody the defendant is detained, and at whose suit, *(e)* it will be bad on a general demurrer. This allegation however is only necessary, where the plaintiff proceeds upon a bill of Middlesex or *latitat*, &c. or by *attachment* of privilege, in the King's Bench; and not where he proceeds by *original* writ in that court, or by action in the Common Pleas. And, in a declaration in *debt*, it is unnecessary to state at whose suit the defendant is in custody; the words "*of a plea that he render, &c.,*" being a sufficient allegation, that he is in custody at the plaintiff's suit. *(f)*

Upon this statute, a defendant in the actual custody of the sheriff or other officer, may be proceeded against by the *same* plaintiff at whose suit he was arrested, or by a *third* person: by the former, upon the original *caption*, by the latter upon a subsequent *charge*, and by either of them, upon a *re-capture* by virtue of an *escape* warrant. *(g)*

When the defendant is a prisoner in custody of the sheriff, &c., a bill must be filed against him, in the King's Bench, with the clerk of the *declarations in the King's Bench office; it being holden, that the [*343] delivery of a declaration against a prisoner, though within *two* terms, is a nullity, if there were no bill filed before: *(aa)* And, by rule of E. 5 W. & M. if the declaration be not filed in the King's Bench, *(bb)* and Exchequer, *(c)* or entered and left in the office in the Common Pleas, before the end of the next term after the writ or process, by which the prisoner was taken or charged in custody, is returnable, the prisoner shall be discharged, in the King's Bench and Exchequer, on filing common bail; or, in the Common Pleas, upon entering his appearance with the proper officer, by writ of *supersedeas*, made by him, according to the ancient practice of that court. *(dd)*

The statute expressly provides, that the plaintiff may declare against a defendant in custody of the sheriff, &c., before the end of the *next* term after the process is returnable: But a subsequent rule, of the court of

(d) Append. Chap. XV. § 1, &c.

(e) 2 Ld. Raym. 1362. 1 Wils. 119, 20.

(f) *Id. ibid.* 1 Ken. 114.

(g) *Ante*, 233, 4, 5.

(aa) 4 East. 16; and see 1 Chit. Rep. 389.

(bb) R. E. 5 W. & M. *reg.* 3, § 6, K. B.; and see Carth. 469. 1 Salk. 98, S. C.

(c) R. E. 5 W. & M. *reg.* 3, § 6, in *Scac.* Man. Ex. Append. 208.

(dd) R. E. 5 W. & M. *reg.* 3, § 6, C. P. And for the form of the writ of *supersedeas*, see Append. Chap. XV. § 35, &c.

King's Bench, *(c)* having rather ambiguously required, that if the defendant should remain in custody for *two* terms, and the plaintiff should not declare against him within that time, the defendant should be discharged out of custody, after the end of the *second* term after such imprisonment; the judges of that court, in favour of liberty, determined, that where a defendant was arrested in one term, on a writ returnable the next, the term in which the defendant was arrested should be reckoned as one of the two terms; and consequently, that the defendant should be discharged, for want of a declaration, after the end of the same term in which the writ was returnable. *(f)* This practice however has been since altered; and it is now settled, agreeably to the letter and intention of the statute, that in all cases where a prisoner is taken or charged in custody, by *mesne* process issuing out of the King's Bench, the plaintiff may declare against him, before the end of the next term after the return of the process, by virtue whereof he was taken or charged in custody. *(g)* And a plaintiff need not declare against a prisoner, until the term next after the return of the writ, even though there was time in the term in which the writ was sued out, to have made it returnable in that term, and it be not in fact made returnable until the next term. *(h)* The term however, in which the process whereon the defendant was arrested is returnable, is still accounted one of the two terms; although it be returnable on the last day of the term: *(i)* and the plaintiff cannot declare *before* the return of the process, upon which the defendant was taken or charged in custody. *(k)*

If the defendant be taken and detained, or charged in custody of the sheriff, &c., for a *bailable* cause of action, a copy of the declaration [*344] should *be delivered personally to the defendant, or left for him with the gaoler or keeper of the goal or prison in whose custody he is confined, before the end of the next term after the return of the process: *(a)* And if any gaoler or keeper of a prison, having received a copy of a declaration against any prisoner in his custody, shall suppress the same, and not deliver it forthwith unto such prisoner, an attachment shall be issued against him. *(b)* It is not sufficient, where the defendant is a prisoner in custody of the sheriff, &c., to file or enter a declaration in the office, to which the defendant is not obliged to plead, and on which the plaintiff cannot take a regular judgment: *(c)* And, in the Common Pleas, if a defendant in custody employ an attorney, merely for the purpose of putting in bail, the delivery of a declaration to such attorney is not sufficient. *(d)* But it is not necessary, in that court, to enter the declaration with the prothonotary, before the delivery thereof to the prisoner; it being sufficient, if it be entered at any time before the giving of a rule to appear and plead. *(ee)* And, in the King's Bench, if the defendant be served in custody of the sheriff, &c., with a copy of process, at the suit of the *same* or a *different* plaintiff, it is not necessary that a

(c) R. T. 2 Geo. I. K. B.

(f) 3 Bur. 1448. 4 Bur. 2060. *Cookson v. Forster*, T. 23 Geo. III. K. B.

(g) R. H. 26 Geo. III. K. B. 2 Blac. Rep. 1242, 3, C. P. *accord*.

(h) 6 Durnf. & East, 547.

(i) R. T. 2 Geo. I. *(a)*, K. B.

(k) R. E. 5 W. & M. *reg.* 3, § 1, K. B. C. P. & Excheq.

(a) Stat. 4 & 5 W. & M. c. 21, § 2. 1 Bos. & Pul. 535.

(b) R. E. 5 W. & M. *reg.* 3, § 7, K. B. C. P. & Excheq.

(c) 1 Str. 474. 1 Bos. & Pul. 535; and see 1 Chit. Rep. 386, 720.

(d) 1 Taunt. 493; and see 5 Durnf. & East, 35.

(ee) Barnes, 372. Pr. Reg. 329. Cas. Pr. C. P. 114, S. C. 1 Bos. & Pul. 539.

copy of the declaration should be delivered personally to the defendant, or left for him with the gaoler or turnkey: but it may be delivered or filed, absolutely or *de bene esse*, and the plaintiff may proceed thereon, as if the defendant were at large.^(f)

The plaintiff having declared, an *affidavit* should be made, and filed with the clerk of the rules, in the King's Bench, before the first day of the ensuing term;^(g) stating the delivery of a copy of the declaration, and the time when, and person to whom, the same was delivered;^(h) if to a gaoler or turnkey, that he acknowledged the defendant was then a prisoner in his custody;⁽ⁱ⁾ and that the defendant was arrested, or charged in custody, by process of this court, returnable before the delivery of the copy.^(k) The time when such affidavit was filed should be entered thereon, by the clerk of the rules, and a copy of it produced to the master in the King's Bench, or clerk of the pleas in the Exchequer,^(l) before judgment.^(m) Hence it is necessary, and usual in the King's Bench, when the defendant is in custody of the sheriff, &c., to make *three* copies of the declaration: one to be delivered to the defendant, or left for him with the gaoler or turnkey, who should be asked if the defendant be a prisoner at the plaintiff's suit; another, to be annexed to the original affidavit of such delivery, and filed with the clerk of the rules; and a [*345] third, to be annexed to an office copy of such affidavit: On this last copy, a rule is given with the clerk of the rules, for the defendant to appear and plead; and in default thereof, judgment may be signed.⁽ⁿ⁾ In the Common Pleas, the affidavit of the delivery of a copy of the declaration, &c., should be made and filed with one of the secondaries, within *twenty* days after the end of the next term after that in which the writ or process is returnable, *Easter* term excepted, and within *ten* days after *Easter* term:^(b) therefore, if a declaration against a prisoner be delivered on the last day of the term in which the writ is returnable, the affidavit of the delivery need not be filed till *twenty* days after the expiration of the following term.^(cc) And in that court, the production of a copy of the affidavit to the prothonotary being dispensed with,^(dd) it is only necessary to have *two* copies of the declaration; one to be delivered to the defendant, or left for him with the gaoler or turnkey, and the other to be annexed to an affidavit of such delivery; upon which latter copy, the secondary will give a rule for the defendant to appear and plead.

The mode of *charging* a defendant in actual custody of the sheriff, &c. for a *bailable* cause of action, is by making an affidavit thereof, and suing out *process*; which should be duly marked or indorsed for bail, and left at the sheriff's office. But if the cause of action be not bailable, the *same* plaintiff or a *third* person may proceed against the defendant, as if he were at large, by serving him with a copy of process;^(e) and if he do not appear, by filing a declaration in the office, and giving him notice thereof. But

(f) 1 Durnf. & East, 192; but see Barnes, 392.

(g) R. II. 26 Geo. III. K. B.

(h) R. E. 5 W. & M. reg. 3, § 2, K. B.; and see Append. Chap. XV. § 6.

(i) R. E. 5 W. & M. reg. 3, § 2, (a), K. B.

(k) R. E. 5 W. & M. reg. 3, § 2, K. B.; and see Append. Chap. XV. § 6.

(l) R. E. 5 W. & M. reg. 3, § 2, in *Seac.* Man. Ex. Append. 207.

(m) Same rule, § 2, (b), K. B.

(cc) 3 Moore, 236.

(d) 1 Durnf. & East, 192; but see Barnes, 392.

(b) R. E. 5 W. & M. reg. 3, § 2, C. P.

(dd) Imp. C. P. 7 Ed. 666, 672.

neither the plaintiff nor a third person can charge a prisoner with a declaration, or execution, *(f)* in a *civil* action, when he is in custody of the sheriff, or in any other custody, on a *criminal* account without leave of the court, *(g)* or a judge: and a prisoner in custody on an *attachment* for a contempt, is holden to be a prisoner in custody on a *criminal* account, within the meaning of this rule; *(h)* though if he accept a declaration, and suffer judgment to go against him without complaining, he has waived the advantage which he might have taken of the irregularity, and shall be bound by it. *(i)* A person in custody however, under an attachment, for non-payment of costs, may be charged with an execution in a different action as a matter of course: *(k)* And one who is attainted of felony, or even treason, may be charged with a civil action, by leave of the court or a judge; so as it be not to defeat the effect of the king's pardon, by disabling him from going abroad. *(l)* But the court of Common [*346] Pleas will not grant a *habeas corpus*, to bring up a prisoner in custody on a criminal account, in order to have him charged with a declaration, *(a)* or execution, *(b)* in a civil action.

When a defendant, being a prisoner in custody of the marshal, upon mesne process, shall be taken and detained in custody of any sheriff, by virtue of a judge's warrant for an escape, the plaintiff shall declare against him in custody of such sheriff, before the end of the second term after such taking and detaining; otherwise a *supersedeas* may be made for such defendant: *(c)* And, in the Common Pleas, when the defendant had been previously rendered to the Fleet prison, the court held that the time of his recaption, or coming again into prison, should be looked upon as the time of the render. *(d)*

The times for *appearing* and *pleading*, when the defendant is in custody of the sheriff, &c. are regulated as follows: That "upon every arrest by mesne process out of either court, returnable the first day of *Easter* or *Michaelmas* term, if a copy of the declaration be delivered against the defendant, before one month from the day of *Easter*, or the morrow of *All Souls*," (that is, before the *third* return of *Easter* term, or of *Michaelmas* term, as it then stood), *(ee)* "and affidavit thereof made and filed, and the defendant do not appear before the end of *ten* days after those terms respectively, judgment may be entered against him, if rules have been given: but if he appear within that time, he shall imparl until the next term; unless the action be in *London* or *Middlesex*, and the defendant be in prison within *forty* miles of *London* or *Westminster*; in which case, though he appear before the expiration of that time, he shall plead *two* days before the *essoin* day of the next term: and in default thereof,

(f) Pr. Reg. 325.

(g) T. Raym. 58. 1 Sid. 90, S. C. 1 Lev. 124. 1 Sid. 154, S. C. 1 Lev. 146. 1 Salk. 354. R. T. 2 Geo. I. *(a)*.

(h) Cas. Pr. C. P. 27. Pr. Reg. 325.

(i) Cas. Pr. C. P. 31; and see 1 Durnf. & East, 591. 1 Chit. Rep. 386.

(k) 4 Durnf. & East, 316.

(l) 2 Salk. 500. 7 Mod. 153. 2 Ld. Raym. 848, S. C. *Id.* 1572. 2 Str. 873, S. C. Cas. temp. Hardw. 190. 1 Blac. 30. 1 Wils. 217. Fost, 61, S. C. 2 New Rep. C. P. 246.

(a) 2 New Rep. C. P. 245; and see 1 Marsh. 166. 3 Moore, 259. 1 Brod. & Bing. 23, S. C. *Ante*, 287.

(b) 8 Moore, 81. 1 Bing. 221, S. C.

(c) R. T. 6 Ann. K. B.; and see 6 Mod. 21 254.

(d) Barnes, 382; and see 4 Moore, 380. 2 Brod. & Bing. 35, S. C.

(ee) This term having been since shortened, by the statute 24 Geo. II. c. 48.

rules having been given, judgment may be entered against him as aforesaid.”(f) And where the essoin day of the term fell on a *Monday*, and on the *Saturday* preceding, defendant not having pleaded, the plaintiff signed judgment as for want of a plea, the court of King’s Bench refused to set aside the judgment for irregularity.(g)

“If a copy of the declaration be delivered against such defendant, on or after one month from the day of Easter in *Easter* term, or the morrow of All Souls in *Michaelmas* term, or in *Hilary* or *Trinity* term, and thereupon the plaintiff give rules to appear and answer, then if the defendant appear *two* days before the essoin day of the next term, he shall imparl until the next term; but if he do not appear within that time, judgment may be given against him.”(h)

*And “if a writ be returnable in *any* term, and a copy of [*347] the declaration have been delivered before the essoin day of the next term, the plaintiff in such next term may give rules to appear and answer: and if the defendant do not appear and plead upon the expiration of the rules, judgment shall be given against him.”(a)

When the defendant is in custody of the sheriff, &c. the demand of a plea is unnecessary.(b) And when a plea is filed by the defendant, at an earlier time than by the rules of the court he is compellable to plead, he must, in order to prevent surprise, give notice of his plea:(c) but no such notice is required where the plea is filed in regular time;(d) and, in the Common Pleas, where declaration was delivered to a prisoner in gaol, indorsed with a notice to plead in *eight* days, a plea pleaded before the declaration was filed is good.(e) In other respects, the proceedings subsequent to the declaration, against a defendant in custody of the sheriff, &c. are similar to the proceedings against him when in custody of the marshal or warden; which will be treated of in a subsequent part of this chapter.

It will next be proper to consider the writ of *habeas corpus*, and the manner of removing prisoners under it, into the custody of the marshal of the King’s Bench, or warden of the Fleet prison; after which, the remaining subjects of this chapter will be treated of in their proper order.

The writ of *habeas corpus* lies in *civil* or *criminal* cases. In *criminal* cases, this writ, and the proceedings thereon, principally depend on the statute 31 *Car.* II. c. 2, the provisions of which are extended by the statute 56 *Geo.* III. c. 100, “for more effectually securing the liberty of the subject.” But this writ, whether at common law or under the 31 *Car.* II. c. 2, does not issue as a matter of course, upon application in the first instance, but must be grounded upon affidavit, on which the court are to exercise their discretion, whether the writ shall or shall not issue.(ff) A prisoner in execution, in the King’s Bench, may be charged there criminally, by a justice of peace’s warrant;(gg) but no such justice can take a prisoner of

(f) R. E. 5 W. & M. *reg.* 3, § 3. K. B. C. P. & Excheq.

(g) 2 Dowl. & Ry. 538.

(h) R. E. 5 W. & M. *reg.* 3, § 4. K. B. C. P. & Excheq.

(a) R. E. 5 W. & M. *reg.* 3, § 3. K. B. C. P. & Excheq.

(b) 1 Durnf. & East, 591. 6 Durnf. & East, 524; but see 2 Bos. & Pul. 367.

(c) 4 Durnf. & East, 664. 8 Durnf. & East, 596.

(d) 5 Durnf. & East, 473.

(e) 4 Taunt. 545.

(ff) 2 Chit. Rep. 207.

(gg) 2 Str. 828.

this court out of the custody of the court, and send him to the county gaol.(y) The court, however, will grant a *habeas corpus*, to the warden of the Fleet, to take the body of a debtor confined there, before a magistrate, to be examined from time to time, respecting a charge of felony, or misdemeanour.(h) And where a prisoner is brought up under a *habeas corpus*, issued at common law, he may controvert the truth of the return,

by virtue of the statute 56 Geo. III. c. 100, § 4.(i) In civil [*348] cases, *the writ of *habeas corpus* is used to remove the defendant from one custody to another, as from the custody of the sheriff, or other officer by whom he was arrested, into the custody of the marshal or warden; or from the custody of the marshal into that of the warden, or *vice versâ*; or from the prison of an inferior court. If the defendant be a prisoner in the King's Bench or Fleet prison, by process of the same court, he may be brought up by *rule*; but if he be in custody under the process of another court, there must be a *habeas corpus*.(a)

The writ of *habeas corpus*, in civil cases, is a judicial writ, supposed to issue out of the King's Bench,(b) or prothonotaries' office; commanding the sheriff, or other officer to whom it is directed, to have the body of the defendant, together with the day and cause of taking and detaining him, before the court or a judge, on a day *certain* in term time, or *immediatè*, to *answer* or *satisfy* the plaintiff, or generally, to *do* and *receive* what the court or judge shall consider of him. Hence it is called, according to the subject matter, a writ of *habeas corpus ad respondendum*, *ad satisfaciendum*, or *ad faciendum et recipiendum*;(c) though the latter is more commonly called a *habeas corpus cum causâ*: and it is grantable of common right, at all times, whether in term or vacation, without any motion in court.(d)[A]

(g) 2 Str. 828.

(h) 5 Barn. & Ald. 730.

(i) 4 Barn. & Cres. 136. 6 Dowl. & Ry. 209, S. C.

(a) Barnes, 385; and see the case of the *King v. Umfreville*, T. 31 Geo. III. C. P. Imp. C. P. 7 Ed. 552.

(b) 2 Bur. 777.

(c) *Off. Brev.* 110, 112. *Thes. Brev.* 131.

(d) 1 Lev. 1. 2 Mod. 306.

[A] "The Constitution of the United States provides that 'the writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it.' It has never yet been suspended in the United States. In January, 1807, a bill passed the Senate for its suspension, but was rejected in the House of Representatives by a large majority.

"By the 14th section of the act of Congress of Sept. 24, 1789, the courts of the United States have power 'to issue writs of *scire facias*, *habeas corpus*, and all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.' And that either of the justices of the Supreme Court, as well as the judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of inquiry into the causes of commitment: Provided, that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless when they are in custody under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.' In construction of this act, it has been held that the phrase, 'the writs shall be agreeable to the principles and usages of law,' means those general principles and those general usages which are to be found, not in the legislative acts of any particular State, but in that generally recognized and long established law which forms the substratum of the laws of every State.

"The Supreme Court may grant the writ of *habeas corpus ad subjiciendum*, also, the writ *ad prosequendum*, *testificandum et deliberandum*, but not the writ *ad respondendum*, nor *ad satisfaciendum*, nor the *habeas corpus cum causâ*. *Habeas corpus* lies to a Circuit Court of the United States sitting in a State. Or to the Circuit Court of the District of Columbia. As the jurisdiction of the Supreme Court is appellate, it must be shown to the court that they have

The writ of *habeas corpus cum causâ*(*e*) lies for the defendant to remove himself, or for the plaintiff to remove him, from the custody of the sheriff or other officer by whom he was arrested, into the custody of the marshal of the King's Bench, or warden of the Fleet prison. At common law, when a defendant was arrested, and detained or charged in custody of the sheriff or other officer, for want of bail, upon mesne process, if the plaintiff did not, within *two* terms, cause him to be brought up, by writ of *habeas corpus cum causâ*, and committed, so that he might declare against him in custody of the marshal or warden, the defendant was entitled to his discharge, on common bail or appearance.(*f*) This mode of proceeding was altered by the statute 4 & 5 W. & M. c. 21, § 3, which enables the plaintiff to declare against the defendant, in custody of the sheriff, or other

(*e*) Append. Chap. XV. § 8, 9.

(*f*) R. M. 1654, § 11. R. E. 5 W. & M. reg. 3, § 1, (*a*), K. B. 1 Wils. 120. 2 Bur. 1051. 1 Durnf. & East, 192.

power to award the writ before it will be granted. The authority of the United States courts to grant the writ, is restricted by the act giving the power to cases where the prisoner is confined under or by colour of the authority of the United States, or is necessary to be brought in to testify. It extends to inquiry into the cause of commitment of a person in custody under a commitment of the Circuit Court of the District of Columbia; or any other United States court. It is said of this writ in *ex parte Tobias Watkins*, 'the Supreme Court will not grant a *habeas corpus* to a prisoner in confinement under conviction by the Circuit Court of the United States of the District of Columbia, when it is alleged that the proceedings in that court were *coram non jure*: the power of the Supreme Court to award writs of *habeas corpus*, is conferred expressly on the court by the fourteenth section of the judiciary act, and has been repeatedly exercised; no doubt exists respecting the power; no law of the United States prescribes the cases in which the writ shall be issued, nor the power of the court over the party brought up by it; the term is used in the Constitution as one which was well understood; and the judiciary act authorizes the Supreme Court and all the courts in the United States to issue the writ, 'for the purpose of inquiring into the cause of the commitment.' The writ of *habeas corpus* is a high prerogative writ known to the common law; the great object of which is the liberation of those who may be imprisoned without sufficient cause; it is in the nature of a writ of error to examine the legality of a commitment; it brings up the prisoner with the cause of his confinement, and the court can undoubtedly inquire into the sufficiency of that cause; but if that cause be the judgment of a court of competent jurisdiction, especially a judgment withdrawn by law from the revision of the Supreme Court, it is conclusive, and they will not inquire into it.' The writ does not lie to bring up a person confined in the prison bounds upon a *capias ad satisfaciendum* issued in a civil suit. The Supreme Court will not grant a *habeas corpus* when the party has been committed for contempt by a court of the United States of competent jurisdiction; and if granted, the court will not inquire into the sufficiency of the cause of the commitment; the adjudication of the court below is a conviction, and the commitment in consequence is an execution; and the exercise of the power of revising the case on a *habeas corpus*, would be the exercise of an appellate jurisdiction in criminal cases, which is an authority not granted by the laws of the United States, except by a certificate that the opinions of the judges are opposed, and the court will not do indirectly what they cannot do directly. Upon a *habeas corpus*, the court are only to inquire, whether the warrant of commitment with the evidence returned, states a sufficient probable cause to believe that the person charged has committed the offence stated. If the court go into an examination of the evidence upon which the commitment was grounded, it is unimportant whether the commitment be regular in point of form or not; they will proceed to do what the court below ought to have done. On a return to a *habeas corpus* before the Circuit Court, the prisoner was discharged on the ground that the writ of *capias* by which he was detained, had improperly issued; but there appearing to the court upon the hearing, a sufficient ground for his arrest, he was ordered into custody upon a bench warrant. An application to the Supreme Court for a *habeas corpus* to discharge from this latter custody, was refused. A discharge on *habeas corpus*, discharges the party only from such process under the same indictment, or a new one. Neither the Supreme Court nor any other court of the United States, or judge thereof, can issue a *habeas corpus* to bring up a prisoner who is in custody under sentence or execution of a State court under criminal or civil process, for any other purpose than to be used as a witness.' *Ingersoll on Habeas Corpus*, 34-38. *Vaux on Hab. Corp. Recorder's Decisions*, p. 188 Phila. 1846. 4 Amer. Law Reg. 257. Phila. 1856.

officer who arrested him.(gg) He is still at liberty, however, to remove the defendant, by writ of *habeas corpus cum causâ*, from the custody of the sheriff or other officer, into the custody of the marshal or warden, at any time before or after judgment.(h) This writ also lies for the *bail* of the defendant to bring him up, and surrender him in their discharge, to the custody of the marshal of the King's Bench, or warden of the Fleet prison; and may be granted, in the King's Bench, whether the defendant be in custody in a *civil* suit, or on a *criminal* account:(i) and [*349] under it, we have *seen,(a) the court will either commit the defendant to the custody of the marshal or warden, or remand him to his former custody.

The writ of *habeas corpus cum causâ* should be directed to the sheriff or other officer in whose custody the defendant is detained; and there is an old rule of both courts,(b) directing it to be made returnable in court, at a day certain in term, unless directed to the sheriffs of *London* or *Mid-dlessex*, or unless it be to deliver over the defendant in discharge of his bail. But this rule having fallen into disuse, the writ is now made returnable, before the chief justice at his chambers, *immédiatè*: and under it the defendant should be brought in custody, according to the writ, in due and convenient time,(c) without being permitted to wander abroad, under pretence of such writ:(d) And though the writ be returnable before the chief justice, yet any of the other judges, in his absence, may commit the defendant to the prison of the court.(e) A tipstaff is entitled to take a fee of *six* shillings, and no more, for conducting a prisoner from the judge's chambers to the King's Bench:(f) And the usual allowance to the sheriff, for bringing up a defendant on a *habeas corpus* from the county gaol, is one shilling *per* mile;(g) and if the defendant will not pay the sheriff his charges, the court will remand him.(hh)

When the defendant, being charged with process issuing out of the court of King's Bench, is removed *before* declaration, from the custody of the sheriff or marshal to the Fleet prison, the plaintiff cannot proceed further in that court; but must either declare against him in the Common Pleas, or remove him into the custody of the marshal, by writ of *habeas corpus ad respondendum*,(ii) in order to charge him with a declaration.(k) So where the defendant, being charged with process issuing out of the court of Common Pleas, is removed *before* declaration, from the custody of the sheriff or warden to the King's Bench prison, the plaintiff cannot proceed further in the latter court; but must either declare against him in the King's Bench, or remove him into the custody of the warden, by writ of *habeas corpus ad respondendum*. This writ also lies for a *third* person to remove a defendant from the *Fleet*, or prison of an *inferior* court, in order to charge him with a declaration in the King's Bench.(l) But then, there must be something to charge him with, either in the body of the *habeas corpus* or

(gg) *Ante*, 342.

(h) 1 Salk. 354. 2 Str. 1262. Say. Rep. 154. 3 Bur. 1875.

(i) 7 Durnf. & East, 226. 15 East, 78.

(a) *Ante*, 286.

(b) R. M. 1654, § 7, K. B., § 10, C. P.

(c) 3 Bur. 1875, 6.

(d) R. M. 1654, § 7, K. B.; and see R. M. 28. Car. II. K. B. R. M. 1654, § 10, C. P.

(e) Barnes, 20.

(f) 5 Barn. & Ald. 266.

(g) Barnes, 377.

(hh) 1 Str. 308. 2 Str. 1262. Cas. Pr. C. P. 110.

(ii) Append. Chap. XV. § 10, &c.

(k) 5 Durnf. & East, 36. Barnes, 384, 5, 402.

(l) 3 Bac. Abr. 2. 2 Lil. P. R. 4 Sty. P. R. 330. 1 Mod. 235. 2 Mod. 193, S. C. 1 Salk. 351. 2 Str. 936. 2 Bur. 1049.

return, or ready in court upon bringing him up: *(m)* And under this writ, a defendant may be committed to the custody of the marshal, on a special original. *(n)* The writ of *habeas corpus ad respondendum* should be directed to the warden of the Fleet, or keeper of an inferior prison, returnable at a day certain in court; and will be as good cause of detainer, as a writ of *capias ad respondendum*. *(a)* But this writ does [*350] not lie for the plaintiff in an inferior court, to remove the body of the defendant into the King's Bench, to answer to a new action there for the same debt. *(b)* And a prisoner under criminal process in the house of correction, &c. cannot be brought up by *habeas corpus ad respondendum*, for the purpose of being charged with a declaration on a bailable writ, and re-committed to his former custody, so charged. *(c)*

When the defendant is removed after declaration, from the custody of the sheriff or marshal, to the Fleet prison, the plaintiff should proceed to judgment against him in the King's Bench, and then remove him into the custody of the marshal, by writ of *habeas corpus ad satisfaciendum*, in order to charge him in execution. *(d)* And so, *vice versa*, if a prisoner in the Fleet, charged with a declaration in the Common Pleas, remove himself by *habeas corpus* to the custody of the marshal, the plaintiff must proceed to judgment in the Common Pleas, and then carry him by *habeas corpus ad satisfaciendum*, to charge him in execution. *(e)* This writ is also used as the ordinary mode of charging the defendant in execution, in the Common Pleas, when a prisoner in the Fleet: and it should be directed and returnable in the same manner as the writ of *habeas corpus ad respondendum*; and the number of the judgment roll indorsed thereon, by the attorney who sues it out. *(f)* But where the defendant, a prisoner, after the issuing of a writ of *habeas corpus* for bringing him up to be charged in execution, sues out and obtains the allowance of a writ of error, he cannot be charged in execution, but must be remanded to his former custody. *(g)*

Under one or other of these writs, a defendant may be removed from any civil custody, into that of the marshal or warden. If he be already in custody of the sheriff, under process of the same court, he has only to sue out a writ of *habeas corpus eum causâ*, and deliver it to the sheriff; under which he will be removed, as a matter of course, on paying the usual fees: And he may be removed, in like manner, from the prison of an inferior court. But if he be in custody of the sheriff, under the process of another superior court, a bailable writ must be taken out against him, in the court to the prison of which it is intended to remove him, and lodged in the sheriff's office, as a foundation for his commitment on the *habeas corpus*. When he is in custody of the marshal or warden, under process of both courts, he may be removed, as a matter of course, on suing out a writ of *habeas corpus eum causâ*; but where he is detained upon process

(m) 2 Lil. P. R. 356.

(n) 3 Barn. & Ald. 601.

(a) R. M. 1654, § 7, K. B. § 10, C. P.

(b) Cowp. 116; and see Cas. Pr. C. P. 5 Pr. Reg. 216.

(c) 9 East, 154. 4 Dowl. & Ry. 271.

(d) 1 Sid. 109. R. T. 2 Geo. I. *(h)*, K. B. 2 Str. 1153. Barnes, 385; and see Append. Chap. XV. § 15, &c.

(e) R. T. 2 Geo. I. *(h)*, K. B.

(f) R. M. 1654, § 7. R. T. 2 Geo. I. *(h)*, K. B. R. M. 1654, § 10, C. P.

(g) 1 Barn. & Ald. 676. And see 6 Moore, 260. 3 Brod. & Bing. 93, S. C., where the court of Common Pleas, under particular circumstances, discharged the rule for an attachment against the warden, for disobeying a writ of *habeas corpus*, on his paying all costs.

of another court only, the practice is, to sue out a bailable writ [*351] against him, and put *in bail above thereon, in the court to the prison of which he is intended to be removed; and then to bring a writ of *habeas corpus cum causâ*, in order to surrender him in discharge of his bail: or he may be removed, in term time, by writ of *habeas corpus ad respondendum*, returnable in court on a day certain; upon which he must be charged in court with a declaration, an affidavit being first made of a bailable cause of action.

If a prisoner be removed from the custody of the warden of the *Fleet* to the King's Bench prison, by writ of *habeas corpus*, he must remain in such prison, and shall not be set at liberty, until he has paid the prison fees due to the warden of the *Fleet*.(a) On a removal by writ of *habeas corpus ad respondendum* to the King's Bench or *Fleet* prison, the prisoner cannot be removed elsewhere, till he has answered to the cause depending against him in the King's Bench or Common Pleas:(b) And it is a general rule, applicable to all writs of *habeas corpus* returnable in the King's Bench, that "every prisoner, who, by virtue thereof, shall be committed to the custody of the marshal, shall remain there for two days next after such commitment, notwithstanding any other writ of *habeas corpus*, to the said marshal delivered and allowed."(c)

In an action for an escape out of execution, the declaration alleged that the prisoner was, by *habeas corpus*, brought before a judge of the King's Bench, and by him committed to the custody of the marshal, "as by the said writ of *habeas corpus*, and the said commitment thereon, now remaining in the said court, more fully appears;" and the court of Common Pleas held, 1st, that evidence of a commitment by a judge of the King's Bench, not filed of record, would not support the action; and 2dly, that the above allegation, even if unnecessary, must be proved as laid.(d) But in a subsequent case(e) which was an action against the marshal, for an escape on mesne process, it being alleged in the declaration that the prisoner was arrested on mesne process, and brought before a judge at chambers, by virtue of a writ of *habeas corpus*, and was by him thereupon committed to the custody of the marshal, as by the record thereof, now remaining in the court of King's Bench, appears, &c. it was determined by the court of King's Bench, that such allegation is either impertinent and surplusage, for, properly speaking, such documents are not records, nor capable of becoming so; or considering them as quasi of record, the allegation is sufficiently proved, by the production of them from the office of the clerk of the papers of the King's Bench prison, with whom they are properly deposited. And that court will not compel the marshal to affile of record a writ of *habeas corpus cum causâ*, by virtue of which a person is committed to his custody in execution.(f) In the Common Pleas, the distinction seems to be between commitments by a single judge, on mesne process, and commitments by the court, in execution; the one is said to *be a matter of record, the other not; for the court can only act by record:(aa) and accordingly, where the bill, in an action against the warden for an escape, alleged that the prisoner was brought to the bar of this court by the

(a) R. H. 14 Car. I. K. B.; and see 8 Moore, 157. 1 Bing. 255, S. C. *Ante*, 53, (f).

(b) 1 Salk. 350.

(c) R. H. 5 W. & M. K. B.

(d) 3 Bos. & Pul. 456. 5 Esp. Rep. 8, S. C.

(e) 5 East, 440; and see 3 Barn. & Cres. 2. 4 Dowl. & Ryl. 624, S. C.

(f) 2 Maule & Sel. 202.

(aa) *Per Blosset*, Serj. arg. 2 Moore, 562, 3.

defendant, by virtue of a writ of *habeas corpus*, and was by the same court re-committed to prison in execution, as by the commitment more fully and at large appears;" the plaintiff, on special demurrer, assigning for cause that it was not averred in the bill that the commitment was of record, had leave to amend, on payment of costs.(bb) The prison books of the King's Bench and Fleet prisons, though admissible evidence to prove the period of the commitment and discharge of a prisoner, are not admissible to prove the cause of his commitment.(c)

When a defendant is committed to the custody of the marshal,(d) or has put in bail upon a *cepi corpus*,(e) or *habeas corpus*,(f) the plaintiff, or any other person, may exhibit a bill, and declare against him in the King's Bench, as a prisoner of the court, in whatever action, and charge him with whatever injury he thinks proper.(g)

When the defendant is in *actual* custody of the marshal, he has the privilege of the court, and cannot be compelled to answer elsewhere; so that if he were not to answer here, none could have remedy against him.(h) And even where he is not in actual custody, yet still, when he appears and puts in bail, he is *supposed* to be in custody of the marshal, and may be proceeded against accordingly. But an appearance alone, without bail is not sufficient;(i) it being clearly settled, that when the defendant is not in actual custody, no action can be legally commenced against him as a prisoner, until he has filed bail.(k) It is the entry of bail in such case, which gives this court jurisdiction:(l) and therefore, where no bail is entered for the defendant,(m) or where bail is entered for him by a wrong name,(n) or there are several defendants, and no bail is entered for one of them,(o) the proceedings are void, and *coram non iudice*. But it is said, that by the practice of the King's Bench, though the defendant's bail be not taken and entered till the last day of term, and the bill be put in before, any time that term, it is well enough: yet from the time of the bail, the defendant *is answerable as in custody of the [*353] marshal, and not before, in strictness of law.(a)

The *bill* against a prisoner, in the King's Bench, is a complaint in writing, supposed to be exhibited to the court, but really filed, when necessary, with the clerk of the declarations in the King's Bench office; and, except where the action is brought for a *trespass* committed in *Middlesex*,(b) or other county where the court sits, or the defendant is a prisoner in custody of the sheriff, &c., should allege the defendant to be in custody

(bb) 2 Moore, 561. 8 Tannt. 512, S. C.

(c) 3 Bos. & Pul. 188. And see further, as to the evidence in an action against the *warden*, for an escape, 9 Moore, 778.

(d) 7 Hen. VI. 42. 27 Hen. VI. 6, a. 2 Inst. 23. 4 Inst. 72. 2 Bulst. 207, 8.

(e) 31 Hen. VI. 10. 32 Hen. VI. 4. 21 Hen. VII. 33. Hob. 264, 5. Cro. Jac. 450. Godb. 339. Cro. Car. 330.

(f) Cro. Jac. 621. 1 Salk. 352.

(g) R. E. 15 Geo. II. *reg.* 1. K. B. Cowp. 455. 2 Wms. Saund. 5 Ed. 1, (1).

* (h) 2 Bulst. 123. Carth. 378. 1 Salk. 1, 2, S. C. 2 Bur. 1051. 1 Durnf. & East, 592.

(i) 7 Hen. VI. 41. Cro. Eliz. 605.

(k) 1 Sid. 373. 2 Keb. 363, S. C. 1 Vent. 135. 2 Leb. 13. 2 Keb. 790, S. C.

(l) 1 Vent. 135.

(m) Cro. Eliz. 605. Moor, 694. Cro. Jac. 620.

(n) Cro. Eliz. 223. (o) Poph. 145.

(a) Hob. 70. Cro. Jac. 384. Jenk. 295, S. C.

(b) Dyer, 118, (a).

of the marshal. When the defendant is in actual custody, the bail should be filed, before a copy of it is delivered to the defendant, or left for him with the gaoler or turnkey: *(cc)* the delivery of a declaration against a prisoner, though in due time, being a nullity, if there be no bill filed against him, and he is entitled to his discharge. *(dd)* But when a prisoner is in custody upon process by *original*, it is sufficient to deliver a *declaration* thereon, without filing a *bill* against him. *(ee)* And a declaration against a defendant at large upon *bail* is good, although a bill has not been filed; because, if the bringing of a writ of error, or any other reason, make the filing of a bill necessary, it may be filed at any time. *(f)*

When the defendant is in the actual or supposed custody of the marshal, upon a bill of *Middlesex* or *latitat*, &c., the *bill* exhibited against him in the King's Bench, as a prisoner of the court, is considered as the commencement of the suit, and the bill of *Middlesex* or *latitat*, &c., merely as process to bring him into court. *(g)* Such process therefore, we have seen, *(h)* might formerly have been sued out, though the defendant could not have been arrested upon it, before the cause of action; and the plaintiff is still allowed to give in evidence a cause of action arising after it is sued out, and before the exhibiting of the bill.

A prisoner, in actual custody of the marshal or warden, may be proceeded against by the *same* plaintiff at whose suit he was arrested, or *charged* in custody by a *third* person: and the *same* plaintiff may proceed against him, either for the cause of action expressed in the process, or for a *different* cause of action.

In the King's Bench, when a defendant is committed to the custody of the marshal, on a bill of *Middlesex* or *latitat*, &c., or on an attachment of privilege, *(i)* the plaintiff must in due time file a *bill* *(k)* against him, as a prisoner of the court, with the clerk of the declarations in the [*354] King's Bench *office; and deliver a copy of it to the defendant, or *turnkey* at the King's Bench prison. But when a defendant renders in discharge of his bail, after a declaration has been filed conditionally, and notice served upon him, and rule to plead given, it is not necessary to deliver another declaration for the defendant in custody. *(a)* If a prisoner be turned over from one custody to another, it is considered as a *continuance* of the same imprisonment: *(b)* Therefore, where a defendant, having been taken or charged in custody of the sheriff or other officer by *mesne* process, is afterwards removed by *habeas corpus*, and committed to the custody of the marshal, the proceedings against him are to be reckoned from the time of his having been so taken or charged in custody. *(c)* In general, however, it is a rule, that when the defendant is committed to the

(cc) R. E. 5 W. & M. reg. 3, § 1, *(b)*, K. B. 8 Mod. 226, 7.

(dd) 4 East, 16. 1 Chit. Rep. 389. *Ante*, 343.

(ee) 4 East, 17.

(f) Say. Rep. 49.

(g) 1 Wils. 40, 144, &c. 2 Bur. 960. 2 Wms. Saund. 5 Ed. 1, (1); but see 3 Bur. 1244.

(h) *Ante*, 145.

(i) Cro. Car. 330.

(k) 4 East, 16. Append. Chap. XV. § 19.

(a) 1 Chit. Rep. 720.

(b) 1 Bur. 439. 2 Ken. 173, S. C. 5 Durnf. & East, 36. 6 Durnf. & East, 524.

(c) R. H. 26 Geo. III. K. B.; and see R. T. 26 & 27 Geo. II. § 11, in *Scac. accord.* Man. Ex. Append. 216.

custody of the marshal, upon a *cepi corpus*,^(d) or *habeas corpus*,^(e) &c., before declaration, the plaintiff should declare against him, in the King's Bench, before the end of the term next after such commitment; or, in case of a surrender to the marshal in discharge of bail, before the end of the term next after such surrender, and due notice thereof.^(ff) But the term of the commitment or surrender is to be accounted one, although the defendant was not committed or surrendered till the last day of vacation.^(g) The defendant was formerly brought into court by rule, in order to be charged with a declaration; there being no occasion for a *habeas corpus*, when it was in the same court:^(h) but this practice is now disused. And there is no occasion for an *affidavit* of the delivery of the declaration, where the defendant is in custody of the marshal.⁽ⁱ⁾

In the Common Pleas, if the defendant be committed to prison by process out of this court, or *habeas corpus*, the prisoner entering his appearance with the prothonotary, in case of a plaint or attachment of privilege, or with the filacer on other process, and giving rules to declare, the plaintiff not declaring before the end of the next term after the commitment, the defendant, in reference thereunto, is entitled to be discharged of his imprisonment by *supersedeas*, in the end of the next term; with liberty for the plaintiff to declare upon that appearance, the next term after that at the furthest.^(k) And "if any defendant shall render him or herself, or be rendered to the Fleet prison, in discharge of his or her bail, at the suit of any plaintiff, where no further proceedings by declaration have been had against such defendant so rendered, before such render, unless the plaintiff shall declare against such defendant within two terms after such render, such defendant may be discharged out of custody by *supersedeas*, to be allowed *by one of the justices of this [*355] court, if cause shall not be shown to the contrary, by the plaintiff or his attorney, upon notice to either of them given by the defendant's attorney or agent, and oath made of such notice given."^(a)

It was formerly necessary in this court, as well as in the Exchequer, to bring up the defendant by *habeas corpus*, to the bar of the court, in order to charge him with a declaration at the suit of the plaintiff.^(b) But now, by the statute 8 & 9 W. III. c. 27, § 13, for the more easy and quick obtaining of judgment against prisoners in the Fleet, "it shall and may be lawful for any person or persons, having cause of action against any prisoner or prisoners committed to the said prison of the Fleet, after filing or entering a declaration in such action with the proper officer, to deliver a copy of such declaration to the defendant or defendants in any personal action, or to the turnkey or porter of the said prison:^(c) and after rule given thereupon to plead, to be out in eight days at most after delivery of such copy of declaration, and affidavit made of such delivery,^(dd) before

^(d) R. M. 1654, § 11. R. E. 5 W. & M. reg. 3, § 1, (a), K. B. 6 Mod. 254. R. T. 2 Geo. I. K. B. and note (a). 8 Mod. 306.

^(e) R. M. 16 Car. II. (b), K. B. 6 Mod. 21.

^(ff) R. H. 26 Geo. III. K. B.; and see R. T. 1 Ann. reg. 2, K. B.

^(g) R. T. 2 Geo. I. (a), K. B.

^(h) 2 Sel. P. 2 Ed. 259. 2 Bur. 1051, 2. Ante, 348.

⁽ⁱ⁾ R. E. 5 W. & M. reg. 3, § 2, (a), K. B. 1 Chit. Rep. 390.

^(k) R. M. 1654, § 15, C. P.; and see R. II. 14 & 15 Car. II. reg. 3, C. P.

^(a) R. E. 8 Geo. I. C. P.

^(b) R. H. 14 & 15 Car. II. reg. 3, C. P.

^(c) For the beginning of a declaration against a prisoner in custody of the warden, in C. P. see Append. Chap. XV. § 21.

^(dd) *Id.* § 22.

the Lord Chief Justice or one other of the justices of the Common Pleas, or before the Lord Chief Baron or some other of the barons of the coif of the Exchequer at *Westminster*, to sign judgment in such action against such defendant or defendants, as if he or they had been actually charged at the bar of the Common Pleas or Exchequer, with such action." The practice, as regulated by this statute, is to make two copies of the declaration, and take the same to the prothonotaries' office, where the clerk, on being paid for entering the declaration, will mark both copies; one of which should then be delivered to the turnkey at the *Fleet* prison; and if he acknowledge the defendant to be his prisoner at the plaintiff's suit, an affidavit is made of the delivery, and sworn before a judge, the other copy of the delivery being annexed thereto; after which the affidavit is taken to the secondaries' office, and the secondary will give a rule thereon, for the defendant to appear and plead: and if he do not plead within the time limited by the rule, the plaintiff may sign judgment, and give notice of inquiry, if necessary, to the prisoner or turnkey, and proceed as in other cases.^(e) The declaration, however, must be entered with the prothonotaries, before it is delivered to the defendant:^(f) And where the defendant has put in special bail by attorney, and afterwards renders in discharge of his bail, the declaration it seems should be delivered to himself personally, or the turnkey of the prison, and not to his attorney.^(g) So where the defendant, whilst at large, was served with a copy of process, with notice to appear, but before a declaration became a prisoner in the *Fleet*, and the plaintiff, by virtue of an affidavit of service, entered an appearance for the defendant, left a declaration in the office, and gave him notice thereof; the court set aside the declaration and sub-
[*356] sequent *proceedings, on the ground that as he was a prisoner at the time of the declaration, it ought to have been delivered to the turnkey of the *Fleet*.^(a)

In the Exchequer it is a rule,^(b) that "in all cases where a prisoner is or shall be taken, detained or charged in custody, by mesne process issuing out of that court, and the plaintiff shall not cause a declaration to be delivered to such prisoner, or to the gaoler or turnkey of the gaol or prison where he is detained or charged in custody, before the end of the next term after the return of the process, and cause an affidavit to be made and filed in the office of pleas, of the delivery of such declaration, and of the time when, and person to whom, the same was delivered, by the first day of the next term after the delivery of such declaration, the prisoner shall be discharged out of custody, by writ of *supersedeas*, to be granted by the court or one of the barons, upon entering an appearance, unless, upon notice given to the plaintiff's attorney or clerk in court, good cause shall be shown to the contrary: And in case of a commitment or surrender to the *Fleet* prison in discharge of bail, before a declaration delivered, unless the plaintiff shall cause a copy of a declaration to be delivered as aforesaid, before the end of the term next after such commitment or surrender shall be made, and due notice of such surrender given, the prisoner shall be discharged out of custody, by writ of *supersedeas*, to

(e) Imp. C. P. 7 Ed. 667.

(f) Cas. Pr. C. P. 114.

(g) 2 Blac. Rep. 786; and see Barnes, 392. 1 Chit. Rep. 386, 720. *Ante*, 344, 354.

(a) Barnes, 392; but see 1 Durnf. & East, 591.

(b) R. T. 26 & 27 Geo. II. § 11, in *Scac.* Man. Ex. Append. 214, 15.

be granted as aforesaid, upon entering an appearance, unless, upon notice given to the plaintiff's attorney or clerk in court, good cause shall be shown to the contrary."

When the defendant, being charged with process issuing out of the King's Bench, is removed *before* declaration, from the custody of the sheriff or marshal to the Fleet prison, the plaintiff, we have seen, *(c)* cannot proceed further in the King's Bench, without removing him to the prison of that court, by *habeas corpus ad respondendum*; but he may declare against him in the Common Pleas, in the same manner as if he had been arrested by process out of that court, and proceed to final judgment: and for default of declaring, &c., in due time, that is the proper court to be applied to, for discharging the defendant out of custody. *(d)* In that case however, there having been already an affidavit of the debt, when the plaintiff took out the process upon which the defendant was arrested, it is not necessary to make any further affidavit, in order to charge him in custody; *(e)* and it seems that the defendant, after such removal, may put in and justify bail in either court. *(f)* But where a defendant is removed to the Fleet prison *after* declaration, the action must proceed in that court wherein the plaintiff declares; and the defendant is to be superseded by that court, for want of subsequent prosecution, though detained in the prison of the other court. *(g)*

*A prisoner once committed to the custody of the marshal or warden, is liable to be charged with a civil action, either by the [*357] same plaintiff for a different cause of action, or by a *third* person, so long as he remains in actual custody. For though it be a rule, that a prisoner once supersedeable, is always so, *(a)* yet this holds only with regard to the same plaintiff, at whose suit he was in custody, for the original cause of action; *(b)* and even with regard to him, it must be understood with this qualification, that the prisoner is only supersedeable, so long as he remains in the *same* custody, and under the *same* process; for the moment the nature of the custody is changed, the rule ceases: Therefore, if a prisoner upon mesne process be supersedeable for any irregularity, as for want of the demand of a plea, he cannot take advantage of it, *after* he is charged in execution; supposing he had any opportunity of applying on that ground, *before* he was charged in execution. *(c)* So, where a prisoner is supersedeable, for want of filing a bill against him in due time, he waives the irregularity, by afterwards pleading. *(d)* And it has been holden, that a creditor may lawfully enter a detainer against his debtor, who is in fact resident within the walls of the King's Bench, *(e)* or Fleet prison, *(f)* though he be not there by compulsion. But a *fugitive*, surrendering himself to the warden, in order to take the benefit of an insolvent act, was not considered as a prisoner, nor liable to be charged as such with a declaration. *(gg)*

(c) *Ante*, 349.

(d) Barnes, 384, 5, 402.

(e) Pr. Reg. 330. Barnes, 75. Cas. Pr. C. P. 144, S. C.

(f) 1 Bos. & Pul. 311. *Ante*, 246.

(g) Barnes, 384, 5.

(a) Barnes, 368, 9, 499. 1 H. Blac. 251. 1 Bos. & Pul. 361.

(b) 2 Bur. 1048. *Cookson v. Foster*, T. 23 Geo. III. K. B.

(c) 1 Durnf. & East, 591; but see 7 Moore, 154. 3 Brod. & Bing. 301, S. C.

(d) 1 East, 77; and see 1 H. Blac. 251. 1 Chit. Rep. 387, 8.

(e) 3 Maule & Sel. 144; but see 1 Chit. Rep. 579.

(f) 3 Durnf. & East, 392; but *vide ante*, 219.

(gg) Barnes, 380. Pr. Reg. 326, S. C. 2 Blac. Rep. 970.

In the King's Bench, the mode of charging a prisoner with an action, in custody of the marshal, in *term* time, is by filing a bill against him, as being in such custody, and delivering a declaration, which is a mere copy of the bill, to the turnkey. In *vacation*, there was formerly no way to charge him, but by making an entry in the marshal's book in the King's Bench office, that he should remain in custody, at the suit of the intended plaintiff, which was deemed sufficient to charge him, provided he were then in actual custody; for if he were at liberty, he might have been arrested. *(h)* But in a modern case, *(i)* where this matter was fully discussed, the court of King's Bench were of opinion, that the right method of charging the defendant with a new suit in *vacation*, is to file a bill, as of the preceding term; and then deliver to, or leave for the defendant in custody, a copy of the declaration, as of the preceding term, and to make an affidavit thereof. *(k)* And when the defendant is charged in *vacation*, upon a cause of action arising after the last term, there should be a special memorandum, similar to that against an *attorney* under the [*358] like *circumstances, *(a)* stating the day of bringing the bill into the office of the clerk of the declarations. For preventing, however, the detainer of prisoners charged with declarations in custody of the marshal, where the cause of action against them does not amount to a bailable sum, it is a rule, *(b)* in the King's Bench and Exchequer, that "no declaration shall be sufficient cause of detaining such prisoner in custody, unless an affidavit, that the plaintiff's cause of action against him does amount to *ten* pounds or upwards, (since increased to *twenty* pounds or upwards, by the statute 7 & 8 Geo. IV. c. 71, § 1,) shall be first made and filed with the clerk of the rules in the former court, or in the office of pleas in the latter, and the sum specified in such affidavit indorsed by him on such declaration, before the same is left with the turnkey."

In the Common Pleas there seems to have been formerly a difficulty in proceeding against prisoners in the *Fleet* prison, at the suit of a *third* person; to obviate which, a rule was made, that "if a *captias* were returned in court *non est inventus*, against a prisoner in the *Fleet*, he should be compellable to appear upon a *habeas corpus ad respondendum*, as well at the suit of a stranger, as at his suit whereupon he was imprisoned, and to answer to a declaration according to the rules of the court, or that judgment might be entered against him:" *(c)* and at length, by the statute 13 Car. II. stat. 3, c. 2, § 5, it was enacted, that "every person or persons, having cause of personal action against any prisoner in the *Fleet*, may sue forth an original writ upon his or their cause of action; and that a writ of *habeas corpus* be granted to every such person or persons, to be directed to the warden of the same prison, to have the body of such prisoner before the justices of the Common Pleas, at some certain day in any term, to answer the said plaintiff or plaintiffs, upon his or their said cause of action; and that if the said plaintiff or plaintiffs, at

(h) 6 Mod. 254. 1 Salk. 213, 14, 345. 3 Salk. 150.

(i) 2 Bur. 1052; and see 8 Durnf. & East, 643. 2 Wms. Saund. 5 Ed. 1, (1).

(k) *Qu.* as to the affidavit? which does not seem to be necessary, when the defendant is in custody of the marshal. *Ante*, 354.

(a) 5 Durnf. & East, 325. 8 Durnf. & East, 643. *Ante*, 321; and see 7 Barn. & Cres. 406. Append. Chap. XV. § 20.

(b) R. E. 15 Geo. II. reg. 3, K. B. R. T. 26 & 27 Geo. II. § 3, in *Scac.* Man. Ex. Append. 210.

(c) R. M. 1654, § 13, C. P.; and see *id.* § 10.

the said day, put into the said court his or their declaration, according to the said original writ, against the said prisoner being present at the bar, the said prisoner shall be bound to appear in person, or to put in an attorney to appear for him in the said action; and unless the said defendant plead upon a rule given, to be out in *eight* days at the least after such appearance, judgment by *nihil dicit* may be entered against such defendant, as appearing in person, which shall be good and effectual in law; and such charge in court by declarations, signified by rule unto the said warden, shall be a good cause of detention of such prisoner in his custody, from which he shall not be discharged, without a lawful *superse-deas* or rule of court: and if the said warden shall do otherwise, he shall be responsible to the court, and to the party grieved for damages, by action upon the case, to be brought against him for discharging such prisoner." A rule of court was made, soon after the passing of this statute,^(d) limiting *the times within which prisoners should be brought to [*359] the bar of the court by *habeas corpus*, to be charged with declarations: but the statute 8 & 9 W. III. c. 27, § 13, having dispensed with the necessity of bringing them to the bar of the court for that purpose, the mode of charging them with a declaration, at the suit of a *third* person, is now similar to that used by the *same* plaintiff, at whose suit they were originally arrested: And they may, it seems, be charged with a declaration in *vacation*, as well as in term time.^(a) But a rule was made in this court,^(b) as well as in the King's Bench, in consequence of the statute 5 Geo. II. c. 27, that "no copy of a declaration, delivered at the *Fleet* prison, against any prisoner there, shall be a sufficient charge to hold such prisoner to bail, or to detain such prisoner in custody for want of bail, unless an affidavit that the plaintiff's cause of action amounts to *ten* pounds or upwards, (since increased to *twenty* pounds, by the statute 7 & 8 Geo. IV. c. 71, § 1,) be first made and filed in the proper prothonotary's office, and an indorsement made by the said prothonotary, or his deputy, upon such copy of a declaration, signifying the sum of money specified in such affidavit; for which sum so indorsed, bail shall be required, and for no more." On this rule, it is necessary that the original declaration, indorsed by the prothonotary, should be delivered, and not a copy of such declaration and indorsement:^(c) but the rule is confined to cases where the prisoner is charged with a *new* action; and does not apply, where he is proceeded against by the *same* plaintiff, for the cause of action expressed in the process:^(dd) And the court will not discharge a defendant out of custody, on the ground of the affidavit of the delivery of the declaration not having been filed within *twenty* days after the delivery, if it be by way of detainer.^(e)

When a bill is filed against a prisoner in custody of the marshal, if a copy of it be delivered for him to the turnkey, *four* days exclusive before the end of the term, a rule to plead given, and a plea demanded, the defendant must plead as of that term; but if the bill be not filed, and copy delivered, *four* days exclusive before the end of the term, the defendant may imparl until the next term; and in default of pleading in due time,

(d) R. II. 14 & 15 *Car. II. reg. 3*, C. P.

(a) 2 *Marsh.* 55, 6.

(b) R. II. 8 *Geo. II. reg. 1*, C. P.

(c) *Pr. Reg.* 331. *Barnes*, 434, S. C.

(dd) *Barnes*, 75. *Pr. Reg.* 330. *Cas. Pr. C. P.* 144, S. C.

(e) 2 *Bos. & Pul.* 72.

judgment may be signed. (f) In the Common Pleas, the defendant must plead within the time limited by the rule given by the secondary; and a demand of plea is necessary, when the defendant is in custody of the marshal of the King's Bench prison; (g) which demand may, it seems, be made at the time of delivering the declaration: (h) but when the defendant is in custody of the warden of the *Fleet*, a demand of plea is in general unnecessary; (i) though if a prisoner, in the Common Pleas, be prevented from justifying bail, by the plaintiff's desiring further time to [* 360] inquire into their sufficiency, he is, from the time of his notice of *justification, entitled to a demand of plea, before judgment can be signed against him. (aa)

After the delivery of the declaration against a prisoner in custody of the sheriff, &c., or against a prisoner in custody of the marshal, the plaintiff, in the King's Bench, should proceed to trial or final judgment, within *three* terms next after such declaration delivered, if by the course of the court he can so proceed; of which three terms, the term wherein the declaration was delivered is one; (bb) and should cause the defendant to be charged in execution, within *two* terms next after such trial or judgment; of which two terms, the term wherein the trial was had, or judgment obtained, is also one; (b) in case no writ of error be depending, nor injunction obtained for stay of proceedings: And if any writ of error be depending, or injunction obtained, then within *two* terms next after the judgment is affirmed, the writ of error *non prossed* or discontinued, or the injunction dissolved; including the term of the affirmance, *non pros*, discontinuance, or dissolving the injunction. (b)

In case of a *surrender* to the marshal in discharge of bail, after declaration, the plaintiff, in the King's Bench, should proceed to trial, or final judgment, within *three* terms next after such surrender, and due notice thereof, if by the course of the court he can so proceed; of which three terms, the term of the surrender is one; (c) or, in case of a surrender in discharge of bail, after trial had or final judgment obtained, he should cause the defendant to be charged in execution, within *two* terms next after such surrender, and due notice thereof; of which two terms, the term of the surrender is also one: (c) in case no writ of error be depending, nor injunction obtained for stay of proceedings: And if any writ of error be depending, or injunction obtained, then within *two* terms next after the judgment is affirmed, (c) &c. This rule does not attach in a case where there are two defendants, one of whom suffers judgment by default, and the other pleads to issue; the trial of such issue being had within the *third* term, though the costs are not taxed, nor final judgment in fact signed, till after that term, but then entered, according to the course of the court, as of that term. (d) The final judgment mentioned in the above rule, means final judgment without a trial, as upon an interlocutory judgment, demurrer, or *nul tiel record*: Therefore, if there be a trial against a prisoner, he is supersedeable, unless charged in execution within *two*

(f) R. E. 5 W. & M. reg. 3, (a), K. B.; and see 1 Dowl. & Ry1. 186.

(g) 1 Durnf. & East, 591.

(h) 1 Dowl. & Ry1. 186.

(i) Imp. C. P. 7 Ed. 231, 667.

(aa) 2 Bos. & Pul. 367.

(bb) R. H. 26 Geo. III. K. B.; and see R. T. 2 Geo. I. K. B. and the notes thereon.

(b) R. H. 26 Geo. III. K. B.; and see R. T. 2 Geo. I. K. B. and the notes thereon.

(c) *Id. ibid.* 1 Wils. 297. 2 Wils. 325. 3 Bur. 1787. 4 Bur. 2060. 6 Durnf. & East, 776.

8 Taunt. 674. 3 Moore, 8, S. C.; and see 3 Dowl. & Ry1. 31.

(d) 13 East, 167.

terms afterwards.(e) But when a defendant surrenders in discharge of bail, in the same vacation as the trial was had and verdict obtained against him, the preceding term is not reckoned as one of the two; but the plaintiff is allowed the the two following terms to charge him in execution.(f) After declaration, plea, and issue, which was [*361] joined in *Trinity* term, the defendant *on the 6th *November* gave a *cognovit* for the debt and costs, and on the 11th surrendered in discharge of his bail; in *Hilary* term, the plaintiff entered up final judgment; and the court held, that he might charge the defendant in execution in *Easter* term, though the latter might have been previously supersedeable.(a) And where the plaintiff obtained final judgment in *Hilary* term, against a defendant who surrendered in discharge of his bail, on the day preceding the essoin day of *Easter* term, but notice of the surrender was not given until two days afterwards; it was holden, that the two terms allowed for charging the defendant in execution, were to be calculated from the time of giving notice of the surrender; and of course, that the plaintiff might charge him in execution in *Trinity* term.(bb) A person, when at large, was sued by A., and was afterwards in custody at the suit of B., the court held, that he need not be charged in execution at the suit of A., within two terms after judgment, but might be so charged at any time; for though in custody at the suit of another person, he was not in custody at the suit of A.(c)

In the Common Pleas, in like manner, "if any plaintiff shall declare against any defendant, in custody of the warden of the *Fleet* prison, or of any sheriff or other officer, by virtue of any process of this court and shall not further proceed to judgment, within *three* terms after such declaration delivered, inclusive of the term in which it is delivered, the defendant having appeared; or if any plaintiff, having obtained judgment in this court, in any action against any defendant being a prisoner as aforesaid, shall not charge such defendant, so remaining a prisoner, in execution upon the judgment so obtained, within *two* terms next after such judgment so had and obtained, including the term in which the said judgment shall be signed, then such defendant, so remaining in prison, may be discharged out of custody where he shall be so detained, by *supersedeas*(d) to be allowed by one of the justices of this court, if cause shall not be shown by the plaintiff or his attorney, why such plaintiff had not proceeded before that time to judgment and execution as aforesaid, upon notice to either of them given by the defendant's attorney or agent, and oath made of such notice given."

And "if any defendant shall render him or herself, or be rendered to the *Fleet* prison, in discharge of his or her bail, at the suit of any plaintiff, where any declaration hath been delivered against such person so rendering him or herself, or being rendered, or judgment has been had against him or her before such render, unless, the plaintiff shall proceed to judgment upon such declaration delivered, within *three* terms after such render, the defendant having appeared, and charged such defendant in execution within *two* terms after such judgment obtained, such defendant may be discharged out of custody, by *supersedeas* to be allowed by one of the

(e) 4 East, 349. 13 East, 169, (a).

(f) 6 Durnf. & East, 776; and see 8 Taunt. 674. 3 Moore, 8, S. C.

(a) 3 Dowl. & RyL. 31.

(c) *Per Cur.* M. 22 Geo. III. K. B.

(bb) 3 Barn. & Cres. 738.

(d) Append. Chap. XV. § 49, 50, 53, 4.

justices of this court, if cause shall not be shown to the contrary as aforesaid, by the plaintiff or his attorney, upon notice to either [*362] of them given *by the defendant's attorney or agent, and oath made of such notice given."(a)

Upon these rules it is necessary that the plaintiff, in the Common Pleas, should proceed to final judgment, within *three* terms *inclusive* after declaration, unless he can show that it was out of his power to proceed so fast;(b) and, if final judgment be signed in the vacation of the *third* term, it will not be sufficient to prevent a *supersedeas*.(cc) There is a distinction however between these rules, and those of the King's Bench, as to the time allowed for proceeding against prisoners: In the latter court it is required that the plaintiff shall proceed to *trial* or final judgment, within *three* terms inclusive after declaration, and shall cause the defendant to be charged in execution, within *two* terms inclusive after such *trial* or judgment; of which the term in or after which the trial was had, is reckoned as one:(dd) but, in the Common Pleas, no notice is taken of the *trial*; the rule(e) being, that the plaintiff shall proceed to *judgment* within *three* terms inclusive after declaration, and charge the defendant in execution, within *two* terms inclusive after *judgment* against him. And where the plaintiff had omitted to charge the defendant in execution within *two* terms, the court held, that the defendant was supersedeable, although in the mean time he had removed himself to the King's Bench prison, by *habeas corpus*, in another action.(f)

In the Exchequer it is a rule,(g) that "in all cases, after a declaration delivered at the *Fleet*, or any other gaol or prison, unless the plaintiff shall proceed to judgment thereupon, within *three* terms next after such declaration delivered, if by the course of the court he could so proceed, (of which three terms the term wherein the declaration was delivered shall be taken to be one); or in case of a surrender in discharge of bail after declaration delivered, unless the plaintiff shall proceed to final judgment thereupon, within *three* terms next after such surrender and due notice thereof, if by the course of the court he could so proceed, (of which three terms the term wherein the surrender was made shall be taken to be one,) the prisoner shall be discharged out of custody, by writ of *supersedeas*, upon entering an appearance; unless, upon notice given to the plaintiff's attorney or clerk in court, good cause shall be shown to the contrary: And in all cases, after final judgment obtained against any prisoner in the *Fleet*, or any other gaol or prison, unless the plaintiff shall cause such prisoner to be charged in execution upon the said judgment, within *two* terms next after such final judgment obtained, (of which two terms the term wherein final judgment was obtained shall be taken to be one,) in case no writ of error shall be depending on such judgment; but

if any writ of error shall be depending thereupon, then within [*363] *two* terms next *after the judgment shall be affirmed, or the writ of error *non-prossed* or discontinued, including the term of the affirmance, *non-pros* or discontinuance; or, in case of a surrender in discharge of bail, after final judgment obtained, unless the plaintiff shall

(a) R. E. 8 Geo. I. C. P. Imp. C. P. 6 Ed. 644, 5.

(cc) *Id.* 379.

(e) R. E. 8 Geo. I. C. P.

(f) 7 Moore, 154. 3 Brod. & Bing. 301, S. C.

(g) R. T. 26 & 27 Geo. II. § 11, in *Seac.* Man. Ex. Append. 215, 16.

(b) Barnes, 383.

(dd) 4 East, 349.

proceed to cause the defendant to be charged in execution upon the said judgment, within *two* terms next after such surrender, and due notice thereof, (of which two terms the term wherein the surrender was made shall be taken to be one), in case no writ of error shall be depending on such judgment; but if any writ of error shall be depending thereupon, then within *two* terms next after the judgment shall be affirmed, or the writ of error *non-prossed* or discontinued, including the term of the affirmance, *non-pros* or discontinuance; the prisoner shall be discharged out of custody by *supersedeas*, unless, upon notice given to the plaintiff's attorney or clerk in court, good cause shall be shown, in either of the said cases, to the contrary."

The mode of proceeding to trial and final judgment against a prisoner, in all the courts, is pretty much the same as in common cases. The plea is usually pleaded in *person*; but it may be pleaded by *attorney*, as is commonly done, where the defendant surrenders after appearance in discharge of his bail: The issue in that case is delivered to the attorney, but otherwise to the defendant or turnkey:(a) and formerly, where a prisoner appeared by attorney, he was bound to pay for the issue, or judgment might be signed; though it was otherwise, where he appeared in person:(b) and notice of trial to the gaoler or turnkey is deemed sufficient.(c) In the Common Pleas, *ten* days notice of trial was formerly required to be given to a defendant in the *Fleet* prison;(d) but now, the same notice of trial is usually given as in other cases.

In order to *charge* a defendant in execution, in the King's Bench, the proceedings must be entered on record, and the judgment roll docketed and filed:(e) after which, if the defendant be a prisoner in the county gaol, a writ of *capias ad satisfaciendum* must be sued out, directed to the sheriff of the county in whose custody he is, if the venue be laid in that county; or if not, a *ca. sa.* must be sued out into the county where the venue is laid, and a *testatum ca. sa.* directed to the sheriff of the county where he is a prisoner, and sent to the under-sheriff, with directions to charge him in custody:(f) or if he be detained in the King's Bench prison, at the suit of the *same* plaintiff, the plaintiff's attorney should obtain a side-bar rule from the clerk of the rules, for the marshal to acknowledge him in his custody;(g) and the marshal, being served with a copy of the rule, will write his acknowledgment at the bottom of it, which ought to be of the *same* term in which the *defendant is charged in execution, and not [*364] of a *preceding* term.(a) A *committitur* piece(b) should be then drawn up on parchment, in the form of a bail-piece, and filed with the clerk of the judgments, in order that he may enter the *committitur* on record:(c) And it is usual, before this is done, to enter the *committitur* in the marshal's book, kept at the King's Bench office.(dd) If the defen-

(a) Imp. C. P. 7 Ed. 672.

(b) Cas. Pr. C. P. 35. 2 Wils. 11. But now, judgment can in no case be signed, for non-payment of the issue money. R. H. 35 Geo. III. K. B. & C. P. 6 Durnf. & East, 218. 2 H. Blac. oct. ed. 551. 1 Bos. & Pul. 292, (b).

(c) 1 Str. 248.

(d) R. H. 14 & 15 Car. II. *reg.* 3, C. P.

(e) Imp. K. B. 10 Ed. 619. Lee's Prac. Dic. 1 Ed. 940. 2 Archb. K. B. 117.

(f) Imp. K. B. 10 Ed. 619.

(g) R. T. 2 Geo. I. § 2, (b), K. B. Append. Chap. XV. § 25.

(a) 1 Durn. & East, 464; and see 10 East, 46, *accord.* where the reason is given for this practice.

(b) Append. Chap. XV. § 26.

(c) *Id.* § 27.

(dd) 2 Bur. 1049; and see 1 Salk. 272, 3. 2 Str. 1215, 1226. 2 Smith, R. 243. 1 Chit. Rep. 364, 5. *Ante*, 289.

dant be not detained in custody at the suit of the *same* plaintiff, the proper mode of proceeding is, to sue out a writ of *habeas corpus ad satisfaciendum*, and bring the defendant into court thereon, in order to charge him in execution.

It was formerly holden, that the *committitur* must be actually entered on record, before the end of the second term inclusive after trial or judgment, otherwise the defendant was supersedeable; and there was no extension of the time, to the continuance day after term; nor was an entry in the marshal's book in time sufficient.*(ee)* But it was afterwards determined, that if the plaintiff's attorney signed judgment, and filed the *committitur* piece with the clerk of the judgments, within the second term after trial and verdict against a prisoner, that was a sufficient charging him in execution within *two* terms, pursuant to the rule of court; though the final judgment and *committitur* were not entered of record, by the officer of the court, till the continuance day after the second term, provided the entries were then complete.*(ff)* And a rule of court is now made,*(gg)* that "the *committitur* on every judgment obtained against a prisoner in this court, shall be filed with the clerk of the dockets, on or before the last day of the term in which the prisoner is charged in execution: and the said clerk shall enter such *committitur* on the judgment roll, within *four* days next after the end of such term, exclusive of the last day of term; unless the last of the four days be *Sunday*, and in that case within *five* days next after the end of such term; and in default thereof, the prisoner shall be entitled to be discharged." In the construction of the above rule it has been holden, that where a prisoner is charged in execution, it is not sufficient for the plaintiff's attorney to file a *committitur* piece in due time with the clerk of the dockets; but he must also see that the latter enters the *committitur* on the judgment roll, within the time prescribed by the rule; and if that be not done, the prisoner is entitled to be discharged.*(h)* But this rule does not extend to the case of a prisoner committed under a *habeas corpus*, in which no *committitur* piece was ever necessary.*(i)* It is usual for the clerk of the judgments, at the end of every term, to send to the marshal a docket or list of the *committiturs* which have been entered in that term, stating therein [*365] *the names of all the plaintiffs at whose suit the defendant is charged in execution; from which docket or list an entry is made by the marshal. And where the clerk of the judgments had made a mistake, in omitting the name of one of several plaintiffs, in his docket transmitted to the marshal, it was rectified by the court, at the instance of the clerk.*(a)* When the defendant has been once committed, a second commitment for the same cause, before the first is discharged, or notice given that it is abandoned, is clearly informal.*(b)* But where the defendant being acknowledged by the marshal to be in his custody, at the suit of A. it was moved that he might be charged in execution also, on a judgment of *outlawry* in another action at the suit of B. the court ordered the same in the first instance.*(c)* In the Exchequer, where a prisoner was charged

(ee) 2 Str. 1215, 1226. 3 Bur. 1841.

(ff) 1 East, 405.

(gg) R. E. 41 Geo. III. K. B. 1 East, 410.

(h) 2 Barn. & Cres. 342. 3 Dowl. & RyL. 597, S. C.

(i) *Pitcher v. Faucett*, T. 43 Geo. III. K. B.; and see 1 Chit. Rep. 365.

(a) *Gage and another v. Parsons*, M. 36, Geo. III. K. B.

(b) 1 Durnf. & East, 227.

(c) *Amos v. Martin*, T. 36 Geo. III. K. B.; but see *Imp. K. B. 10 Ed. 625, (a)*, where it is said, that a *habeas corpus ad satisfaciendum* in this case would have been proper.

in execution in *Trinity* term, for a sum which was wrongly stated in the judgment roll and subsequent proceedings, the court, in the following term, ordered the judgment roll and *committitur* to be altered, according to the facts appearing by the *postea*, and master's *allocatur*.(d)

If the defendant be removed, after declaration, to the *Fleet*, or found in the prison of an *inferior* court, the mode of charging him in execution, in the King's Bench, is by writ of *habeas corpus ad satisfaciendum*, returnable in that court, on a day certain in term; and the number of the judgment roll must be indorsed on the *habeas corpus*.(e) Nor is the prisoner bound to give notice of his removal; but the plaintiff must take notice of it at his peril: Therefore, where a prisoner, who had been surrendered in discharge of his bail, and afterwards removed to the *Fleet*, without giving any notice to the plaintiff, was charged in execution as a prisoner in the King's Bench, the court granted a *supersedeas*; for the plaintiff should have demanded to see the prisoner, and if not produced, would have known where to find him, and bring him back by *habeas corpus*, to charge him; and it would be putting difficulties upon prisoners, to oblige them to give notice.(f)

In order to *charge* the defendant in execution, in the Common Pleas, when he is a prisoner in the county gaol, it does not seem to be necessary that the proceedings should be first entered on record; that court having refused to discharge a prisoner out of execution, where there was no judgment against him docketed, and entered upon the rolls of the court.(g) In other respects, the mode of charging a defendant in execution in the county gaol, is the same in the Common Pleas, as in the King's Bench.(hh) Where the defendant is a prisoner in the *Fleet*, the proceedings being first entered on record, and the judgment roll docketed and filed, a *habeas corpus ad satisfaciendum* should be sued out, directed to the warden, and returnable in court on a day certain.(i) On this writ, the number roll of *judgment should be indorsed, by the attorney who sues it [*366] out:(a) and the writ being signed by the prothonotaries, allowed by a judge and sealed, should be taken to the clerk of the papers of the *Fleet* prison, *four* days before the return;(b) upon which, the defendant being brought into court, with the judgment roll, the court will commit him to the custody of the warden, charged in execution at the plaintiff's suit; and the secondary marks the *habeas corpus* and commitment by the court, in the margin of the judgment roll, and afterwards enters the award of the writ and *committitur* thereon.(c) If a defendant be brought into court upon a *habeas corpus ad satisfaciendum*, he is to be charged in execution upon that judgment only on which the *habeas corpus* issued; and therefore, if there be several judgments on which he is to be charged, there must be a *habeas corpus ad satisfaciendum* in each cause.(dd)

When the defendant is charged, by any of these means, the execution is considered as executed; and therefore, where the plaintiff afterwards died, it was holden that his executors were not bound to revive the judg-

(d) 11 Price, 410.

(e) 1 Sid. 190. R. M. 1654, § 7, R. T. 2 Geo. I. (b), K. B.

(f) 2 Str. 1153.

(g) 2 Bos. & Pul. 163.

(hh) Imp. C. P. 672; and see Barnes, 389.

(i) R. M. 1654, § 10, C. P.

(a) R. M. 1654, § 10, C. P.

(c) *Id.* 707. Append. Chap. XV. § 28.

(b) Imp. C. P. 7 Ed. 668.

(dd) Barnes, 223.

ment by *scire facias*; or to charge the defendant in execution *de novo*.(e) But where the plaintiff, having charged the defendant in execution, died, and the defendant's wife took out administration to the plaintiff, the court ordered the defendant to be discharged out of custody; and held that the plaintiff's attorney had no lien on the judgment for his costs.(f) And the court of Common Pleas discharged a defendant out of custody in execution, after the plaintiff's death, it appearing that the next of kin did not intend to take out administration, on service of the rule *nisi* on the next of kin.(g) But they would not discharge a defendant out of custody in execution, at the suit of a plaintiff, although the application was not made until *eighteen* months after the death of the latter; it appearing that he had appointed executors who were still alive, and had not assented to the discharge.(h)

By the statute 8 & 9 W. III. c. 27, § 8, "if the marshal or warden, or their respective deputies, or keeper of any other prison, shall, after one day's notice in writing given for that purpose, refuse to show any prisoner committed in execution, to the creditor at whose suit such prisoner was committed or charged, or to his attorney, every such refusal shall be adjudged to be an escape in law." And, by § 9, "if any person or persons, desiring to charge any person with any action or execution, shall desire to be informed by the said marshal or warden, or their respective deputies, or by the keeper of any other prison, whether such person be a prisoner in his custody or not, the said marshal or warden, &c. shall give a true note in writing thereof, to the person so requesting the same, or to his law-
[*367] ful attorney, upon demand at his *office for that purpose; or in default thereof, shall forfeit the sum of *fifty* pounds: And if such marshal or warden, &c. shall give a note in writing, that such person is an actual prisoner in his or their custody, every such note shall be accepted and taken as sufficient evidence that such person was at that time a prisoner in actual custody."

If the defendant be superseded or supersedeable, for want of proceedings *before* judgment, the plaintiff may nevertheless take or charge him in execution, at any time *after* judgment: (a) but he cannot do so, if the defendant be superseded, or supersedeable, for want of being charged in execution; (b) his only remedy in that case, for charging the person of the defendant, being by action of *debt* upon the judgment, wherein the defendant cannot be holden to special bail: (c) And it is a rule in the Common Pleas that "if prisoners discharged by *supersedeas*, for want of prosecution, be afterwards arrested or detained in custody, by action of *debt* upon the judgment obtained in the former cause, a common appearance shall be accepted." (d) The *supersedeas* however, in the first action, cannot be pleaded in bar of the second: (e) and, after judgment obtained in the second action, the defendant is again liable to be taken in execution. (f)

(e) *King v. Millett*, H. 22 Geo. III. K. B. *Combrune v. —*, T. 42 Geo. III. K. B. M. 43 Geo. III. K. B. S. C. *accord*; but see *Barnes*, 258, 366. 1 Bos. & Pul. 176.

(f) 8 Durnf. & East, 407. *Ante*, 339, 40. (g) 2 New Rep. C. P. 240.

(h) 8 Moore, 145; and see *id.* 529. 1 Bing. 431, S. C.

(a) R. T. 2 Geo. I. § 1, (c), K. B. 1 Durnf. & East, 591, (a). 7 East, 332. *Barnes*, 376. Cas. Pr. C. P. 136, S. C. *Davies & Brown*, in the Exchequer, M. 27 Geo. III. S. P.

(b) R. T. 2 Geo. I. § 1, (c), K. B. *Barnes*, 376. Cas. Pr. C. P. 136, S. C. 7 East, 330.

(c) Cowp. 72.

(d) R. H. 8 Geo. II. *reg.* 2, C. P.; and see Cas. Pr. C. P. 34. *Barnes*, 376, 390. 1 Bos. & Pul. 361. *Ante*, 177; but see 1 Durnf. & East, 592.

(e) 1 Durnf. & East, 273.

(f) Cowp. 72. 2 Blac. Rep. 982.

In the King's Bench it is a rule,^(g) that "the marshal present to the judges, in their chamber at *Westminster* Hall, within the first *four* days of every term, a list of all such prisoners as are supersedeable; showing as to what actions, and on what account they are so, and as to what actions, (if any,) they still remain not supersedeable." And by another rule^(h) it is ordered, that "if, by reason of any writ of error, special order of the court, agreement of parties, or other special matter, any prisoner, detained in the actual custody of the marshal, be not entitled to a *supersedeas* or discharge, to which such prisoners would, according to the general rules and practice of the court, be otherwise entitled, for want of declaring, proceeding to judgment, or charging in execution, within the times prescribed by such general rules and practice, then and in every such case, the plaintiff or plaintiffs, at whose suit such prisoner shall be so detained in custody, shall, with all convenient speed, give notice in writing of such writ of error, special order, agreement, or other special matter, to the marshal, upon pain of losing the right to detain such prisoner in custody, by reason of such special matter: and the marshal shall forthwith, after the receipt of such notice, cause the matter thereof to be entered in the books of the prison; and shall also present to the judges of the court from time to time, a list of all the prisoners to whom such special matter shall *relate, showing [*368] such special matter, together with the list of prisoners supersedeable, as required by the first-mentioned rule." And, by a previous rule,^(aa) "all prisoners who have been, or shall be, in custody of the marshal, for the space of *six* months after they are supersedeable, although not superseded, shall be forthwith discharged out of the King's Bench prison, as to all such actions in which they have been or shall be supersedeable." There is also a similar rule in the Common Pleas,^(bb) for discharging prisoners out of the *Fleet* prison.

If the declaration be not delivered, and an affidavit thereof duly made and filed, when the defendant is in custody of the sheriff, &c., or if the plaintiff do not proceed to trial or final judgment, or cause the defendant to be charged in execution, in due time, the defendant, we have seen,^(c) may be discharged out of custody, by writ of *supersedeas*, or otherwise, according to the course of the court, on filing bail by *bill*, or entering a common appearance by *original*, in the King's Bench;^(d) or, in the Common Pleas, he may be discharged by writ of *supersedeas*, on entering an appearance with the proper officer;^(e) unless, upon notice given to the plaintiff's attorney, good cause be shown to the contrary.^(d) And the defendant may also be discharged out of custody, when bail above has been put in and justified for him, and allowed; or when the action is abated, discontinued or decided in his favour. But where B., being in custody at the suit of A., in a joint action against B. and C., justified bail in an action entitled by mistake A. against B. only, and a rule so entitled was served on the marshal of the King's Bench, who thereupon discharged B. out of custody, he not being charged in more than one action at the suit

(g) R. T. 56 Geo. III. K. B. 5 Maule & Sel. 522.

(h) R. M. 57 Geo. III. K. B. 5 Maule & Sel. 522.

(aa) R. T. 19 Geo. III. K. B.

(bb) R. H. 6 & 7 Geo. IV. C. P. 3 Bing. 442.

(c) *Ante*, 343, 260, &c.

(d) R. H. 26 Geo. III. K. B.; and see R. E. 5 W. & M. reg. 3, § 6. R. T. 2 Geo. I. K. B. Say. Rep. 111.

(e) R. E. 5 W. & M. reg. 3, § 6. R. E. 8 Geo. I. C. P. *Ante*, 343, 361.

of A.; it was holden that the marshal was liable in an action for an escape.(f)

To discharge a prisoner, for not declaring, or for not proceeding to final judgment or execution, in due time, his attorney or agent should obtain a certificate,(g) or copy of the causes wherewith he stands charged, from the gaoler or keeper of the prison in which he is confined,(h) if in custody of a sheriff, &c.; or, if in custody of the marshal or warden, from the clerk of the papers of the King's Bench or Fleet prison; and in the former case, an affidavit must be made, of the gaoler having signed the same;(i) upon which a summons(k) should be taken out, and served on the plaintiff's attorney or agent, to attend a judge, and show cause why a writ of *supersedeas* should not issue to discharge the defendant, if in [*369] custody of a sheriff, &c., or warden of the Fleet; or, if in custody of the marshal, why he should not be discharged out of such custody,(a) on filing common bail by bill, or entering a common appearance by original.

At the time appointed by the summons, the plaintiff's attorney or agent either attends and consents to an order, shows cause against it, or does not attend. In the latter case, an affidavit being made of the service and attendance,(b) the judge will make an order(cc) for the defendant's discharge on the first summons, if the application be not for declaring, in the King's Bench; but in the Common Pleas, the order on the first summons, if not consented to, is only an order *nisi*, unless cause be shown within six days;(dd) and in either court, if it be for not proceeding to judgment or execution in due time, there must be three summonses, before the judge will make an order for non-attendance; and in a country cause, the order on an attendance is not absolute in the first instance, but only an order *nisi*, unless cause be shown within a limited time, to give the agent an opportunity of writing to his client for instructions.

When an order is made for the defendant's discharge, common bail should be filed with the clerk of the common bails by bill,(e) or a common appearance entered with the filacer by original: and if the defendant be in custody of the marshal, a certificate from the clerk of the bails or filacer, of the bail being filed, or an appearance entered, will be a sufficient ground for discharging him, without a *supersedeas*.(ff) But if the defendant be in custody of a sheriff, &c. or of the warden of the Fleet, a writ of *supersedeas* is necessary;(gg) for issuing which, in the King's Bench by bill, the bail-piece, signed by one of the judges, is a warrant to the officer, with whom it is to be left; and he delivers it over to the clerk of the common bails to be filed.(hh) By original, the writ of *supersedeas* is made out

(f) 5 East, 292.

(g) It was formerly necessary to get a certificate from the clerk of the declarations, in the King's Bench, that no bill or declaration was filed in his office against the defendant. R. T. 2 Geo. I. § 1, (b), K. B. 1 Str. 474. But this certificate is now dispensed with, except in cases where a declaration has been delivered, but no bill filed.

(h) R. T. 2 Geo. I. § 1, (b), K. B. Append. Chap. XV. § 30.

(i) Append. Chap. XV. § 31.

(k) *Id.* § 32.

(a) R. E. 16 Car. II. reg. 1, K. B.; and see 3 Maule & Sel. 144, 5.

(b) R. E. 16 Car. II. reg. 1, K. B. Append. Chap. XVIII. § 14, 15.

(cc) Append. Chap. XV. § 33.

(dd) Imp. C. P. 7 Ed. 677.

(e) R. T. 9 W. III. K. B.

(ff) R. T. 2 Geo. I. § 2, (b), K. B.

(gg) Append. Chap. XV. § 35, &c. *Ante*, 343, 361.

(hh) R. T. 2 Geo. I. § 2, (b), K. B.

by the filacer: *(i)* and, in the Common Pleas, it is signed by the prothonotaries. *(k)*

A fraud having been attempted to be practised, in obtaining the discharge of a prisoner from the custody of the warden, by altering the sum for which bail was allowed, in the order for the writ of *supersedeas*, *(l)* a general rule was made in the Common Pleas, that "in every rule, and also in every judge's order, for the allowance of bail, which contains also an order for a *supersedeas* to discharge the defendant out of custody, there be inserted in the body of such rule or order, in words at length, the sum for which such bail was allowed; and that the same sum be also written in figures, in the margin thereof: And that there be inserted in the body of every such *supersedeas*, in words at length, the sum for which such bail was allowed: and that the prothonotary or [*370] his clerk, who signs the *supersedeas*, shall indorse the same sum in figures on the said writ; which indorsement shall be attested by the initials of such prothonotary or clerk: And that the said sum so directed to be inserted in the body of such rule or order, and in the body of the said writ, and the said sum also directed to be written in figures in the margin of the rule or order, and to be indorsed on the writ of *supersedeas*, shall in no case be written on an erasure: and every such rule and order shall be retained and filed in the prothonotaries' office." *(a)*

Having thus shown in what manner the defendant is to be discharged, it will be proper to consider what causes will be sufficient to prevent his discharge, for not declaring, proceeding to trial or final judgment, or charging him in execution. We have already seen, *(b)* that where a prisoner is supersedeable, for want of filing a bill against him in due time, he waives the irregularity by afterwards pleading. When there are two defendants, and one of them is arrested and detained in prison, but the other absconds, so that the plaintiff is obliged to proceed to outlawry against him, this seems to be a good cause for not declaring against the defendant who is in prison, until the other defendant be outlawed: *(c)* But the plaintiff in such case must move for time to declare against the defendant in custody. *(d)*

After declaration, if the *venue* be laid in a county where the assizes are holden but once a year, it may be impossible, by the course of the court, for the plaintiff to try his cause in *three* terms: this therefore, when it happens, is allowed to be a good cause for not proceeding to trial. *(e)* So where the writ, in a country cause, was returnable in *Michaelmas* term, and the plaintiff declared in *Hilary*, and the defendant imparled till *Easter* term, by which means the plaintiff was disabled from proceeding to trial till the next summer assizes, a judge refused to grant a *supersedeas*. *(f)* And in like manner, where the court take time to give judgment on *demurrer*, &c. they will not suffer the plaintiff to be prejudiced, but will allow this to be a good cause for not proceeding to final judgment. *(g)* Where a prisoner, who had been charged with a declaration as

(i) Trye, in *pref.*

(k) Imp. C. P. 7 Ed. 677, 681.

(l) 7 Taunt. 437. 1 Moore, 144, S. C.

(a) R. E. 57 Geo. III. C. P. 1 Moore, 256. 2 Chit. Rep. 379; and see 7 Taunt. 551.

(b) *Ante*, 357.

(c) Barnes, 401. 2 Blac. Rep. 759; but see Pr. Reg. 327, *semb. contra.*

(d) *Per Cur.* E. 12 Geo. III. K. B. 2 Crompt. 3 Ed. 8. Barnes, 396, 401. 2 Blac. Rep. 759.

2 New Rep. C. P. 404.

(e) Barnes, 383.

(f) *Cripps & Wiggin*, T. 28 Geo. III. K. B.

(g) Barnes, 383; and see 1 Ken. 376.

of *Trinity* term, absconded during the long vacation, and did not return into custody till *Hilary* term following, the court of Common Pleas would not discharge him, though the plaintiff had not signed judgment before the end of *Hilary* term.^(h)

After trial or final judgment, a writ of error and injunction are, whilst they continue in force, good causes for not charging the defendant in execution.⁽ⁱ⁾ So, a writ of error has been deemed a good cause for [*371] not *charging him in execution, although the bail thereto do not justify.^(a) And where the plaintiffs, being assignees of a bankrupt, were prevented from charging the defendant in execution, by his pleading a bad plea to a *scire facias*, the court of Common Pleas would not grant a *supersedeas*.^(b) And in that court, it seems that a prisoner in custody on mesne process may be charged in execution, after judgment against him, notwithstanding the allowance of a writ of error.^(c) A regular treaty of accommodation, or agreement for a compromise, is, in any stage of the action, a good cause for not declaring, &c.:^(d) But no treaty or agreement is sufficient to prevent a *supersedeas*, unless it be in writing, signed by the defendant or his attorney, or some person duly authorized by the defendant; and it be expressed therein, that proceedings are stayed at the defendant's request.^(ee)

It is also a rule in all the courts,^(ff) for preventing unnecessary expense to plaintiffs, in case of notice given by prisoners of their intention to apply for their discharge, under any act made for the relief of insolvent debtors, that "after such notice given to any plaintiff, no prisoner shall be superseded or discharged out of custody, at the suit of such plaintiff, by reason of such plaintiff's forbearing to proceed against him, according to the rules and practice of the court, from the time of such notice given, until some rule or order shall be made in the cause in that behalf, by the court, or one of the judges thereof." And, by the statute 7 Geo. IV. c. 57,^(gg) "no prisoner who shall have petitioned the court for relief under that act shall, after the filing of his or her petition, be discharged out of custody, as to any action, suit or process, for or concerning any debt, sum of money, damages, or claim, with respect to which an adjudication in the matter of such petition can under the provisions of that act be made, by or by virtue of any *supersedeas*, judgment of *non pros*, or judgment as in the case of a nonsuit, for want of the plaintiff or plaintiffs in such action suit or process proceeding therein." Where the defendant, after surrendering in discharge of his bail, in an action in the Common Pleas, was committed to *criminal* custody for a misdemeanor, and continued in such custody, the court would not discharge him from the action, because the plaintiff had omitted to charge him in execution within *two* terms after his surrender.^(hh) And where the defendant, after verdict, applied for his discharge under

(h) 4 Moore, 380. 2 Brod. & Bing. 35, S. C.

(i) R. H. 26 Geo. III. K. B.

(a) 6 Maule & Sel. 139.

(b) 2 Wils. 378.

(c) 1 Bos. & Pul. 292; and see Barnes, 376. *Sed quære?* and see 2 Wils. 380.

(d) 4 Bur. 2063. 2 Blac. Rep. 918. 3 Wils. 455, S. C. 1 East, 78, *in notis*.

(ee) R. H. 26 Geo. III. K. B. R. H. 35 Geo. III. C. P. R. T. 26 & 27 Geo. II. § 11, *in Scac.* Man. Ex. Append. 216.

(ff) R. E. 3 Geo. IV. K. B. 5 Barn. & Ald. 799. 2 Chit. Rep. 377 1 Dowl. & Ryl. 472. R. M. 3 Geo. IV. C. P. 7 Moore, 459. 1 Bing. 120. R. M. 3 Geo. IV. *in Scac.* 11 Price, 422, 3.

(gg) § 15, and see stat. 3 Geo. IV. c. 123, § 11.

(hh) 1 Bing. 221. 8 Moore, 81, S. C.; and see 4 Dowl. & Ryl. 216, 347, *ante*, 214.

the insolvent debtors's act, and was sentenced to *eighteen months'* imprisonment, the court of Common Pleas held, that though no [*372] *further proceedings had been taken, the death of the plaintiff did not entitle the defendant to be discharged at his suit.(a)

By the common law, a prisoner in execution was to be kept *in salvâ et arctâ custodiâ*, till he satisfied the plaintiff. But, in order to prevent any unnecessary hardship or oppression, rules of court were made, in the beginning of the reign of king *George* the second, for the better government of the King's Bench and Fleet prisons,(b) and the preservation of good order therein; which have been since extended and explained by subsequent rules:(c) and tables of *fees* were settled and established, to be taken by the marshal or warden, for any prisoner's commitment, or coming into gaol, or chamber rent there, or discharge thence, in any civil action.(d) By the statute 55 Geo. III. c. 50, all fees and gratuities paid or payable by any prisoner, on the entrance, commitment or discharge to or from prison, shall absolutely cease, and the same are thereby abolished and determined; with an exception of the King's Bench prison, Fleet, Marshalsea, and Palace courts:(e) And, by the statute 56 Geo. III. c. 116, § 3, "the said recited act, and the provisions therein contained, shall extend to all prisoners, as well civil as criminal, whether confined for debt or crime, in any of the prisons in *England*, except as to the said prisons in the said act excepted." There is also a clause in the Lords' act,(f) for the further protection of prisoners against oppression of inferior officers, and the exaction of gaolers to whose custody they may be committed.

For the *subsistence* of prisoners confined in county gaols, and in the King's Bench, Fleet, and Marshalsea prisons, certain allowances are made out of the county rates, by the statutes 14 Eliz. 5, § 37. 43 Eliz. c. 2, § 14, 15, and 53 Geo. III. c. 113. By the 52 Geo. III. c. 160, justices of the peace are enabled to order parochial relief to prisoners confined under mesne process for debt, in such gaols as are not county gaols. By the 53 Geo. III. c. 21, the commissioners of the customs and excise are authorized to make allowance, for the necessary subsistence of poor persons confined under Exchequer process, &c. And, by the last general insolvent act,(g) "the court for the relief of insolvent debtors may order and direct the assignees to pay to any prisoner who shall have petitioned the court for relief under that act, out of his or her estate and effects, such allowance for his or her support and maintenance, during such prisoner's imprisonment, and previous to the adjudication in the matter *of his or her [*373] petition, as to the said court shall seem reasonable and fit. And in all cases where such prisoner shall, upon such adjudication, be liable to further imprisonment, at the suit of his or her creditor or creditors, it

(a) 1 Bing. 431. 8 Moore, 529, S. C.

(b) R. M. 3 Geo. II. K. B. R. II. 3 Geo. II. C. P. *Ante*, 52, (d), 53, (f).

(c) R. T. 19 Geo. III. R. T. 21 Geo. III. R. II. 57 Geo. III. R. M. 58 Geo. III. K. B. R. T. 58 Geo. III. K. B. 1 Barn. & Ald. 728. 2 Chit. Rep. 373. R. II. 59 Geo. III. K. B. 2 Barn. & Ald. 403. 2 Chit. Rep. 374. 2 Barn. & Cres. 344. 3 Dowl. & Ry. 599, S. C.

(d) *Jan.* 19. 3 Geo. II. C. P. *Dec.* 17. 4 Geo. II. K. B. *Ante*, 53, (f).

(e) § 14.

(f) 32 Geo. II. c. 28, § 12. *Ante*, 231, 2.

(g) 7 Geo. IV. c. 57, § 17; and see stat. 1 Geo. IV. c. 119, § 5.

shall be lawful at any time for the said court, on the application of such prisoner, to order the creditor or creditors, at whose suit he or she shall be so imprisoned, to pay to such prisoner such sum or sums of money, not exceeding the rate of *four* shillings by the week in the whole, at such times, and in such manner, and in such proportions, as the said court shall direct; and that on failure of payment thereof, as directed by the said court, the said court shall order such prisoner to be forthwith discharged from custody, at the suit of the creditor or creditors so failing to pay the same.”(a)

The rigour of imprisonment is also considerably abated, by a prisoner's being allowed, on giving security to the marshal or warden, the benefit of the *rules* of the King's Bench or Fleet prison, or of living within certain limits,(b) out of its walls. This benefit is extended to prisoners in execution, as well as to those who are confined on mesne process; and it may be had by one in custody on an *excommunicato capiendo*:(c) but it is never granted, except under very special circumstances,(d) to a prisoner in execution on a *criminal* account:(e) and, generally speaking, prisoners in custody for a contempt are not entitled to the rules of the King's Bench prison.(f) But where the marshal, in consequence of a surgeon's certificate that a prisoner in his custody for a contempt, in not paying money pursuant to the master's *allocatur*, was dangerously ill, and would die if closely confined, allowed the prisoner the rules until he got better, and afterwards confined him again within the walls; the court refused to proceed against the marshal, by ordering him to pay the money, for the non-payment of which the prisoner was in contempt, and dismissed the application with costs.(gg) For preventing prisoners from breaking the rules, it is ordered, that “whenever it shall be made appear to the court, that any person, having the benefit of the rules of the prison of the King's Bench, shall, during such time as he has had the benefit of such rules, have escaped and gone at large out of and beyond the limits of [*374] the said *rules, every such person shall thenceforth lose and be deprived of the benefit of such rules: and be thereafter wholly incapable of enjoying the same, under any grant thereof; and shall thenceforth be kept and confined a prisoner, within the walls of the said prison, unless the court shall otherwise order.”(aa) And, by a late rule,(bb) “no clerk, turnkey, officer, or other person, employed by or under the marshal, shall receive or take, except from the marshal, any fee, gratuity, or reward,

(a) 7 Geo. IV. c. 57, § 56; and see stat. 1 Geo. IV. c. 119, § 19.

(b) For the limits of the *rules* of the King's Bench prison, see R. E. 30 Geo. III. K. B. 3 Durnf. & East, 583. R. E. 35 Geo. III. K. B. 6 Durnf. & East, 305. R. T. 36 Geo. III. K. B. 6 Durnf. & East, 778. And for the limits of the *rules* of the Fleet prison, see 9 Moore, 283. 2 Bing. 163.

(c) 1 Str. 413. And for the nature of this writ see 7 Durnf. & East, 153. See also the statute 53 Geo. III. c. 127, by which excommunication is discontinued, except in certain cases; and a writ *de contumace capiendo* is given, instead of the writ *de excommunicato capiendo*, for non-appearance in, or disobeying the orders of, any ecclesiastical court, or for a contempt committed in the face of such court. See also 5 Barn. & Ald. 791. 1 Dowl. & Ryl. 460, S. C. 3 Dowl. & Ryl. 570. The ecclesiastical court, however, has no jurisdiction over trusts: and therefore where a party, sued as a trustee, was arrested on a writ *de contumace capiendo*, the court of the King's Bench discharged him out of custody. 1 Barn. & Cres. 655. 3 Dowl. & Ryl. 41, S. C.

(d) 4 Dowl. & Ryl. 832.

(e) 1 Str. 196. 2 Str. 845.

(f) 2 Str. 817.

(gg) 2 Dowl. & Ryl. 709; and see 4 Dowl. & Ryl. 832.

(aa) R. H. 57 Geo. III. K. B.

(bb) R. H. 2 & 3 Geo. IV. K. B. 5 Barn. & Ald. 560. 2 Chit. Rep. 376, 7. 1 Dowl. & Ryl. 471.

for or in respect of making inquiry into the sufficiency of any person or persons proposed or intended to give security, upon the granting of the rules of the King's Bench prison, or otherwise in respect of the granting of the said rules: and that the marshal do dismiss any person who shall offend therein."

A prisoner likewise, whether he be detained in custody on mesne process, or in execution, may, on petition to the court,^(c) have *day* rules allowed him, or the liberty of going out of the prison or its rules, for transacting his business in term time. The petition for this purpose must be signed by the prisoner, before he goes at large:^(d) and when the day rule is made in the King's Bench, it covers, by relation back, the liberation of a prisoner who had signed the petition, but had gone out of prison before the sitting of the court on the same day; though the marshal was sued for the escape before the sitting of the court.^(e) But every prisoner having a day rule, must return within the walls or rules of the prison, at or before *nine* o'clock in the evening of the day for which such rule shall be granted.^(f) It was formerly a rule, that "no prisoner in the King's Bench prison, or within the rules thereof, should have, or be entitled to have, day rules, above *three* days in each term;" and another rule was made,^(g) by which it was ordered, that "notwithstanding the above rule, if any person in the King's Bench prison should thereafter state, by affidavit, any special cause, to the satisfaction of this court, for having an additional day rule or day rules, beyond those allowed by the aforesaid rule, such additional rule or rules should be granted accordingly, for any day or days ensuing such application." But, by a subsequent rule,^(h) the two former ones were repealed: so that the practice is now the same, as it was before the three last rules were made upon the subject.⁽ⁱ⁾

Besides these indulgences, some permanent provisions were made for the relief of prisoners in execution, by the statute 32 Geo. II. c. 28, § 13, which (originating in the House of Lords,) is called the *Lords' act*. By this statute, "if any person shall be charged in execution, for any sum of money not exceeding 100*l.*," (since extended to 200*l.* by the 26 Geo. III. c. 44, § 1, and to 300*l.* by the 33 Geo. III. c. 5, § 1, which is made perpetual by the 39 Geo. III. c. 50, "and shall be minded to deliver up to *his creditors, all his estate and effects; in satisfaction of his [*375] debts, he may, in order to entitle himself to the benefit of the above acts, before the end of the first term next after he shall be charged in execution, exhibit a petition to any court of law, from whence the process issued, upon which he was taken and charged in execution; or to the court into which he shall be removed by *habeas corpus*, or charged in custody; certifying the cause of his imprisonment, and setting forth a just and true account of all the real and personal estate, which he, or any persons in trust for him, was or were entitled to, at the time of his so petitioning, and also at the time of his first imprisonment, and of all incumbrances and charges (if any,) affecting the same, and likewise a just and true account of all securities, deeds, evidences, writings, &c., concerning the same, and

(c) For the form of the *petition* for a day rule, in K. B. see Append. Chap. XV. § 57; and for the day rule thereon, *id.* § 58.

(d) 1 Str. 503.

(e) 9 East, 151; and see 8 Mod. 80, *ante*, 235.

(f) R. E. 30 Geo. III. K. B. 3 Durnf. & East, 584.

(g) R. M. 37 Geo. III. K. B. 7 Durnf. & East, 82.

(h) R. H. 45 Geo. III. K. B. 6 East, 2.

(i) 2 Smith R. 340; and see *id.* 5, 27.

the names and places of abode of the witnesses, &c. ; upon which he shall be entitled to his discharge, on complying with the requisites of the act." And, by the statute 49 Geo. III. c. 6, "all persons who are or shall be in custody for contempt of any court of *equity*, by not paying any sum or sums of money or costs, ordered to be paid by any decree or order of any such court, shall be entitled to the benefit of the said several acts of parliament, and shall be subject to all the said terms and conditions, as are therein expressed and declared, with respect to prisoners for debt only." (a)

The humane provisions of the Lords' act were rendered as beneficial as possible, by the liberality of the judges, who construed it to extend to prisoners in custody upon an *attachment*, for the non-performance of an award. (b) or non-payment of costs, (c) &c. ; which construction has been recognized by the statute 33 Geo. III. c. 5, § 4, whereby, after reciting that persons are often committed on attachments, for not paying money awarded, under submissions to arbitration by or made rules of court, and likewise for not paying costs duly and regularly taxed and allowed, after proper demands made for that purpose, and also upon writs of *excommunicato capiendo*, or other process for or grounded on the non-payment of costs or expenses, in causes or proceedings in ecclesiastical courts ; it is declared and enacted, that "all such persons are and shall be entitled to the benefit of this act, and subject to the same terms and conditions as are therein expressed and declared, with respect to prisoners for debt only." (d) And a defendant in custody upon an attachment, who had been convicted on an indictment for an assault and upon reference to the king's coroner and attorney, was awarded to pay so much for costs, and so much for *compensation* to the prosecutrix, was held to be entitled to be discharged as an

insolvent debtor, under the Lords' act, without the aid of *the [*376] statute 33 Geo. III. c. 5. (aa) It has also been determined, that the Lords' act extends to prisoners charged in execution, on process issuing out of *inferior*, as well as *superior* courts. (bb) And it is no objection to a prisoner's being discharged under it, that his creditor is dead ; (cc) or that the defendant has agreed not to take the benefit of the act. (dd) And where the defendant, in the Common Pleas, is charged in execution with the penalty of a bond, it may be reduced to the principal and interest, in order to entitle him to such benefit. (e) But the defendant in a *qui tam* action is not entitled to the benefit of the Lords' act ; (f) nor a defendant in custody under a writ *de excommunicato capiendo*, for contumacy in not paying a sum for alimony, and also for costs in the ecclesiastical court. (g) And a prisoner who is taken in execution for more than

(a) See also the statute 57 Geo. III. c. 117, § 6, by which persons imprisoned under any writ of *capias*, on extents in aid, may apply to the court of Exchequer for their discharge. 3 Price, 95 ; and see stat. 1 Geo. IV. c. 119, § 41 ; and the last general insolvent act. (7 Geo. IV. c. 57,) § 75, *post*, 1066.

(b) 1 Durnf. & East, 266. 8 Taunt. 57. 1 Moore, 494, S. C.

(c) Cowp. 136. 1 Durnf. & East, 266. 4 Durnf. & East, 317, 809. 7 Durnf. & East, 156. 1 Bos. & Pul. 336. 13 East, 190. 8 Taunt. 57. 1 Moore, 494, S. C. 2 Barn. & Ald. 59. M'Clel. 577 ; but see 10 East, 408.

(d) And see the statutes 52 Geo. III. c. 13. 53 Geo. III. c. 102, § 47. 1 Geo. IV. c. 119, § 4, 16. 7 Geo. IV. c. 57, § 10, 50.

(aa) 13 East, 190.

(bb) 7 East. 84. 3 Smith, R. 102, S. C.

(cc) Barnes, 370. 1 Bos. & Pul. 336.

(dd) 3 Smith, R. 51.

(e) 2 Blac. Rep. 369 ; but see Barnes, 367, 369, 371.

(f) 3 Bur. 1322. 1 Blac. Rep. 372, S. C.

(g) 11 East, 231.

300*l.* and afterwards reduces his debt below that sum, is not entitled to be discharged under it, in the next term after he has so reduced his debt, unless it be also the next term after he was taken in execution.^(h)

It was also provided, by the statute 32 Geo. II. c. 28, § 24, that "no person who should have taken the benefit of any act for the relief of insolvent debtors should have or receive any benefit or advantage under this act, or be deemed to be within the meaning thereof, so as to gain any discharge, unless compelled by any creditor to discover and deliver up his or her estate or effects:" which clause was held to apply only to persons having taken the benefit of general insolvent acts, and not to persons previously discharged under the Lords' act.⁽ⁱ⁾ And, by a subsequent act of parliament,^(k) this clause was altogether repealed.

The act requires that the petition should be exhibited before the end of the *first* term next after the prisoner is charged in execution.^(l) But if a defendant be taken in *vacation*, on a writ returnable the following term, the petition may be exhibited before the end of the next term after the return of the writ:^(m) And where a defendant taken on a *capias ad satisfaciendum* escaped, and was retaken and committed to the custody of the marshal in a subsequent term, the court held, that he might apply to be discharged under the Lords' act, in the term following.⁽ⁿ⁾ By the statute 33 Geo. III. c. 5, § 5, "where any debtor shall have neglected to take the benefit of the acts, within the time limited, and shall make it appear to the court out of which the execution issued, that such neglect arose from ignorance or mistake, such debtor shall then be entitled to take the benefit of the acts, as if he had taken the same within the time so limited as aforesaid." Upon which statute it has been holden, that a prisoner is entitled to the benefit of the acts, who has been prevented from applying for it in due time, by the misconduct of his agent;^(o)

or by his ignorance *of the creditor's place of abode, till re- [*377] cently before his application.^(a) But where an insolvent debtor, who had neglected to apply for his discharge under the Lords' act, in the next term after he was charged in execution, afterwards applied, but was prevented by poverty from proceeding until a subsequent term, the court held, that he was not entitled to his discharge; for the 33 Geo. III. c. 5, § 5, only excuses delays occasioned by ignorance or mistake.^(b) So, where an insolvent had delayed his petition beyond the time limited, in expectation of being discharged by a commission of bankrupt, the court held, that he was not entitled to relief on the above statute.^(c)

When a prisoner intends to take the benefit of the Lord's act, he must give to or leave for every creditor at whose suit he is in execution, or his executors or administrators, at his or their usual place of abode, or, in case they cannot be met with, to or for his or their attorney or agent last employed in the action, a *notice* in writing,^(d) signed with his proper name or mark, importing that he intends to petition the court, and setting forth a true copy of the account or *schedule*^(e) he intends to deliver in; which notice must be given *fourteen* days at least before the petition is presented:^(f) and though the court in one case held, in favour of liberty, that

(h) 1 Bos. & Pul. 423.

(k) 52 Geo. III. c. 34, § 2.

(m) 6 Taunt. 493. 2 Marsh. 200, S. C.

(a) 13 East, 190; and see 2 Chit. Rep. 226.

(c) 1 Dowl. & Ryf. 539.

(e) Append. Chap. XV. § 60.

(i) 2 Smith R. 24, 5; and see 2 Chit. Rep. 354.

(l) Barnes, 378.

(n) 4 Durnf. & East, 367.

(o) *Id.* 231.

(b) 1 Chit. Rep. 220.

(d) Append. Chap. XV. § 59; and see 2 New Rep. C. P. 67.

(f) 32 Geo. II. c. 28, § 13.

under circumstances, the day of giving the notice might be reckoned as one; *(g)* yet in a subsequent case it was holden, that there must be *fourteen* clear days, exclusive both of the day of service and that of presenting the petition. *(h)* And notice of a prisoner's intention to apply to a wrong court, is not cured by the plaintiff's opposing his discharge. *(i)* But the notice is sufficient, though it do not specify the christian and surnames of the parties: *(k)* And leaving it with the agent of the plaintiff's attorney, and with the shopman at the plaintiff's warehouse in town, when he resided in the country, was deemed sufficient, the agent having appeared according to the notice, and opposed the discharge. *(l)* An *affidavit* is annexed to the notice and schedule, made by some person who saw the defendant sign them: *(m)* and an affidavit of due service of the notice and schedule is also to be made, on unstamped paper, and sworn before a judge in town, or commissioner in the country. *(n)* Where the plaintiff had not been served with any notice, a prisoner discharged under the act was allowed to be retaken in execution, although more than a year had elapsed since the time of his being discharged. *(o)*

After the expiration of the time specified in the notice, the *petition* *(p)* is to be exhibited, with a certificate annexed, or copy of causes [*378] in which the *defendant stands charged, obtained from the gaoler, *(a)* or from the clerk of the papers, if the defendant be in custody of the marshal of the King's Bench, or warden of the Fleet prison. If he be in any other custody, there must be an *affidavit* of having seen the gaoler sign the certificate; *(b)* which affidavit must be sworn before a judge in town, or commissioner in the country: The petition, certificate, and affidavit of service of the notice, being left with the clerk of the rules in the King's Bench, or one of the secondaries in the Common Pleas, he will draw up a rule for bringing the prisoner into court, and summoning the creditors to appear, personally or by attorney, at some certain day to be therein specified: *(c)* a copy of which rule should be served on each creditor, and also on the gaoler, and an *affidavit* made of such service: *(d)* or if the creditor abscond, so that he cannot be personally served with a copy of the rule, the court will order that service upon his attorney shall be deemed good service. *(ee)*

In the King's Bench, it is a rule, that "insolvent debtors petitioning under the Lords' act, and subsequent acts for their further relief, shall be brought into this court, during term time, on *Mondays* and *Thursdays*, and upon no other days: *(ff)* And an insolvent who does not appear in pursuance of the rule he has obtained for coming up on a particular day, to take the benefit of the act, cannot come up on another day, without a fresh rule for that purpose; and therefore a motion to discharge his rule is unnecessary. *(gg)* But, notwithstanding the above rule, the court will permit insolvents to be brought into court on the last day of term, when the notices expire too late for the last appointed day. *(hh)* And, by the

(g) 4 Barn. 2525.

(i) 1 Taunt. 64.

(l) *Id.* 560; and see 4 Bing. 230.

(n) *Id.* § 62.

(a) Append. Chap. XV. § 64, 5.

(c) 32 Geo. III. c. 28 § 13. Append. Chap. XV. § 67, 8.

(d) Append. Chap. XV. § 70.

(ff) R. II. 37 Geo. III. K. B.

(hh) Short's Rules and Orders, 66, *n.*

(h) 4 Barn. & Ald. 522.

(k) 1 Chit. Rep. 561, *in notis.*

(m) Append. Chap. XV. § 61.

(p) Append. Chap. XV. § 63.

(b) *Id.* § 66.

(ee) Barnes, 384.

(gg) 1 Chit. Rep. 214.

statute 1 Geo. IV. c. 55, § 3, "all persons who are directed to be brought before the court of King's Bench, by the 32 Geo. II. c. 28, or any other law for the relief of insolvent debtors, may be brought before some single judge of the same court, sitting under the authority of the 57 Geo. III. c. 11, and all orders made by, and all proceedings had before, such single judge, shall be as good, valid and effectual, to all intents and purposes, as if such orders had been made by, and such proceedings had before, the said court of King's Bench." In the Common Pleas, by a late rule, "insolvent debtors are to be brought into court on the following days, that is to say, in *Hilary* and *Michaelmas* terms, on the days appointed for the *London* sittings at *Nisi Prius*, and on *Saturdays*; and in *Easter* term, on the days appointed for the *London* sittings at *Nisi Prius* on *Tuesdays*, and on the last *Saturday* in the term; and in *Trinity* term, on the days appointed for the *London* sittings, and on *Tuesdays*; and on no other days." (i) In the latter court, a rule cannot be had for the next day, with only *one* day's notice, to discharge an insolvent debtor, though it be prayed for on the last day *but one of the [*379] term. (a) In the Exchequer it is a rule, that applications for the discharge of insolvent debtors can only be made at the rising of the court, when the other business of the day is over. (b)

When the prisoner is charged in execution above *twenty* miles from *Westminster hall*, or the court out of which the execution issued, the rule requires him to be brought to the next *assizes*, (c) or (by statute 52 Geo. III. c. 34, § 1,) before the justices assembled at any general or quarter sessions of the peace, to be holden within the distance of *twenty* miles of the gaol in which the debtor is confined, and that the creditors be summoned to appear there; and a copy of such rule is to be served on every creditor, his executors or administrators, or left at his or their dwelling house or usual place of abode, or with his or their attorney, *fourteen* days at least before the holding of such *assizes*. (d)

On bringing up the prisoner, the court or judge of assize, or the justices at sessions, are, in a summary way, to examine into the matter of the petition; and after being sworn to the truth of his schedule, if no opposition be made, the court or judge, &c., will make a rule or order (e) for discharging him, upon executing an assignment and conveyance of his estate and effects, to and for the benefit of the creditor or creditors (if more than one,) who shall have charged him in execution; which is done by a short indorsement on the back of the petition. (f) But if the persons, at whose suit the prisoner is in execution, are not satisfied with the truth of his oath, and either personally or by attorney desire further time, the court may remand him; and direct the parties to appear on some other day, to be appointed by the court, within the first week of the next term at farthest, (f) or sooner if the court shall think fit: (g) And where, on a prisoner's being brought up to be discharged under the Lords' act, it appeared that a commission of bankrupt had been issued against him since his arrest and imprisonment, and that he had not passed his final examination, the court ordered him to be remanded, until such examination had taken place: On a sub-

(i) R. M. 47 Geo. III. C. P.; and see R. M. 46 Geo. III. C. P. 2 New Rep. C. P. 96.

(a) 4 Taunt. 588.

(b) 5 Price, 648.

(c) Append. Chap. XV. § 69.

(d) 32 Geo. II. c. 28, § 15.

(e) Append. Chap. XV. § 71.

(f) 32 Geo. II. c. 28, § 13.

(g) 3 Bur. 1393.

sequent day, however, it appearing that he had passed it to the satisfaction of the commissioners, he was ordered to be discharged, on inserting an assignment in his schedule to the plaintiff, of all his estate, title and interest in the property therein mentioned, subject to the commission, and the payment or satisfaction of his debts under it.^(h) And where a prisoner came up to be discharged under the Lords' act, it was holden to be no ground for opposing him, that he had forged an acceptance to a bill of exchange, on which the plaintiff had obtained judgment, and taken him in execution as the drawer.⁽ⁱ⁾

On the prisoner's being brought up, the creditors may file *interrogatories* for his examination, before he is admitted to take the benefit of the act.^(k) In such case, it is a rule in the King's Bench, that "the [*380] creditor do file *his interrogatories with the clerk of the rules, and that the clerk of the rules do thereupon draw up a rule for the debtor's examination before the master, to whom he shall also deliver the original interrogatories; and that the debtor having been previously sworn in open court for the purpose, the master shall proceed to take down in writing the examination of the debtor, in answer to the said interrogatories; and the same being signed by the debtor, shall be afterwards filed by the master, with the clerk of the rules; and the said interrogatories and examination shall be produced by the clerk of the rules and read, when the debtor shall, on a subsequent day, be brought up by rule for that purpose."^(a) In the Common Pleas, the court will order interrogatories for the examination of a defendant in custody, by one of the secondaries; which interrogatories must be filed with him.^(b)

When a prisoner has been brought into court, to be discharged under the Lords' act, and upon his examination the court have refused to discharge him, they will not afterwards discharge him on that act, though he make an affidavit of circumstances, in answer to the cause shown on his examination against his discharge, and that those circumstances were not then disclosed, owing to a mistake.^(c) And if a prisoner, brought up to be discharged under the above act, deliver in a false schedule, and be remanded, the court of Common Pleas will not, at the instance of a creditor, even with the prisoner's consent, order him to be brought up a second time, for the purpose of amending his schedule, and assigning over that property which he had before concealed.^(d) But that court will not regulate their proceedings, as to the discharge of an insolvent, by what has passed in the *insolvent debtors'* court; therefore it is no ground for opposing his discharge, that he has been remanded in that court for fraud.^(e)

All objections to the insufficiency of the schedule, in point of *form*, must be made the first time the prisoner is brought up.^(f) And if, on the second day, the creditor shall make default, or shall appear and be unable to discover any estate or effects omitted in the account, the court shall immediately order the prisoner to be discharged, upon his executing an assignment and conveyance of his estate and effects; unless the creditor

(h) 8 Moore, 423.

(i) 9 Moore, 592.

(a) R. E. 36 Geo. III. K. B.

(c) 1 H. Blac. 101.

(e) 6 Taunt. 493. 2 Marsh. 200, S. C.; and see 6 Moore, 573.

(f) 32 Geo. c. 28, § 13. Barnes, 372.

(k) 33 Geo. III. c. 5, § 5.

(b) 3 Moore, 317.

(d) 1 Bos. & Pul. 143.

insist upon his being detained in prison, and shall agree by writing, signed with his name or mark, (or, if he be out of *England*, under the hand of his attorney,) to pay and allow the prisoner weekly, a sum not exceeding 3s. 6d. (or, if more creditors than one insist on his detention, not exceeding 2s. a week each,)(*g*) to be paid on *Monday* in every week, so long as the prisoner shall continue in execution; and in every such case, the prisoner shall be remanded.(*h*) And the court have no power to moderate the sum to be paid to a prisoner, on his being remanded; but a note must be signed for the *full sum directed by the act.(*a*) But if [*381] failure be made in payment of the said weekly sums, the prisoner, upon application to the court in term time, or in vacation to a judge, may, by order of the court or judge, be discharged out of custody, on executing an assignment and conveyance of his estate and effects.(*b*)

The prisoner may be compelled to include in his schedule, every thing that he can sell for his own benefit;(c) and the place of a life-guardswoman being constantly sold, the court will compel a prisoner who holds such a place to sell it, and insert the value in his schedule, before they permit him to take the benefit of the act.(*d*) But the full or half pay of an officer in the army is not the subject of sale; and therefore a prisoner cannot be compelled to include it in his schedule.(*e*)

If the prisoner be detained in custody, the *note* or security for payment of his allowance,(*f*) must be signed by the plaintiff, if in *England*, or otherwise by his attorney; it not being sufficient for the attorney to sign the note, if his client can be met with.(*gg*) And if the note be not signed by the plaintiff in open court, it is the practice to require an affidavit with the note, showing that it was duly signed;(h*h*) which affidavit must be properly entitled: and where a note to pay a prisoner his *six-pences* was written upon the same paper with an affidavit to verify the plaintiff's handwriting thereto, it was holden, that the affidavit not being duly entitled in the cause, though the note was so, could not be aided by reference; and therefore, as it could not be read, the prisoner was discharged.(*i*) Where there are several plaintiffs, the note must be signed by all of them,(*k*) or, if they are partners, by one on behalf of himself and the others;(l) a note signed by one of several lessors of the plaintiff in *ejectment*,(*m*) or by one of several executors,(*n*) without mentioning the others, not being deemed sufficient. But where, by a deed of dissolution of partnership, a power was reserved to the remaining partners, to use the name of the retiring partner, in the prosecution of all suits brought for the recovery of partnership property, it was holden that in an action, in which judgment had been obtained by all the partners before the dissolution, the remaining partners had authority, under that power, to give to the defendant a note for payment of the sixpences, under the Lords' act, on behalf

(*g*) 37 Geo. III. c. 85, § 3, 4; but see Barnes, 377, 389, 90.

(*h*) 32 Geo. II. c. 28, § 13. And for the form of a rule of court, on defendant's being remanded in the Exchequer, see Append. Chap. XV. § 76.

(*a*) 1 Bos. & Pul. 336; but see Barnes 387, 397, *semb. contra*.

(*b*) 32 Geo. II. c. 28, § 13.

(*c*) Durnf. & East, 681.

(*d*) *Id. ibid.* *Cadwalader Jones's case*, M. 14 Geo. III. K. B.

(*e*) 3 Durnf. & East, 681. 1 H. Blac. 628. 3 Bos. & Pul. 324, &c.

(*f*) Append. Chap. XV. § 73, &c.

(*gg*) Imp. K. B. 10 Ed. 643, (*a*); but see Barnes, 371, 382, 399. 1 Bos. & Pul. 337.

(*hh*) *Edwards v. Carter*, M. 36 Geo. III. K. B.

(*i*) 2 Smith R. 393.

(*k*) 7 Durnf. & East, 156. 8 Durnf. & East, 325.

(*l*) 8 Durnf. & East, 25.

(*m*) 7 Durnf. & East, 156.

(*n*) 8 Durnf. & East, 325.

of themselves and the retiring partner.(o) If a plaintiff hold the defendant in execution in several actions, he need not give more than one note for 3s.

6*d.* a week.(p) And, in an action at the suit of a corporation, if [*382] the note be sealed with the *corporation seal, it is deemed a sufficient compliance with the act:(a) and the note is valid, though it do not state the style of the court in which the action was brought.(b) The payment is to be made, by the act, every *Monday*; and the note must be drawn up accordingly.(c) And, in the Common Pleas, it seems that such note ought to contain an express promise to pay the allowance on a *Monday*, although it be dated on that day of the week.(d) It was determined in one case,(e) that such a note ought to be stamped: but the judges, upon a conference, afterwards held a stamp to be unnecessary.(f)

The act of parliament requires payment to the debtor; but the courts, in construing the act, have considered payment to the turnkey as payment to the debtor: and payment to the person who opened the door of the prison, has been considered, by the court of Common Pleas, as payment to the turnkey.(g) If the payment be not made in time,(h) or any part of the money be paid in a spurious or foreign coin,(i) the prisoner has a right to his discharge: And where the money was not paid before *ten o'clock* at night of the day on which it became due, it was holden that the defendant's right to his discharge was not waived, by the turnkey on the felon's side accepting it after that time.(k) But the defendant cannot, it seems, be discharged for non-payment of the money, where he removes himself to the prison of another court.(l) The mode of obtaining a prisoner's discharge for non-payment of the allowance, if by application to the court in term-time, or to a judge in vacation: and where a note is given at the assizes, the court will discharge him for non-payment of the allowance, upon a record of the proceedings being sent to them, signed by the judge of assize.(m) A judge's order for a prisoner's discharge under the Lord's act, made out of term, has been held to be final:(n) But, in the Common Pleas, this order cannot be made by a judge in term, though summonses were taken out in vacation, and the order only delayed till the beginning of term, by an irregularity in the affidavits.(o)

It sometimes happens, that persons who are prisoners in execution in gaol, for debt or damages, will rather spend their substance in prison, than discover and deliver up the same, towards satisfying their creditors their just debts, or so much thereof as such substance will extend to pay: To remedy which, there are *compulsive* clauses in the Lord's act,(pp) by which it is enacted, that "if any prisoner who shall be committed or charged in execution, in any prison or gaol, for any debt or damages not exceeding one hundred pounds, besides costs," (since extended to 200*l.* by the 26 [*383] *Geo. III. c. 44, § 2, and to 300*l.* by the 33 Geo. III. c. 5, § 3, which is made perpetual by the 39 Geo. III. c. 50,) "shall not

(o) 5 Barn. & Ald. 267.

(a) 1 New Rep. C. P. 306.

(b) *Blakemore v. Rouse*, M. 36 Geo. III. K. B. 3 Bos. & Pul. 184, C. P.

(c) *Id. ibid.*, and see 4 Bing. 230, (a).

(d) *Id.* 670. 1 Bos. & Pul. 271.

(e) Say. Rep. 183. Doug. 60; and see 7 Durnf. & East, 157.

(f) 5 Durnf. & East, 36; and see 7 Durnf. & East, 156. 7 Taunt. 7.

(g) Barnes, 368.

(h) Doug. 68. *Webster v. Wilkinson*, H. 26 Geo. III. K. B.

(i) 1 Bos. & Pul. 92.

(p) *Jones v. Cox*, M. 36 Geo. III. K. B.

(b) 2 Smith, R. 642. 2 Chit. Rep. 226.

(c) 7 Durnf. & East, 530.

(d) 1 New Rep. C. P. 111.

(e) *Id.* 382.

(f) 32 Geo. II. c. 28, § 16, 17.

(g) 7 Taunt. 7.

(h) 32 Geo. II. c. 28, § 16, 17.

(i) 32 Geo. II. c. 28, § 16, 17.

within *three* months next after every such prisoner shall be committed or charged in execution, make satisfaction to his or her creditor or creditors, who shall charge any such prisoner in execution, for such debt, damages and costs, then such creditor or creditors may require every such prisoner (on giving *twenty* days' notice^(a) in writing to him or her, of such creditor's design,) to give in to the court at law from which the writ or process issued, on which any such prisoner shall be charged in execution, or into the court in the prison of which any such prisoner shall be removed by *habeas corpus*, or shall remain or be charged in execution, within the first *seven* days of the term which shall next ensue the expiration of the said *twenty* days, in respect to any prisoner charged in any prison belonging to the courts in *Westminster hall*; and at the second court which shall be held by any other court of record, after the expiration of the said *twenty* days, in respect to any prisoner charged in any prison belonging to such other court; and where any such prisoner shall be charged in execution in any county gaol, or other gaol or prison, above the space of *twenty* miles distant from *Westminster hall*, or the court or courts out of which the writ or process issued, on which any such prisoner is or shall be charged in execution, then to give in upon oath, at the assizes or great sessions, and on the crown side thereof, which shall be held for the county or place in the prison of which any such prisoner shall be, next after the expiration of *twenty* days from the time of giving any such notice, a true account in writing, to be signed with the proper name or mark of every such prisoner, of all the real and personal estate of such prisoner, and of all incumbrances affecting the same, to the best of his or her knowledge and belief, in order that the estate and effects of such prisoner may be divested out of him or her, and may by the court, judge or judges, justice or justices aforesaid, be ordered to be assigned and conveyed, in manner and for the purposes thereafter declared."

"And every such creditor or creditors shall also give *twenty* days like notice in writing, of such his her or their intention to require any such prisoner to be brought up as aforesaid, to all and every other creditor and creditors of every such prisoner, if any, at whose suit any such prisoner shall be detained or charged in custody,^(b) if such other creditor or creditors can be met with; and if not, then to the attorneys last employed in the actions or suits in which any such prisoner shall be so detained or charged in custody, by any such other creditor or creditors: and shall likewise give a like notice in writing to the sheriff or sheriffs, gaoler or keeper of the gaol or prison in which any such prisoner shall be detained in custody, of such his or her intention to have any such prisoner so brought up, and to require such sheriff, &c. to bring up every such prisoner accordingly; and every such notice which shall be so given to any such sheriff, &c. shall be so given *twenty* days at least *before the time appointed for [*384] any such prisoner to be so brought up; and thereupon every such sheriff, &c. shall, at the costs of such creditor or creditors, cause every such prisoner to be brought, as by such notice in writing shall be required, to such court, assizes or great sessions as aforesaid, together with a copy of causes of his or her detainer there."

"And that every prisoner who, in pursuance of this act, shall be brought up to any such court, assizes or great sessions as aforesaid, shall, on proof

(a) Append. Chap. XV. § 77.

(b) *Id.* § 78.

being there first made of such notices as aforesaid having been given, deliver in there in open court, upon oath, within the time therein before for that purpose prescribed, a full true and just account, disclosure and discovery in writing, of the whole of his or her real and personal estate, and of all books, papers, writings and securities, relating thereto, and of all incumbrances then affecting the same, and the respective times when made, to the best of his or her knowledge and belief, (other than and except the necessary wearing apparel and bedding of such prisoner, and his or her family, and the necessary tools or instruments of his or her respective trade or calling, not exceeding the value of *ten* pounds in the whole); which account shall be subscribed with the proper name or mark of the prisoner, who shall so deliver in the same."

"And, on the delivering in of any such account, the estate and effects of every such prisoner shall be by him or her assigned and conveyed, by a short indorsement on the back of every such account, to such person or persons as the court, judge or judges, justice or justices, in which or to whom any such account shall be so given in, shall order or direct, in trust, and for the benefit of the creditor or creditors who shall have required any such prisoner to be brought up as aforesaid, and of such other creditor or creditors (if any,) of every such prisoner, at whose suit any such prisoner shall be charged in custody or execution, and who shall, by any *memorandum* or writing, to be signed by such creditor or creditors, before any such conveyance or assignment shall be made, consent to any such prisoner's being discharged out of gaol or prison, at his her or their suit, and agree to accept a proportionable dividend of such prisoner's estate and effects, with the creditor or creditors who shall have required any such prisoner to be brought up; and if there shall be no other creditor or creditors, or there being any such, if he, she or they shall not agree in writing to discharge such prisoner, and accept such proportionable dividend as aforesaid, then in trust for the creditor or creditors only, who shall require any such prisoner to be brought up for the purpose aforesaid: And, by such assignment and conveyance as aforesaid, all the prisoner's estate and effects shall be vested in the creditor or creditors, to whom the same shall be assigned and conveyed, in trust as aforesaid; and if any *overplus* shall remain of any such prisoner's estate, after payment of the debt, or damages and costs, which shall be due to any creditor or creditors, at whose suit any such prisoner shall, in pursuance of this act, be discharged out of gaol or prison, and all reasonable charges expended in or by means [*385] of getting in such estate or *effects, the same shall be paid to such prisoner, his or her executors administrators or assigns."

And, upon every such discovery, assignment and conveyance being made and executed, to the satisfaction of the court, judge or judges of assize, justice or justices of great session, before whom the same shall be made, every such prisoner shall, by such court, &c., be discharged and set at liberty, in the actions and charges, at the suit of the creditor or creditors who shall require him or her to be so brought up, and also, in the actions and charges of every other creditor who shall sign such consent as aforesaid, for his or her discharge; with the same benefit of making use of such discharge, as is therein before provided for prisoners seeking, and who shall obtain their discharge, under the provisions contained in the former part of this act; and no stamp shall be necessary on any such assignment and conveyance, or any rule or order which shall be made for any such

discharge. But, notwithstanding any discharge obtained by virtue of this act, for the person of any prisoner, the judgment obtained against every such prisoner shall continue and remain in force, and execution may at any time be taken out thereon, against the lands, tenements, rents or hereditaments, goods or chattels of any such prisoner, other than and except the necessary wearing apparel and bedding for himself and family, and the necessary tools for the use of his trade or occupation, not exceeding 10*l.* in value in the whole,(a) as if he had never been before arrested, taken in execution, and released out of prison.(b)

These clauses have been construed to extend to a prisoner in execution on an attachment, for non-payment of costs, pursuant to an award.(c) And it is competent for any one creditor, whose debt does not exceed 300*l.* besides costs, to compel his debtor to make an assignment of his estate and effects, for the benefit of all his creditors, although the aggregate of the debts, for which he is in execution, exceed that sum.(d) But a prisoner in execution, at the suit of a creditor whose debt exceeds 300*l.*, is not liable to be brought up, under the compulsory clauses of the Lords' act, to make an assignment of his estate and effects.(e) And if a prisoner be brought up by rule of court, under the above clauses, on a day *after* the first *seven* days of the term next ensuing the expiration of the *twenty* days' notice required by the act, he cannot be called upon to give in upon oath an account of his estate.(f) The notices required by the above act need not be personally served on the detaining creditors: And where the service was sworn to be on the attorney of a creditor residing abroad, it was deemed sufficient, although the affidavit did not state that he was the attorney last employed in the suit under which the insolvent was detained; the objection being *taken by the insolvent, and not [*386] on the part of the creditor.(aa) The act gives no authority to remand a prisoner, refusing to give in an account of his property, otherwise than generally.(bb) And where an insolvent was brought up at the assizes, under the compulsory clauses of the Lords' act,(cc) to deliver in a schedule of his estate and effects, and not being then prepared to do so, was remanded generally, and more than *sixty* days would have elapsed before the next assizes; the court, at the instance of the prisoner, made an order upon the gaoler, to bring him up at the subsequent assizes for examination, notwithstanding the lapse of *sixty* days.(dd) In another case, where a prisoner, on being brought up, delivered in a schedule, in which it was stated that he was entitled to an annuity after the death of his mother, secured on a freehold estate, which he had sold to his brother for 1000*l.* which sum he had spent extravagantly and improvidently, the court of Common Pleas allowed him to be discharged, on his consenting to amend his schedule, by inserting that he was ready to assign his interest in the estate to the plaintiff, if he had any, and that he would execute an assignment accordingly; although he had been before remanded by the insolvent

(a) In the compulsive clause, § 17, the exception is general, and extends to all wearing apparel, &c., without any restriction in point of value.

(b) 32 Geo. II. c. 28, § 20.

(c) 8 Taunt. 57. 1 Moore, 494, S. C.

(d) 5 Barn. & Ald. 537. 1 Dowl. & Ryl. 25, S. C.

(e) 2 Dowl. & Ryl. 165.

(f) M'Clel. 6. 13 Price, 186, S. C.

(aa) 5 Barn. & Ald. 749. 1 Dowl. & Ryl. 394, S. C.

(bb) M'Clel. 6. 13 Price, 186, S. C.

(cc) § 16, 17.

(dd) 7 Dowl. & Ryl. 234.

debtors' court, for not having satisfactorily accounted for the disposition of his property.^(ee)

For the relief of debtors, in execution for *small debts*, it is enacted by the statute 48 Geo. III. c. 123, that "all persons in execution upon any judgment, in whatsoever court the same may have been obtained, and whether such court be or be not a court of record, for any debt or damages not exceeding the sum of 20*l.*, exclusive of the costs recovered by such judgment, and who shall have lain in prison thereupon for the space of *twelve* successive calendar months next before the time of their application to be discharged as thereafter mentioned, shall and may, upon his her or their application for that purpose in term time, made to some one of his majesty's superior courts of record at *Westminster*, to the satisfaction of such court, be forthwith discharged out of custody, as to such execution, by the rule or order of such court: Provided always, that in the case of any such application being made to be discharged out of execution, upon a judgment obtained in any of his majesty's superior courts of record at *Westminster*, such application shall be made to such one of those courts only, wherein such judgment shall have been obtained; and that, whether the person so in execution shall then be actually detained in the gaol or prison of the same of the same court, or shall then stand committed on *habeas corpus* to the gaol or prison of another court."

"Provided always, that for and notwithstanding the discharge of any debtor or debtors by virtue of this act, the *judgment* whereupon any such debtor or debtors was or were taken or charged in execution, shall nevertheless remain and continue in full force, to all intents and purposes, except as to the taking in execution the person or persons of such debtor or debtors thereupon, as is thereafter provided; and that it [*387] *shall and may be lawful for the creditor or creditors, at whose suit such debtor or debtors had been, was or were so taken or charged in execution, to take out all such *execution* or executions on every such judgment, against the lands, tenements, hereditaments, goods and chattels of any debtor or debtors, (other than and except the necessary wearing apparel and bedding of and for him her or them, and for his her or their family, and the necessary tools for his her or their trade or occupation, not exceeding the value of 10*l.* in the whole,) or to bring any such action or actions on any such judgment, against such debtor or debtors respectively, or to bring any such action, or use such remedy, for the recovery and satisfaction or his her or their demand, against any other person or persons liable to satisfy the same, in such and the same manner, but in such and the same manner only, as such creditor or creditors otherwise could or might have done, in case such debtor or debtors had never been taken or charged in execution upon such judgment."

"Provided also, that no debtor or debtors who shall be duly discharged in pursuance of this act, shall at any time afterwards be taken or charged in execution, upon any judgment therein so as before declared to continue and remain in full force, nor be arrested in any action to be brought on any such judgment; and that no proceeding whatsoever by *scire facias*, action, or otherwise, shall be maintained or had against the bail in any action upon the judgment, wherein the defendant or defendants shall have

been charged in execution, and afterwards discharged by virtue of the provisions of this act."

A plaintiff who has lain in prison more than twelve months, under an execution, for the costs of a nonsuit not amounting to 20*l.*, is entitled to be discharged under the above statute.(a) And, in the Exchequer, a prisoner was discharged under it, notwithstanding he had previously been brought up under the compulsory clauses of the Lords' act, and refused to deliver in a schedule of his effects, and in consequence been remanded;(b) and another prisoner was discharged, although he was entitled to an annuity sufficient to satisfy the judgment. 2 Younge & J. 10. But the statute applies only to cases of persons in execution upon judgments in civil actions:(b) and therefore it has been holden, that one in custody on an *attachment*, for non-payment of money under 20*l.* found due by an award made a rule of court, is not entitled to his discharge under it.(c) So, a defendant in custody on an attachment, for non-payment of money awarded by the master to the prosecutor of an indictment for an assault, of which the defendant was convicted, is not entitled to his discharge under the above act, after having been imprisoned *twelve* calendar months; although the sum awarded for damages do not exceed 20*l.* exclusive of costs.(d) And where a defendant was arrested for a sum under 20*l.* and afterwards gave a warrant of attorney for the original debt and costs of the action, which together exceeded that sum, under which judgment was entered up, and he was taken in execution; the Court of Common Pleas held, that he was *not entitled to his discharge, [*388] under the above statute; as the warrant of attorney did not appear to have been improperly obtained from him, nor was he in custody at the time it was given.(ad) On a motion for the discharge of an insolvent debtor under the above statute, the rule in the King's Bench, is absolute in the first instance, after due notice of the application has been given to the plaintiff or his attorney:(bb) but, in the Common Pleas, it is in the first instance only a rule *nisi*:(cc) and the court, on showing cause, required the record to be examined by the officer, to ascertain whether the judgment had been entered up for a less sum than *twenty* pounds, and whether the defendant had lain in prison *twelve* months by virtue of such judgment; the affidavit of the defendant, as to these facts, not being deemed sufficient.(dd)

The acts of parliament hitherto mentioned, are only for the relief of debtors in *execution*; but besides these acts, other have been *occasionally* passed, for the relief of insolvent debtors in *general*.(e) The cases decided on these latter acts, may be classed under the following heads: 1st, the cases in which insolvent debtors are,(f) or are not,(g) entitled to the benefit of the acts; 2dly, the jurisdiction of the justices, at an

(a) 3 Maule & Sel. 282.

(b) McClel. 6. 13 Price, 186, S. C.

(b) McClel. 6. 13 Price, 186, S. C.

(c) 10 East, 408. 2 Barn. & Ald. 61.

(d) 2 Maule & Sel. 201; and see 8 Dowl. & Ry. 58, *accord*.

(ad) 6 Moore, 287.

(bb) 2 Barn. & Cres. 804. 4 Dowl. & Ry. 361, S. C. And for the form of a *notice* of prisoner's intention to apply for his discharge, under this statute, see Append. Chap. XV. § 80, and for the form of an *affidavit*, to obtain the rule thereon, *id.* § 81.

(cc) 7 Taunt. 37, 467.

(dd) 8 Moore, 80.

(e) See the statute 34 Geo. III. c. 69, § 37, and the other statutes referred to, *ante*, 212, (k).

(f) 8 Durnf. & East, 49. 2 East, 148. 3 Bos. & Pul. 394. 4 Taunt. 460, 854.

(g) 6 Durnf. & East, 28, 399. 7 Durnf. & East, 305. 1 Bos. & Pul. 477. 6 East, 347. 7 East, 91. 3 Smith, R. 115, S. C. 8 East, 433. 2 Campb. 443. 1 Price, 315. 3 Barn. & Ald. 407. 2 Chit. Rep. 222, S. C. 4 Barn. & Cres. 419. 6 Dowl. & Ry. 491, S. C.

adjourned session;(h) 3dly, their remanding the insolvent, for obtaining money or goods under false pretences;(i) 4thly, the property which passes under the acts;(k) 5thly, the assignment of it by the clerk of the peace;(l) 6thly, the evidence in support of an *ejectment* by the assignee,(m) or to prove the insolvent's discharge;(n) and lastly, the liability of future effects.(o)

At length, by the statute 53 Geo. III. c. 102,(p) (Lord *Redesdale's* act,) a court was established for the permanent relief of insolvent debtors in *England*, called '*The Court for relief of Insolvent Debtors.*' This statute was amended by the 54 Geo. III. c. 23, and 56 Geo. III. c. 102, and continued by the 59 Geo. III. c. 129; but having been suffered to expire, the statute 1 Geo. IV. c. 119, was made, for the permanent relief of insolvent debtors in *England*, which was amended by 3 Geo. IV. c. 123, and 5 Geo.

IV. c. 61, and afterwards repealed by 7 Geo. IV. c. 57, except [*389] as *to the matters of certain petitions therein mentioned. The insolvent debtors' court has been holden to be such a court, as privileges the parties and their witnesses, in attending it, from arrest, *eundo, morando, et redeundo*, in the same manner as when in attendance upon any other court.(a) A lessor whose property has been assigned to a provisional assignee, under the statute 1 Geo. IV. c. 119, cannot eject an occupier of land which passed under the assignment; although the provisional assignee has never taken possession, nor has any permanent assignee been appointed, or rent withheld from the lessor, 4 Bing. 348. And the provisional assignee of that court may maintain an *ejectment*, for the property of an insolvent, under the provisions of the statute 1 Geo. IV. c. 119, without a previous application to the court.(b) But an assignment of the property of an insolvent, under that statute, only transferred the property he was possessed of at the time of presenting the petition for his discharge; and did not pass any after acquired property to his assignee.(c) And neither the 53 Geo. III. c. 102,(d) nor the 1 Geo. IV. c. 119,(e) discharged the prisoner from all his debts; but only from the demands of such of his creditors as were named in his schedule, and specified in the order of discharge. It has also been determined, that a plea of discharge, under the statute 53 Geo. III. c. 102, is no bar to an action of *trespass* for mesne profits, accruing before the discharge.(f)

The laws for the relief of insolvent debtors in *England* were finally amended and consolidated by the statute 7 Geo. IV. c. 57, by which it is enacted, that "it shall be lawful for any person who shall be in actual custody, within the walls of any prison(g) in *England*, upon any process

(h) 6 Durnf. & East, 76. 8 Durnf. & East, 424.

(i) 6 Durnf. & East, 76. 8 East, 180.

(k) 3 Bos. & Pul. 321.

(l) 2 East, 257. 8 Moore, 384. 1 Bing. 354, S. C.

(m) 5 Maule & Sel. 72. 3 Dowl. & Ryl. 509.

(n) 3 Stark. Ni. Pri. 54. 4 Barn. & Cres. 335. 6 Dowl. & Ryl. 464, S. C.

(o) 6 Durnf. & East, 366. 8 East, 55. See also Barnes, tit. *Prisoners*, 2 Blac. Rep. 992, 1188, 1307, 1309. 8 Taunt. 403, for determinations on former statutes, in the Common Pleas.

(p) § 1, 10.

(a) 6 Taunt. 356. 2 Marsh. 57, S. C. *Ante*, 195.

(b) 2 Car. & P. 79. 3 Bing. 203, S. C.

(c) 9 Moore, 710. 2 Bing. 372, S. C. (d) 7 Taunt. 179. 1 Chit. Rep. 222.

(e) 4 Barn. & Cres. 419. 6 Dowl. & Ryl. 491, S. C.; and see 4 Barn. & Cres. 15. 6 Dowl. & Ryl. 75, S. C. 4 Barn. & Cres. 214. Ry. & Mo. 322. 2 Car. & P. 120, S. C., as to the description of debts in the schedule. (f) 3 Barn. & Ald. 407. 2 Chit. Rep. 222, S. C.

(g) Stat. 7 Geo. IV. c. 57, § 12, 52; and see stat. 3 Geo. IV. c. 123, § 8. 5 Geo. IV. c. 61, § 12, & 6 Geo. IV. c. 121, § 1.

whatsoever, for or by reason of any debt, damage, costs, sum or sums of money, or for or by reason of any contempt of any court whatsoever, for non-payment of any sum or sums of money, or of costs taxed, or untaxed, either ordered to be paid, or to the payment of which such persons would be liable in purging such contempt, or in any manner in consequence or by reason of such contempt, at any time within the space of *fourteen* days next after the commencement of the actual custody of such prisoner, whether such commencement shall have been in the same or any other prison, or the rules or liberties of any prison, or afterwards, if the said court shall in any case think reasonable to permit the same, to apply by *petition* in a summary way to the said court, for his or her discharge from such custody, according to the provisions of that act; And in such petition shall be stated the time and place of the first arrest of such prisoner, in the cause or causes wherein he or she shall then be detained, and the time of his or her commitment to the prison where he or she shall then be confined; and if such prisoner shall not have been in the same custody from the time of such first arrest, then the means and manner by which the change of custody of such prisoner has taken place; and also the name or names of the person or persons at whose suit or prosecution such prisoner shall, at the time of presenting such *peti- [*390] tion, be detained in custody, and the amount of the debt or debts, sum or sums of money, and of such costs as aforesaid, so far as the amount of such costs is ascertained, for which he or she shall be so detained, &c. And such prisoner shall, in such petition, pray to be discharged from custody, and to have future liberty of his or her person against the demands for which such prisoner shall be then in custody, and against the demands of all other persons who shall be, or claim to be, creditors of such prisoner, at the time of presenting such petition; which petition shall be subscribed by the said prisoner, and shall forthwith be filed in the said court.”(a)

And “such prisoner shall, at the time of subscribing the said petition, duly execute a conveyance and assignment to the provisional assignee of the said court, in such form as it is to that act annexed, of all the estate right, title, interest, and trust of such prisoner, in and to all his real and personal estate and effects, both within this realm and abroad, except the wearing apparel, bedding, and other such necessities of such person, and his or her family, and the working tools and implements of such prisoner, not exceeding in the whole the value of *twenty* pounds; and of all future estate, right, title, interest, and trust of such prisoner, in or to any real and personal estate and effects, within this realm or abroad, which such prisoner may purchase, or which may revert, descend, be devised or bequeathed, or come to him or her, before he or she shall become entitled to his or her final discharge in pursuance of that act, according to the adjudication made in that behalf; or in case such prisoner shall obtain his or her discharge from custody, without any adjudication being made in the matter of his or her petition, then before such prisoner shall be at large and out of custody; and of all debts due or growing due to such prisoner, or to be due to him or her, before such discharge as aforesaid; which conveyance and assignment, so executed as aforesaid, in form aforesaid, shall vest all the real and personal estate and effects of such prisoner,

(a) Stat. 7 Geo. IV. c. 57, § 10, and see stat. 1 Geo. IV. c. 119, § 4.

and all such future real and personal estate and effects as aforesaid, of every nature and kind whatsoever, and all such debts as aforesaid, in the said provisional assignee.”(b)

And “every such prisoner, who shall apply for relief under that act, shall, within the space of *fourteen* days next after his or her petition shall have been filed, or within such further time as the said court shall think reasonable, deliver into the said court, a *schedule*, containing a full and fair description of such prisoner, as to his or her name or names, trade or trades, profession or professions, together with the last usual place of abode of such prisoner, and the place or places where he or she has resided, [*391] during the time when his or her debts were contracted: and *also a full and true description of all *debts* due or growing due from such prisoner at the time of filing such petition, and of all and every person and persons to whom such prisoner shall be indebted, or who, to his or her knowledge or belief, shall claim to be his or her creditors; together with the nature and amount of such debts and claims respectively, distinguishing such as shall be admitted, from such as shall be disputed by such prisoner; and also a full, true, and perfect account of all the estate and effects of such prisoner, real and personal, in possession, reversion, remainder, or expectancy; and also of all places of benefit or advantage held by such prisoner, whether the emoluments of the same arise from fixed salaries, or from fees, or otherwise; and also of all pensions or allowances of the said prisoner, in possession or reversion, or held by any other person or persons for or on behalf of the said prisoner, or of and from which the said prisoner derives, or may derive, any manner of benefit or advantage; and also of all rights and powers, of any nature and kind whatsoever, which such prisoner, or any other person or persons in trust for him, or for his or her use, benefit, or advantage, in any manner whatsoever, shall be seised or possessed of, or interested in, or entitled unto, or which such prisoner, or any other person or persons in trust for him or her, or for his or her benefit, shall have any power to dispose of, charge, or exercise for the benefit or advantage of such prisoner; together with a full, true, and perfect account of all the debts due or growing due, at the time of filing such petition, to such prisoner, or to any person or persons in trust for him or her, or for his or her benefit or advantage, either solely or jointly with any other person or persons, and the names and places of abode of the several persons from whom such debts shall be due or growing due, and of the witnesses who can prove such debts, so far as such prisoner can set forth the same; and the said schedule shall also contain a balance sheet of so much of the receipts and expenditures of such prisoner, and of the *items* composing the same, as shall be at any time required by the said court in that behalf; and shall also fully and truly describe the wearing apparel, bedding, and other necessities of such prisoner, and his or her family, and the working tools and implements of such prisoner, not exceeding in the whole the value of *twenty* pounds, which may be excepted by such prisoner from the operation of that act, together with the

(b) 7 Geo. IV. c. 57, § 11, and see stat. 1 Geo. IV. c. 119, § 4. And for the assignment by the provisional assignee, see stat. 1 Geo. IV. c. 119, § 7. 7 Geo. IV. c. 57, § 19; and as to the effect of such assignment, see 1 Moore & P. 19. 4 Bing. 392, S. C. For the sale and disposal of the property, see stat. 1 Geo. IV. c. 119, § 7, &c. 7 Geo. IV. c. 57, § 20, &c. And for the removal of assignees, and appointment of new ones, in case of death, &c., see stat. 1 Geo. IV. c. 119, § 14. 7 Geo. IV. c. 57, § 38.

value of such excepted articles respectively; and the said schedule shall be subscribed by such prisoner, and shall forthwith be filed in the said court, together with all books, papers, deeds, and writings, in any way relating to such prisoner's estate or effects, in his or her possession, or under his or her custody or control."(*a*)

After the petition and schedule are filed, the court is required to appoint a time and place for hearing the matters of them;(*b*) of which notice is to be given to the creditor or creditors at whose suit the prisoner is detained in custody, or his or their attorney or agent, and to the other creditors named in the schedule, and resident within the united [*392] kingdom, whose debt shall amount to the sum of five pounds; and to be inserted in the *London Gazette*, and also, if the court shall think fit, in the *Edinburgh* and *Dublin Gazettes*, or either of them, and in such other newspaper or newspapers as the said court shall direct.(*aa*) At the time of hearing, the matters of the petition and schedule are to be examined: and creditors may oppose the prisoner's discharge; whereupon the hearing may be adjourned, if necessary, and the prisoner shall remain in custody, and be again brought up, and the hearing and examination further proceeded in, as to the court shall seem fit.(*b*) Affidavits may be received in opposition to the prisoner's discharge, in certain cases mentioned in the act; and interrogatories filed, for the examination or cross examination of the persons making or joining in the same:(*c*) And the schedule and prisoner's accounts may be referred, if the court shall think fit, upon application made by a creditor, and supported by oath or affidavit, to an officer of the court, or examiner, who may order the attendance of the prisoner.(*d*)

And after such examination made into the matters of the petition and schedule of any such prisoner as thereinbefore directed, it is, as we have seen in a former chapter,(*e*) declared to be lawful, "at such hearing, or adjourned hearing as aforesaid, for the said court, or the commissioner or justices therein mentioned, upon such prisoner's swearing to the truth of his or her petition and schedule, and executing such warrant of attorney as is thereafter directed, to adjudge that such prisoner shall be discharged from custody, and entitled to the benefit of that act, at such time as the said court or commissioner, or justices, shall direct, in pursuance of the provisions thereafter contained in that behalf, as to the several debts and sums of money due, or claimed to be due, at the time of filing such petition, from such prisoner, to the several persons named in his or her schedule as creditors, or claiming to be creditors for the same respectively; or for which such persons shall have given credit to such prisoner, before the time of filing such petition, and which were not then payable; and as to the claims of all other persons, not known to such prisoner at the time of such adjudication, who may be indorsees or holders of any negotiable security set forth in such schedule, so sworn to as aforesaid."(*f*)

(*a*) Stat. 7 Geo. IV. c. 57, § 40; and see stat. 1 Geo. IV. c. 119, § 6.

(*b*) 7 Geo. IV. c. 57, § 41.

(*aa*) 7 Geo. IV. c. 57, § 42.

(*b*) *Id.* § 43.

(*c*) *Id.* § 44; and see stat. 1 Geo. IV. c. 119, § 22.

(*d*) 7 Geo. IV. c. 57, § 45; and see stat. 1 Geo. IV. 119, § 16. And for the mode of bringing up an insolvent debtor, when in custody, before a commissioner of the insolvent court, on stat. 53 Geo. III. c. 102, see 2 Chit. Rep. 225.

(*e*) *Ante*, Chap. X. p. 213, 14.

(*f*) 7 Geo. IV. c. 57, § 46; and see stat. 1 Geo. IV. c. 119, § 16.

The discharge of any prisoner, so adjudicated as aforesaid, is declared by the act(*g*) to extend to "all process issuing from any court, for any contempt of any court, ecclesiastical or civil, for non-payment of money, or of costs or expenses in any court, ecclesiastical or civil; and in such case, the said discharge shall be deemed to extend also to all [*393] costs which *such prisoner would be liable to pay, in consequence or by reason of such contempt, or on purging the same: And every discharge so adjudicated as aforesaid, as to any debt or damages of any creditor of such prisoner, shall be deemed to extend also to all costs incurred by such creditor, before the filing of such prisoner's schedule, in any action or suit brought by such creditor against such prisoner, for the recovery of the same: and all persons, as to whose demands for any such costs, money or expenses, any such person shall be so adjudged to be discharged, shall be deemed and taken to be creditors of such prisoner in respect thereof, and entitled to the benefit of all the provisions made for creditors by that act; subject nevertheless to such ascertaining of the amount of the said demands, as may be had by taxation or otherwise, and to such examination thereof as is therein provided, in respect of all claims to a dividend of such insolvent's estate and effects."

The discharge of any such prisoner so adjudicated, is also declared by the act,*(a)* to extend to "any sum and sums of money, which shall be payable by way of annuity, or otherwise, at any future time or times, by virtue of any bond, covenant, or other securities, of any nature whatsoever: And every person and persons who would be a creditor or creditors of such prisoner, for such sum or sums of money, if the same were presently due, shall be admissible as a creditor or creditors of such prisoner, for the value of such sum or sums of money, so payable as aforesaid; which value the said court shall, upon application at any time made in that behalf, ascertain; regard being had to the original price given for such sum or sums of money, deducting therefrom such diminution in the value thereof, as shall have been caused by the lapse of time since the grant thereof to the time of filing such prisoner's petition; and such creditor or creditors shall be entitled in respect of such value, to the benefit of all the provisions made for creditors by that act, without prejudice nevertheless to the respective securities of such creditor or creditors, excepting as respects such prisoner's discharge under that act." Previously to the above act, the grantor of an annuity, who had been discharged out of custody, under the insolvent act, 51 Geo. III. c. 125, was holden to be discharged, both as to his person and property, from all payments of the annuity.*(b)* But that act did not operate as a discharge of his sureties, or of specific securities.*(b)* And a person discharged under it was holden to be liable to his surety, for the arrears of an annuity, due after his discharge, which the surety had been obliged to pay.*(c)*

After any person shall have become entitled to the benefit of the statute 7 Geo. IV. c. 57,*(d)* by any such adjudication as aforesaid, "no writ of *fiery facias*, or *elegit*, shall issue on such judgment obtained against such prisoner for any debt or sum of money, with respect to which such person

(*g*) § 50, and see stat. 1 Geo. IV. c. 119, § 16.

(*a*) § 51; and see stat. 1 Geo. IV. c. 119, § 10.

(*b*) 4 Taunt. 460; and see *id.* 854, *accord.*

(*c*) 2 Maule & Sel. 551. *Ante*, 213.

(*d*) § 61; and see stat. 1 Geo. IV. c. 119, § 23.½

shall have so become entitled, nor in any action upon any new contract or security for payment thereof, except upon the judgment entered

*up against such prisoner, according to that act: And if any [*394] suit or action shall be brought, or any *scire facias* be issued, against any such person, his or her heirs, executors or administrators, for any such debt or sum of money, or upon any new contract or security for payment thereof, or upon any judgment obtained against or any statute or recognizance acknowledged by, such person for the same, except as aforesaid, it shall and may be lawful for such person, his or her heirs, executors or administrators, to *plead* generally, that such person was duly discharged according to that act, by the order of adjudication made in that behalf, and that such order remains in force, without pleading any other matter specially: (aa) whereto the plaintiff or plaintiffs shall or may *reply* generally, and deny the matters pleaded as aforesaid, or reply any other matter or thing which may show the defendant or defendants not to be entitled to the benefit of that act, or that such person was not duly discharged according to the provisions thereof, in the same manner as the plaintiffs might have replied, in case the defendant or defendants had pleaded that act, and a discharge by virtue thereof, specially."

Particular modes of proceeding are appointed by the act, in the case of married women, (a) and prisoners of unsound mind: (b) and the act only extends to prisoners within the walls of the prison, except under particular circumstances. (c) It is also provided, that "the benefit of that act shall not be allowed to any prisoners petitioning the said court, who having been arrested in any county or place where he or she had, at or lately before such arrest, his or her usual place of abode, other than in the counties of *Middlesex* or *Surrey*, or the city of *London*, or borough of *Southwark*, such usual place of abode being distant more than *twenty* miles from the court-house of the said court, shall be removed by any writ of *habeas corpus*, sued out on his or her behalf, or by his or her procurement or request, from custody in such county or place, to any other county." (d)

And "no person petitioning the said court for relief under that act, who shall have been at any time discharged by virtue of the same, or of any other act for the relief of insolvent debtors, or who shall have been duly declared bankrupt before the commencement of his or her imprisonment, under any commission still remaining in force, and shall not have obtained his or her certificate under such commission, shall be entitled to the benefit of that act, within the space of *five* years after such discharge, or declaration of bankruptcy, unless three fourths in number and value of the creditors against whom such person shall seek to be discharged, by virtue of that act, shall signify their assent to such discharge, or it shall be made to appear to the satisfaction of the said court, or of a commissioner thereof on his circuit, or such justices as aforesaid, before whom the said person shall be brought, for the hearing of the matters *of his or her petition, that such person has since such former [*395] discharge, or declaration of bankruptcy, endeavoured by indus-

(aa) For the history of the acts for the relief of insolvent debtors, with the mode of pleading them, and the evidence thereon, see *Cas. temp. Hardw.* 145, 6.

(a) Stat. 7 Geo. IV. c. 57, § 72; and see stat. 3 Geo. IV. c. 123, § 12. 5 Barn. & Ald. 759.

(b) Stat. 7 Geo. IV. c. 57, § 73; and see stat. 1 Geo. IV. c. 119, § 44.

(c) 7 Geo. IV. c. 57, § 12, and see *id.* § 52.

(d) *Id.* § 66.

try and frugality to pay all just demands upon him or her, and has incurred no unnecessary expense; and that the debts which such person has incurred, subsequent to such discharge, or declaration of bankruptcy, have been necessarily incurred for the maintenance of such person, or his or her family; or that the insolvency of such person has arisen from misfortune, or from inability to acquire subsistence for himself or herself, and his or her family.”(aa)

It is also provided, that “the act shall not extend to discharge any prisoner seeking the benefit thereof, with respect to any debt due to his majesty or his successors, or to any debt or penalty with which he or she shall stand charged at the suit of the crown, or of any person, for any offence committed against any act or acts of parliament, relative to any branch of the public revenue; or at the suit of any sheriff or other public officer, upon any bail bond entered into for the appearance of any person prosecuted for any such offence; unless three of the commissioners of his majesty’s treasury for the time being shall certify, under their hands, their consent to such discharge.”(bb)

As it may sometimes happen, that a debt of, or claim upon, or balance due from such prisoner as aforesaid, may be specified in his or her schedule so sworn to as aforesaid, at an amount which is not exactly the actual amount thereof, without any culpable negligence or fraud, or evil intention on the part of such prisoners there is a clause in the act,(cc) that “in such case, the said prisoner shall be entitled to all and every benefit and protection of that act; and the creditor in that behalf shall be entitled to the benefit of all the provisions made for creditors by that act, in respect of the actual amount of such debt, claim, or balance, and neither more nor less than the same, to all intents and purposes, such error in the said schedule notwithstanding.”

The *future* effects of an insolvent are liable by this act:(d) And “before any adjudication shall be made in the matter of the petition of any such prisoner, the said court, or commissioner, or justices, shall require such prisoner to execute a *warrant of attorney*, to authorize the entering up of a judgment against such prisoner, in some one of the superior courts at *Westminster*, in the name of the assignee or assignees of such prisoner, or of such provisional assignee, if no other assignees shall have been appointed, and shall have accepted such office, for the amount of the debts stated in the schedule of such prisoner, so sworn to as aforesaid, to be due, or claimed to be due, from such prisoner, or so much thereof as shall appear at the time of executing such warrant of attorney to be due and unsatisfied; and the order of the said court for entering up such judgment shall be a sufficient authority

to the proper officer for entering up the same; and such judgment [*396] shall have the force of a recognizance: *And if at any time it shall appear to the satisfaction of the said court, that such prisoner is of ability to pay such debts, or any part thereof, or that he or she is dead, leaving assets for that purpose, the said court may permit execution to be taken out upon such judgment, for such sum of money as under all the circumstances of the case the said court shall order: such sum to be distributed rateably amongst the creditors of such prisoner, according to the mode

(aa) Stat. 7 Geo. IV. c. 57, § 64; and see stat. 1 Geo. IV. c. 119, § 42, 3.

(bb) Stat. 7 Geo. IV. c. 57, § 74; and see stat. 1 Geo. IV. c. 119, § 40.

(cc) 7 Geo. IV. c. 57, § 63.

(d) 7 Geo. IV. c. 57, § 11, 57, 8, 9; and see stat. 1 Geo. IV. c. 119, § 25, 29, 30. *Ante*, 388.

thereinbefore directed, in the case of a dividend made after adjudication; and such further proceedings shall and may be had upon such judgment, as may seem fit to the discretion of the said court from time to time, until the whole of the debts due to the several persons against whom such discharge shall have been obtained, shall be fully paid and satisfied, together with such costs as the said court shall think fit to award; and no *seire facias* shall be necessary to revive such judgment, on account of any lapse of time, but execution shall at all times issue thereon, by virtue of the order of the said court: Provided always, that in case any such application against any such prisoner shall appear to the said court to be ill founded and vexatious, it shall be lawful for the said court not only to refuse to make any order on such application, but also to dismiss the same, with such costs against the party or parties making the same, as to the said court shall appear reasonable; and the said costs shall be paid accordingly.”(a)

*CHAPTER XVI.

[*397]

Of the REMOVAL of CAUSES, from INFERIOR COURTS.

THE different modes of *commencing* actions, in the courts of King's Bench, Common Pleas, and Exchequer, having been already considered, it may be proper to take a view of the various means by which they are *removed* thither from inferior courts. These are, by writ of *certiorari*, or *habeas corpus*, from inferior courts of record; or by writ of *pone, record-ari facias loquelam*, or *accedas ad curiam*, from such as are not of record.

The writ of *certiorari*(a) is a writ issuing sometimes out of Chancery,(b) and sometimes out of the King's Bench or Common Pleas:(c) and lieth where the king would be certified of any record which is in the Treasury, or in the Common Pleas, or in any other court of record; or before the sheriff and coroners: or of a record before commissioners, or before the escheator; in which cases he may send this writ to any of the said courts or officers, to certify such record before him *in banco*, or in Chancery, or before other justices, where the king pleaseth to have the same certified: and he or they to whom the *certiorari* is directed, ought to send the same record, or the tenor of it, as commanded by the writ; and if they fail so to do, then an *alias* shall be awarded, and afterwards a *pluries*, with a clause of *vel causum nobis significes*, and after that an attachment, if good cause be not returned upon the *pluries*.(d)

Suits commenced in inferior courts of record may, it seems, be removed by *certiorari* into the Exchequer, by the plaintiff or defendant:(e) And

(a) 7 Geo. IV. c. 57, § 57; and see stat. 54 Geo. III. c. 23, § 14. 1 Geo. IV. c. 119, § 25. And for the mode of proceeding against future effects, see stat. 1 Geo. IV. c. 119, § 28, 9. 7 Geo. IV. c. 57, § 58, 9; and as to the cancelling of the warrant of attorney, and entering satisfaction on the judgment, when the debts are satisfied, see stat. 7 Geo. IV. c. 57, § 62.

(aa) Append. Chap. XVI. § 1, &c.

(b) *Id.* Chap. XLV. § 28.

(c) 2 Ld. Raym. 836. 1 Salk. 148. 7 Mod. 138, S. C. Barnes, 345, 399. Pr. Reg. 221.

(d) F. N. B. 245. A. B. Gilb. Exec. 175. 6 Palm. 562.

(e) Skin. 244, 246. And see Man. Ex. Pr. 152, &c., for the different modes of removing causes into the court of Exchequer.

this court, having an original and in many cases an exclusive jurisdiction in fiscal matters, will not permit questions in the decision of which the king's revenue is interested, to be discussed before any other tribunal. On such occasions, the court interposes upon motion, by ordering the proceedings to be removed into the office of pleas.(f) The usual order, in cases of this nature, is that the action be removed out of the King's Bench or Common Pleas, or other court in which it is depending, into the office of pleas in the Exchequer; and that it shall be there in the same forwardness, as in the court out of which the action is removed. This order, however, [*303] does not operate as a *certiorari*, to remove the proceedings; *but as a personal order on the party, to stay them there, with liberty to commence his action in the office of pleas; and of course calls upon the defendant in that action to appear, to accept a declaration, and to put the plaintiff in the same state of forwardness, in the office of pleas, as he was in the other court.(aa)

When a *certiorari* issues out of Chancery, it is returnable in that court; and the record when brought up, if wanted in another court, must be sent there by *mittimus*.(bb) And anciently, it seems, no other court but the Chancery could grant a *certiorari*, on a suggestion, where there was nothing before them;(c) but it is now settled, that a record may be removed into the King's Bench or Common Pleas, as well by *certiorari* out of these courts,(d) as by *certiorari* and *mittimus* out of Chancery:(e) For, as the King's Bench and Common Pleas have the superintendence of all inferior jurisdictions, their proceedings are removable into these courts, in order that the judges may inspect the record, and see whether they keep within the limits of their jurisdiction.(ff)

A *certiorari* lies, in general, for the removal of all causes from inferior courts,(g) whether the defendant has been proceeded against therein by *capias*, or other process:[A] and it will lie to remove an *ejectment* from an

(f) Hardr. 176. Parker, 143. 1 Anstr. 205, n. Man. Ex. Pr. 161, 2, 164, n. 1 Price, 206.

(aa) *Per Eyre*, Ch. B. 1 Anstr. 205, n; and see 3 Price, 584. Chitty's Commercial law, 1 V. 805, 6.

(bb) Append. Chap. XLV. § 30.

(c) Gilb. Exec. 153, cites 41 Ass. 22.

(d) Cro. Eliz. 821. 1 Ld. Raym. 216. 2 Atk. 317. *Thes. Brev.* 77. Append. Chap. XVI. § 1, &c.

(e) F. N. B. 244, (A), 245, (A). Gilb. Exec. 175, 6; and see 1 Madd. Chan. 12.

(ff) Gilb. Exec. 143. 1 Salk. 144, 5.

(g) 2 Dowl. & Ry. 409, *per Bayley*, J.

[A] A supreme court has power, by the common law, to review the proceedings of all inferior tribunals, and to pass upon their jurisdiction and decisions of questions of law. But unless a statute confers the power of reviewing determinations of inferior tribunals upon questions of fact, such determinations are conclusive, and cannot be reversed on *certiorari*. The court can only review errors in law. *Scott v. Beatty*, 3 Zab. N. J. 201. *Starr v. Trustees of Rochester*, 6 Wend. 564. *Independance v. Pompton*, 4 Halst. 209. *Ex parte Hayward*, 10 Pick. 358. *Le Roy v. The Mayor, &c.*, 20 Johns. 430. *Parks v. Boston*, 8 Pick. 226. *Willy v. Washburn*, 16 Johns. 50. *State v. Senft*, 2 Hill, 369. *Baldwin v. Simmons*, 4 Halst. 196. *Wood v. Tallman*, Coxe, 153. *Ex parte Nightingale*, 11 Pick. 168. *Williamson v. Carnan*, 1 Gill & Johns. 196. *Clark v. Vanleiu*, 6 Halst. 78. *Farley v. McIntire*, 1 Green, 190. *Graecen v. Allen*, 2 Green, 74. *Andrews v. Andrews*, 2 Green, 141. And when the proceedings of the court below are, in any stage of them, different from the course of the common law, whether in civil or criminal cases, the writ of *certiorari* is the only proper process to correct any error that may have occurred, unless some different process is given by statute. *Commonwealth v. Ellis*, 11 Mass. 466. *Bath Bridge, &c., Company v. Magoun*, 8 Greenl. 293. *Ruhlman v. Commonwealth*, 5 Binn. 27. *Phillips v. Phillips*, 3 Halst. 123. *Triggs v. Boyce*, 4 Hayw. 100. *Williamson v. Carnan*, 1 Gill & Johns. 196. *Macaboy v. Com-*

inferior court.(h) This writ may be sued out *before*, or, in some cases, *after* judgment; and lies in civil actions *before* judgment, in the King's

(h) 1 Barn. & Cres. 253. 2 Dowl. & Ry. 407, S. C. 3 Barn. & Cres. 550. 5 Dowl. & Ry. 445, S. C.; but see Barnes, 421. *Ran. Eject.* 2 Ed. 174, 5. *Ad. Eject.* 2 Ed. 176, 7, *seml. contra.*

monwealth, 2 Virg. Cas. 270. *Bob v. State*, 2 Yerg. 173. *Buggen v. McGruder*, Walk. 112. *Swaw v. The Mayor, &c.*, 8 Gill. 150. *The State v. Bell*, 13 Ired. 373.

Whenever the record of an inferior court is brought, in due course of law, by appeal, writ of error, &c., before a superior court, and there is a manifest defect, or a suggestion of a diminution, a *certiorari* will be awarded, as auxiliary process, directing a return of a full and complete transcript, and other papers. *Smith v. Oplydyke*, 7 Halst. 85. *State v. Collins*, 3 Dev. 117. *State v. Reid*, 1 Dev. & Bat. 382. *Browne v. Osborne*, 1 Blackf. 32. *Thatcher v. Miller*, 11 Mass. 414. *Stewart v. Ingle*, 9 Wheat. Rep. 526. *Commonwealth v. Roly*, 12 Pick. 496. *Reid v. De Wolf*, Wright, 418. *Andrews v. Bosworth*, 3 Mass. 223. *Fowler v. Lindsay*, 3 Dall. 413. *Sweet v. Overseers*, 3 Johns. 23. *Thorp v. Ross*, 2 South. 720. *Soyre v. Blanchard*, *Id.* 551. *Commonwealth v. New Milford*, 4 Mass. 447. *Scott v. Hall*, 2 Munf. 229. *Fidd v. Milton*, 3 Cranch, 514. *Burr v. Waterman*, 2 Cow. 38, note. *Brackett v. State*, 2 Tyler, 152. And, perhaps, wherever there is error in civil or criminal proceedings, which cannot be reached by writ of error, the proper remedy in the absence of a statutory one, is the writ of *certiorari*. In case no appeal will lie, the supreme court will issue a *certiorari* to the district court for the purpose of reviewing its summary proceedings. *The People v. Turner*, 1 Cal. 152. And this writ may issue to all inferior tribunals and jurisdictions, in cases where they exceed their jurisdictions, and in cases where they proceed illegally, and there is no appeal or other mode of directly reviewing their proceedings. But an error of judgment on the part of the judge, either as to the facts or the law of the case, could not be inquired into and corrected. *Doolittle v. Galena and Chicago R. R. Co.*, 14 Ill. 381.

This *certiorari*, and not a writ of error, is the proper process to remove the proceedings of the court of sessions, county commissioners, &c., in laying out highways, and other proceedings respecting highways and turnpike roads. *Commonwealth v. Coombs*, 2 Mass. 489. *Commonwealth v. Hall*, 8 Pick. 440. *Commonwealth v. West Boston Bridge*, 13 Pick. 195. *Commonwealth v. Cambridge*, 7 Mass. 158. *White's case*, 2 Overt. 109. *Lawton v. Commissioners*, 2 Caines, 179. *Cowan's case*, 1 Overt. 311. *Matter of Highway*, 2 Pen. 1038. *Burrows v. Vandevier*, 3 Ham. 383. *Adams v. Newfane*, 8 Verm. 271. *Schuylkill Falls Road*, 2 Binn. 250. So of the proceedings of the mayor and aldermen of Boston, in laying out and altering streets. *Parks v. City of Boston*, 8 Pick. 218. And to remove the proceedings of the Common Pleas or sessions, on a complaint against the alleged father of a bastard child. *Browne v. Simpson*, 2 Mass. 445. *Commonwealth v. Cole*, 5 Mass. 517. *Commonwealth v. Moore*, 3 Pick. 194. *Mariner v. Dyer*, 2 Greenl. 165. *Tillson v. Bowley*, 8 Greenl. 163. *Lawson v. Scott*, 1 Yerg. 92. *Sweet v. Overseers*, 3 Johns. 23. *Gile v. Moore*, 2 Pick. 386. *Chylin v. Hubbard*, Brayt. 38. Or the proceedings before a justice of the peace, on a complaint to recover a fine under the militia law. *Edgar v. Dodge*, 4 Mass. 670. *Commonwealth v. Derby*, 13 Mass. 433. *Ball v. Brigham*, 5 Mass. 406. *Dunham v. United States*, 4 Hayw. 54. *Knight v. Payne*, Wright, 369. *Rathbun v. Sayer*, 15 Wend. 451. Or to correct proceedings in cases of foreign attachment. *Allen v. Williams*, 1 Hayw. 17. *Fryar v. Blackmore*, 2 Hayw. 374. *Hartshorn v. Wilson*, 2 Ham. 27. *Wilson v. Ray*, Charlt. 109. *Branson v. Skinn*, 1 Green, 250. *Ayres v. Bartlet*, 2 Green, 330. *Learned v. Dural*, 3 Johns. Cas. 141, *contra.* *Walker v. Gibbs*, 1 Yeates, 255. *Lewis v. Wallick*, 3 S. & R. 411. So where an appeal is not allowed by law, it is a substitute for an appeal. *Reardon v. Guy*, 2 Hayw. 245. *Dougan v. Arnold*, 4 Dev. 99. *Swaim v. Fentress*, 4 Dev. 601. Or to remove irregular proceedings of a commissioner of insolvency. *Anon.*, 1 Wend. 90. Or the proceedings of the assistant justices of the city of New York, under the statute relating to summary proceedings to recover the possession of land. *Reach v. Cosine*, 9 Wend. 227. Or the proceedings of justices of the peace appointing a town officer, on the neglect of the town to make an appointment. *Widly v. Washburn*, 16 Johns. 49. In Maryland and New Jersey, it is the process by which the decrees of the Orphan's court are brought before the Supreme court for correction. *Bradford v. Richardson*, 3 Har. & M'Hen. 348. *State v. Mayhew*, 4 Halst. 70. *Cozens v. Dickenson*, 2 Pen. 507. *State v. Judges, &c.*, 2 South. 554. *Ludlow v. Ludlow*, 1 South. 387. *Ex parte Caig*, Charlt. 159. *McCaskill v. McCaskill*, Charlt. 151. *Burroughs v. Mickle*, 2 Pen. 913. *Fampolt v. Feght*, 2 Green, 207. *Durham v. Hall*, 3 Har. & M'Hen. 352. And in Massachusetts the proceedings of the Common Pleas, (when an appeal was not allowed,) on a complaint for flowing land by a mill-dam. *Commonwealth v. Ellis*, 11 Mass. 462. *Spring v. Lovell*, 6 Mass. 399. *Vandusen v. Comstock*, 3 Mass. 187. And where a decision was made without giving the party a fair opportunity to be heard, or to produce testimony. *Fonda v. Canal Appraisers*, 1 Wend. 288. *Brooklyn v. Patchen*, 8 Wend. 47. So, if notice is not given to parties before ad-

Bench or Common Pleas, in all cases where these courts have jurisdiction, and can administer the same justice to the parties as the court below: and

judicating upon their rights. *Commissioners v. Claw*, 15 Johns. 537. *Commonwealth v. Chase*, 2 Mass. 170. *Commonwealth v. Cambridge*, 4 Mass. 627. *Commonwealth v. Coombs*, 2 Mass. 489. *Commonwealth v. Peters*, 3 Mass. 229. *Commonwealth v. Sheldon*, 3 Mass. 188. *State v. Baring*, 8 Greenl. 135. *Ex parte Baring*, 8 Greenl. 137.

Certiorari to correct proceedings of inferior tribunals is not a writ of right, but is matter of sound discretion in the court. *Bath Bridge, &c. Company v. Magoun*, 8 Greenl. 293. *Drowne v. Stimpson*, 2 Mass. 445. *Lee v. Childs*, 17 Mass. 352. *Huse v. Grimes*, 2 N. Hamp. 210. *Munroe v. Baker*, 6 Cow. 396. *People v. Supervisors, &c.*, 15 Wend. 198. Addis. 193, note. *Freeman v. Oldham*, 4 Monr. 420. *State v. Senft*, 2 Hill, 367. *Rockingham v. Westminster*, 24 Verm. 228. *Duggen v. McGrunder*, Walker, 112. And before granting it the court will look into the record, and the circumstances attending the process; and if the error be such as does not affect the substantial justice of the case, but is in the forms of proceeding only, the writ will be refused. *Ex parte Weston*, 11 Mass. 417. *Ex parte Adams*, 4 Pick. 25. *Freetown v. Commissioners*, 9 Pick. 46. *Royalton v. Fox*, 5 Verm. 458. *Wilbraham v. Commissioners*, 11 Pick. 322. *The State v. Anderson*, Cox, 318. The uniform practice is to consider the grounds for granting a *certiorari* open for investigation during the next term after granting it, whether it be granted within or out of court. *Dwiggins v. Robertson*, 1 Overt. 81. And *certiorari* cases are said not to be triable at the first term, but stand open to exception. *Hamilton v. Archer*, 1 Overt. 368. And where the exception goes to the jurisdiction of the court, or strikes at the remedy, showing that the plaintiff is not entitled to it, or that upon some principles of law the writ ought not to have been allowed, it is never too late, while the matter is *in fieri*, for the court to interpose and quash the writ, and this may be done *ex mero motu*, whenever they discover the facts which, if known at the application of the writ, would have induced a refusal of an *allocatur*. *Haines v. Campion*, 3 Harr. 49. *The State v. Ten Eyck*, 3 Harr. 373. *The State v. Kingsland*, 3 Zab. N. J. Rep. 85.

Notice of *certiorari* must be given by the adverse party; but the necessity of process for that purpose is superseded by his coming in voluntarily. *Anon.*, 1 Hayw. 405. When notice is given to appear on the return day of the *certiorari*, and the writ is not then returned, nor any proceedings had to continue it in court, it is discontinued, and a *procedendo* should issue. *Anon.*, 1 Hayw. 420. Notice will be ordered at any time before two terms have elapsed, after the *certiorari* is filed. *Williams v. Gorman*, 2 Hayw. 155.

In the return of a writ of *certiorari*, it is proper for the court below, and indeed its duty to state enough of the proceeding to show that they have jurisdiction, not only of the subject-matter of the inquiry and of the person proceeded against, but also that some proof was made which had, at least, a tendency to establish the material allegations in issue. To this extent, it is the duty of the court above to look into the return. If it appears that the court had no jurisdiction of the subject-matter, or that there was no evidence legally tending to establish the main facts, which could alone authorize the judgment in either case, in such cases, the court does not deliberate of evidence, but determines merely whether there is any evidence whatever. *The People v. Overseers of Ontario*, 15 Barb. 286. And such testimony should be returned as applies to the question of the jurisdiction of the inferior tribunal over the subject-matter, and over the persons of the parties; and that question is properly examinable in the court issuing the *certiorari*. *The People v. Goodwin*, 1 Selden, 568.

The fact that a proceeding is void for want of authority or jurisdiction in the inferior tribunal, is not a sufficient reason for refusing to remove it by this writ. *Commonwealth v. Blue Hill Turnpike*, 5 Mass. 420. *Hawthorne v. McGuire*, 1 Harring. 530. *State v. Thompson*, 2 N. Hamp. 237. *Ex parte Hayne*, 10 Pick. 358. *Commonwealth v. West Boston Bridge*, 13 Pick. 197. *Starr v. Trustees of Rochester*, 6 Wend. 564. *Cowan's Case*, 1 Overt. 311. *Jeffers v. Brookfield*, Cox, 38. *State v. Pownall*, 1 Fairf. 24. *Williamson v. Curnan*, 1 Gill & Johns. 197. *State v. Huntingdon*, 1 Const. Rep. 325. *Davis v. Mathews*, Charl. 111. *Herrigas v. McGill*, 1 Ashm. 152. *Morrison v. Wilmington, &c. Turnpike*, 1 Harring. 366; although a *certiorari* will not issue to remove a cause for trial above, merely from a defect of jurisdiction in the court below. *Fowler v. Lindsay*, 3 Dall. 411.

By the common law, writs of *certiorari* removed only the record or proceedings in the nature of a record, or of an officer or of courts of limited jurisdiction, and the court decided only as to the jurisdiction and regularity of the proceedings; but in New York, under section 47 of 2 Revised Statutes, a writ of *certiorari* gives power to examine and correct erroneous decisions of questions of fact. *Morewood v. Hollister*, 2 Selden, 309. In order to bring the facts before the court, if no state of the case can be agreed on, the proper practice is, in the first instance, to call on the court below to certify what the facts are. Their return is conclusive. *Scott v. Beatty*, 3 Zab. N. J. 256. And if the court below fail to make a return of the facts, resort may then be had to affidavits. *Id.* And when the return does not show that the whole of the testimony has been returned, it will be presumed there was evidence in the court below to sustain the finding of the jury, or of the court, as the case may

though the cause cannot be determined in the court above, yet this writ may be granted, if the inferior court have no jurisdiction over it, or do not proceed therein according to the rules of the common law.(i) But if the inferior court have jurisdiction, and the court above have not, a *certiorari* cannot be had; as where an action is brought in *London*, for calling a woman whore,(k) or upon a custom or bye-law which is only suable in the inferior court.(l) A *certiorari* also lies, to remove a cause from the court of the isle of *Ely*;(m) or from the *Cinque ports*;(n) or other exempt jurisdiction. And even in the case of a customary proceeding by foreign attachment, if the defendant cannot find bail below, he may sue out a **certiorari*; and upon putting in bail in the court above, [*399] the cause shall go on there.(a) But a *certiorari* lies not in general, where the debt or damages appear to be under *forty shillings*;(b) though the court of King's Bench refused to quash a *certiorari* upon this ground, in an action for an assault brought against excise officers, who could not have had an impartial trial in the inferior court.(cc)

It seems to have been formerly holden, that no *certiorari* lay to *Wales*;(dd) or a *county palatine*, in civil cases;(ee) and it cannot now be had as a matter of course;(ff) nor unless a special ground be laid, as that the case strongly calls for a trial at bar.(gg) And where a *certiorari* issued, to remove a cause from the court of Great Sessions in *Wales*, without any special ground for so doing, and without any notice having been given to the opposite party, but was not delivered to the judges of that court, till the day before the trial would in course have taken place, and after great expenses had been incurred; the court of King's Bench, under these circumstances, not only quashed the *certiorari*, and directed a *procedendo* to issue, but ordered that the party who issued it, should pay to the opposite party, the costs incurred by the latter in the court below, together with the costs of the application.(h) By the statute 1 Geo. IV. c. 87, § 5, "it shall not be lawful for the defendant to remove any action of *ejectment*, commenced by a landlord under the provisions of that act, from any of the courts of Great Session in *Wales*, to be tried in an *English* county, unless such court of Great Session shall be of opinion that the same

(i) 1 Lil. P. R. 253.

(k) 2 Rol. Abr. 69. Carth. 75.

(l) 1 Salk. 352. 6 Mod. 177, S. C. Say. Rep. 156. 2 Bur. 777, 8. 2 Blac. Rep. 1060. 2 Bos. & Pul. 93; and see 5 Barn. & Ald. 821. 1 Dowl. & Ry. 537.

(m) 1 Salk. 148. 2 Ld. Raym. 836. 7 Mod. 138, S. C. *Williams v. Thomas*, E. 22 Geo. III. K. B., cited in Doug. 751, (v). But in the Common Pleas, when the writ is directed to the court of Pleas of the Bishop of *Ely*, it should be indorsed with the words *Isle of Ely*, before it is sealed. R. E. 13 W. III. C. P.; and see 3 East, 128.

(n) 1 Lil. P. R. 253, 257.

(a) 1 Salk. 148. 2 Ld. Raym. 837. 7 Mod. 138, S. C.

(b) Brownl. *Brev. Jud.* 140. 2 Brownl. 82. Moyle, 69, Clift, 374.

(cc) 4 Durnf. & East, 499.

(dd) Gilb. Exec. 202. *Williams v. Thomas*, E. 22 Geo. III. K. B., cited in Doug. 751, (v); and see 2 Ken. 370, 440.

(ee) Gilb. Exec. 201.

(ff) Doug. 749. *Williams v. Thomas*, E. 22 Geo. III. K. B., cited in Doug. 751, (v).(gg) *Id. ibid.* Append. Chap. XVI. § 6.

(h) 1 Barn. & Cres. 143; and see 13 Price, 449.

be. *Snow v. Perkins*, 2 Mich. (Gibbs,) 238. The granting of a *certiorari*, operates as a *superseas* to further proceedings on the record, which it brings up for review; but it does not revoke a judgment executed or in process of execution. The power of this writ cannot be extended by a special order of the judge of the superior court. *Mayor, &c., of Macon v. Shaw*, 14 Geo. 162.

ought to be so removed, upon special application to the court for that purpose." And, by the statute 5 Geo. IV. c. 106, § 23, "no writ of *certiorari* shall be granted, issued forth, or allowed, to remove any action, bill, plaint, cause, suit, or other proceeding at law whatsoever, originated in or commenced, carried on, or had, in any of his majesty's courts of Great Sessions in *Wales*, unless it be duly proved upon oath, that the party or parties, suing forth the same, hath or have given *seven days'* notice thereof in writing, to the other party or parties concerned in the action, &c., sought to be so removed; and unless the party or parties so applying, or suing forth such writ, shall, upon oath, show to the court, in which application shall be made, sufficient cause for issuing such writ; and so that the party or parties therein concerned, may have an opportunity to show cause, if he or they shall so think fit, against the issuing or granting such *certiorari*; and that the costs of such application be in the discretion of the court, wherein such application shall be made for such *certiorari*." The court of King's Bench would not grant a *certiorari*, to remove proceedings in *quare impedit*, from the court of Great Session at [*400] *Chester*, into the King's Bench, where a special verdict was *expected to be found; the proper course being, to remove the special verdict, when found, into the latter court, by writ of error.(a) And a plaint in *replevin* cannot be removed from a county court in *Wales*, into the King's Bench, by *certiorari*.(b)

In *criminal* cases, a *certiorari* always lies, unless it be expressly taken away;(c) but an *appeal* never lies, unless it be expressly given by the statute.(c) A *certiorari* is granted of course, on the application of the crown: but when a defendant applies for it, he must lay some ground before the court, supported by affidavit.(d) And the court of King's Bench may grant a *certiorari*, to remove an indictment for a misdemeanor, from the Great Sessions in *Wales*, into this court.(e) But the court refused a *certiorari*, to remove an indictment for a misdemeanor, and proceedings thereon at the assizes, after conviction and before judgment; which was prayed for the purpose of applying for a new trial, on the judge's refusal of the evidence, on the ground of the verdict being against evidence, and the judge's direction.(f) On moving for a rule *nisi* for a *certiorari*, to remove an order of sessions, it is irregular to entitle the affidavits in any cause; and if they are entitled, they cannot be read.(g)

After judgment, a *certiorari* does not in general lie, to remove a cause from an inferior court;(h) and therefore if it be returned thereon, that the defendant is condemned by judgment, he shall be remanded, and continue in prison, without being let to bail against the will of the plaintiff, until agreement be made with him of the sum adjudged.(i) So, where, in an action for *sixteen* pounds, brought in the forest court of *Knaresborough*, the defendant suffered judgment by default, and afterwards sued out a *certiorari*, to remove the cause into the King's Bench; the latter court held, that the *certiorari* was too late, and made a rule for a *procedendo*

(a) 6 Dowl. & Ryl. 489.

(b) 5 Barn. & Cres. 206. 7 Dowl. & Ryl. 709, S. C.

(c) 3 Dowl. & Ryl. 35; and see *id.* 275, 301. 2 Barn. & Cres. 228. 3 Dowl. & Ryl. 306, S. C. 8 Dowl. & Ryl. 117.

(d) 2 Durnf. & East, 89.

(e) 3 Durnf. & East, 638.

(f) 13 East, 411; and see 2 Ken. 370, 440.

(g) 1 Barn. & Cres. 267.

(h) 7 Dowl. & Ryl. 769.

(i) Stat. 2 Hen. V. st. 1, c. 2. Year Book, 9 Hen. VI. 8.

absolute, although the defendant, in opposition to that rule, swore that the jurisdiction of the inferior court was limited to *five pounds*.^(h) But if a defendant in execution have an action depending against him in the court below, this, being returned, will be a cause of detainer in the court above: And in cases of absolute necessity, as where the inferior court refuses to award execution,^(k) the court above will grant a *certiorari* after judgment, for the sake of doing justice between the parties. So, where the inferior court acts in a summary method, or in a new course different from the common law, a *certiorari* lies after judgment; though a writ of error does not.^(l)

If the judgment of an *inferior* court be removed into the King's Bench be *certiorari*, and the party sue a *seire facias* to have execution upon such *judgment, he ought to show in his *seire facias*, that [*401] it is the judgment of an inferior court, removed hither by *certiorari*, and to point out the particular limits of the inferior jurisdiction, and pray execution within those limits: But if the judgment be removed into the King's Bench by writ of *error*, and affirmed, the party may have execution in any part of *England*; for by the affirmance it is become the judgment of the King's Bench.^(a) And now by the statute 19 Geo. III. c. 70, § 4, reciting that persons served with process issuing out of inferior courts, where the debt is under *ten pounds*, (since extended to *twenty pounds*, by the statute 7 & 8 Geo. IV. c. 71, § 6,) may, in order to avoid execution, remove their persons and effects beyond the limits of the jurisdiction of such courts; it is enacted, that "in all cases where final judgment shall be obtained in any action or suit, in any inferior court of record, it shall and may be lawful to and for any of his majesty's courts of record at *Westminster*, upon affidavit made and filed of such judgment being obtained, and of diligent search and inquiry having been made after the person of the defendant or his effects, and of execution having issued against such person or effects, and that they are not to be found within the jurisdiction of the inferior court, to cause the record of the said judgment to be removed into such superior court, and to issue writs of execution thereupon, to the sheriff of any county or place, against the defendant's person or effects, in the same manner as upon judgments obtained in the said courts at *Westminster*:" Which provision is extended, by a subsequent statute,^(b) to the courts in *Wales*, and the *counties palatine*: but from these courts, a transcript of the record is to be removed, and not the record itself; and the latter act extends to *all* judgments, for the *defendant* as well as the *plaintiff*. In a case arising upon the former of these statutes, where a judgment was signed against a defendant in an inferior court of record, and he surrendered in discharge of his bail, but, before he was charged in execution, he was removed to the Fleet by *habeas corpus*; the court of Common Pleas determined, that a *certiorari* might be granted to remove the record, in order to charge him in execu-

(h) 1 Dowl. & Ry1. 769.

(k) 1 Lil. P. R. 252, 3.

(l) 1 Salk. 263; and see 9 Moore, 649. 2 Bing. 344, S. C. 10 Moore, 32. *Id.* 171. 2 Bing. 463, S. C.

(a) 1 Ld. Raym. 216. 3 Salk. 320. Carth. 391, S. C.; and see 3 Durnf. & East, 657; but see F. N. B. 242, C. Gilb. Repl. 117.

(b) 33 Geo. III. c. 63, § 1. And for the forms of writs of *certiorari* and proceedings on this statute, see Append. Chap. XVI. § 10, &c. See also stat. 5 Geo. IV. c. 106, § 15, for enforcing obedience to rules, orders, and decrees of the courts of Great Sessions in *Wales*, against persons residing out of the jurisdiction, by process from the courts at *Westminster*.

tion in the Fleet, on the ground that although the case of a prisoner in actual custody be not within the express terms, yet it is within the equity of the statute.(c) But the statute 19 Geo. III. c. 70, § 4, is confined to suits in inferior courts, where the proceedings are similar to those in the superior courts; and therefore does not extend to the case of a foreign attachment.(d) And a *certiorari*, we have seen,(e) will not lie, to remove the record of a judgment obtained against a defendant in the [*402] county palatine of *Durham*, for the *purpose of enabling his bail to render him in the court of King's Bench, though he be a prisoner for debt in the custody of the marshal.(a)

As persons served with process issuing out of courts of *requests* may, in order to avoid execution, remove their persons and effects beyond the limits of the jurisdiction of the said courts, there is a clause in the court of requests act for the city of *Bath*,(b) &c. that "in all cases where a final decree of judgment for any sum or sums exceeding *ten* shillings, shall have been obtained in the said court, it shall and may be lawful to and for any of his majesty's courts of record at *Westminster*, upon *affidavit* made and filed of such decree or judgment being obtained, and of diligent search and inquiry having been made after the person or persons of the defendant or defendants, or his her or their goods and chattels; and of the precept of execution having issued against the person or persons, or effects, as the case may be, of the defendant or defendants; and that the person or persons, goods and chattels, of such defendant or defendants is or are not to be found within the jurisdiction of the said court, (which affidavit may be made before a judge or commissioner authorized to take affidavits,) it shall and may be lawful to and for such superior court, to cause the record of the said decree or judgment to be removed into such superior court, and to issue writs of execution thereupon, to the sheriff of any county, city, liberty or place, against the person or persons, or effects, of the defendant or defendants, in the same manner as upon judgments obtained in the said courts at *Westminster*; and the sheriff, upon every such execution, shall, and he is thereby authorized to detain the defendant or defendants, until the sum of *ten* shillings be paid to him, or to levy the same out of the effects, according to the nature of the execution, for the extraordinary costs of the plaintiff or plaintiffs in the said court, subsequent to the said decree or judgment, and of the execution in the superior court, over and above the money for which such execution shall be issued." And there are similar clauses, in the court of requests acts for other populous districts; as for the town and borough of *Grimsby*, and the liberties thereof, and the several parishes and places in the hundred or wapentake of *Bradley*, *Haverstoe*, and the east division of the hundred or wapentake of *Yarborough*, in the county of LINCOLN;(cc) the hundred of *Elloe*, and parishes of *Surfleet* and *Gosberton*, in the hundred of *Kirton*;(dd) the borough and parish of *Boston*, and hundreds of *Skirbeck* and *Kirton*, (except the parishes of *Gosberton* and *Surfleet*);(ee) and the sokes of *Bolingbrooke* and *Horncastle*, and other places in the same county;(f) the Isle of *Wight*, in the county

(c) 1 H. Blac. 532, 3.

(d) 5 Barn. & Ald. 821. 1 Dowl. & Ryl. 537, S. C.

(e) *Ante*, 286.

(a) 2 Dowl. & Ryl. 177.

(b) Stat. 45 Geo. III. c. lxxvii. § 27.

(cc) Stat. 46 Geo. III. c. xxxvii. § 22.

(dd) Stat. 47 Geo. III. sess. 1, c. xxxvii. § 23.

(ee) *Id.* sess. 2, c. i. § 24.

(f) *Id.* c. lxxviii. § 31.

of SOUTHAMPTON; (g) the townships of *Stockport* and *Brinnington*, and hamlets of *Edgely* and *Brinksway*, in the county palatine of CHESTER; (h) the town and liberties of *Beverley*, in the county of YORK; (i) the town and *port of *Sandwich*, and vills of *Ramsgate* and [*403] *Sarr*, and several parishes, in the county of KENT; (a) the parishes of *Saint John the Baptist*, *Saint Peter the Apostle*, and *Birchington*, and the vill of *Wood*, in the Isle of *Thanet*; (b) the town of *Gravesend*, and hundreds of *Toltingtrough*, *Dartford*, *Wilmington*, and *Axtane*; (c) and the hundred of *Codsheath*, and other places, in the same county; (d) the parishes of *Hales Owen*, *Rowley Regis*, *West Bromwich*, *Tipton*, and manor of *Bradley*, in the counties of WORCESTER, SALOP, and STAFFORD; (ee) the township of *Wolverhampton*, and other places, in the latter county; (ff) the town and borough of *Ipswich*, in the county of SUFFOLK; (gg) and the parish of *Manchester*, in the county palatine of LANCASTER. (hh)

The writ of *certiorari* should be directed to the judge or judges of the inferior court, from which the cause is intended to be removed; and when it is for the removal of a cause, should command them to certify the *record*, with all things touching the same: (ii) therefore, where a *certiorari* in such case was to certify the *tenor* of a record, it was superseded as erroneous; for being to remove a record out of an inferior court, in order to be proceeded on in a superior one, it ought to have been to certify the very record; for otherwise no proceeding could be had upon it. (k) When the *certiorari* issues out of Chancery, it is an *original* writ, and may be tested at any time in term or vacation; (l) and should be made returnable on a general return-day: But when it issues out of the King's Bench or Common Pleas, it is a *judicial* writ, and should be tested in term-time; and, in the King's Bench, it is usually made returnable on a day certain in court. (m) If the writ be mis-directed, (n) or otherwise bad in point of law, the court will order it to be *quashed*, if before them; or if not returned, will grant a *supersedeas*. (o) But the court cannot quash a writ that is not before them: (o) And though the parties to whom the *certiorari* is directed, and in whose keeping the record is, may object to make a return of it on account of an informality in the direction, yet they having in fact returned it into the court above, no such objection can be taken by third persons. (p)

The writ of *certiorari*, we have seen, (q) lies for the removal of all causes from inferior courts, whether the defendant has been proceeded against therein by *capias*, or other process: But the writ of *habeas corpus*, which will next be considered, only lies where the defendant has been arrested upon, or served with a copy of a *capias*, and either remains in custody, or *has given bail. (aa) This latter writ, [*404] though its direct object be to bring up the *body* of the defendant,

(g) Stat. 46 Geo. III. c. lxxvi. § 22. (h) *Id.* c. cxiv. § 26. (i) *Id.* c. cxxxv. § 24.

(a) Stat. 47 Geo. III. sess. 1, c. xxxv. § 29. (b) *Id.* sess. 2, c. vii. § 24.

(c) *Id.* c. xl. § 27. (d) Stat. 48 Geo. III. c. i. § 30.

(ee) Stat. 47 Geo. III. sess. 1, c. xxxvi. § 26. (ff) Stat. 48 Geo. III. c. cx. § 34.

(gg) Stat. 47 Geo. III. sess. 2, c. lxxix. § 26. (hh) Stat. 48 Geo. III. c. xliii. § 33.

(ii) Append. Chap. XVI. § 1, &c. (k) 2 Atk. 317; and see 1 Madd. Chan. 12.

(l) Trye, 10. (m) *Thes. Brev.* 67, 8. Append. Chap. XVI. § 1, &c.

(n) 2 Atk. 318, 19. (o) *Id.* 318; and see Say. Rep. 156.

(p) 4 Durnf. & East, 499. (q) *Ante*, 398.

(aa) 1 Barn. & Cres. 513. 2 Dowl. & Ryl. 722, S. C. 4 Barn. & Cres. 401. 6 Dowl. Ryl. 497, S. C.

serves consequentially to remove *causes* against him from inferior courts: And the ground of removal upon this writ is, that when a defendant, against whom there is a cause depending in an inferior court, is removed by *habeas corpus* into the court above, the inferior court have lost their jurisdiction over him; and not having jurisdiction over his person, they cannot proceed in the cause, and the bail, if any, in the inferior court are discharged. *(b)* But this writ only lies for the *defendant*, and cannot be had by the *plaintiff*, to remove his own cause from an inferior court. *(c)*

The writ of *habeas corpus*, of which something has been already said, *(d)* as it is used to remove prisoners into the custody of the marshal of the King's Bench or warden of the Fleet prison, is a judicial writ issuing out of the court of King's Bench or Common Pleas: and, like the *certiorari*, should be directed to the judge or judges of the inferior court, in which the record is; *(e)* commanding them to have the body of the defendant, together with the day and cause of his being taken and detained, to do and receive, *(f)* &c. There is an old rule of court, *(g)* by which the *habeas corpus*, when directed to the inferior courts of *London, Westminster, Southwark*, and other courts within *five miles of London*, might have been returnable *immediatè*; but otherwise it must have been returnable on a day certain in court. *(g)* The rule however having fallen into disuse, the writ we have seen, *(h)* is now always made returnable *immediatè*.

The writ of *certiorari* or *habeas corpus*, when delivered to the judge or judges of the court below, instantly suspends their power; so that if they afterwards proceed, it is a contempt, for which they are liable to an attachment; and the subsequent proceedings are void, and *coram non judice*. *(i)* [A] On receipt of the writ therefore, it should be forthwith allowed and returned; and the officer cannot refuse to obey it, under pretence of not being paid his fees in the court below, or the charges of bringing up the **defendant*: *(a)* for the former, he has a proper [*405] remedy by action; and for the latter, if not paid, the defendant may be remanded. *(bb)*

It was formerly usual for the defendant in an inferior court to sue out a writ of *certiorari* or *habeas corpus*, and keep it in his pocket, without producing it, till issue was joined, the jury sworn, and the plaintiff had given his evidence; by which means the plaintiff was not only put to considerable expense, but the defendant; knowing before-hand what proofs he could pro-

(b) Skin. 244, 5. And see 3 Bac. Abr. 15. 3 Maule & Sel. 328, in which latter case it was holden, that upon the removal of a cause by *certiorari*, out of an inferior court, the pledges below are discharged, by putting in and perfecting bail above: and the distinction seems to be, that when the *plaintiff* removes the cause, the bail are immediately discharged; but when the *defendant* removes it, they are not discharged, until bail above be put in and perfected. *Id.* 330, *per Bayley, J.*

(c) Cas. Pr. C. P. 5. Pr. Reg. 216. *Ante*, 350.

(d) *Ante*, 347, &c.

(e) For the direction of the writ of *habeas corpus* in particular cases, see Append. Chap. XVI. § 18.

(f) Append. Chap. XVI. § 16.

(g) R. M. 1654, § 8, K. B.; and see R. M. 1654, § 11. R. H. 13 & 14 Car. II. C. P.

(h) *Ante*, 349.

(i) Bro. Abr. tit. *Cause de remover plea*, pl. 48. 1 Salk. 148, 9. 2 Ld. Raym. 837, 8, S. C. Gilb. Exec. 144, 200, 202. Gilb. Repl. 117. Doug. 749, as to the writ of *certiorari*; and Cro. Car. 261. 1 Mod. 195. T. Jon. 209. 3 Mod. 85. Skin. 244. 1 Salk. 143, 352. 6 Mod. 177, S. C., as to the writ of *habeas corpus*.

(a) 2 Str. 814. 2 Bur. 1152; and see Pr. Reg. 219. 1 H. Blac. 105.

(bb) 1 Str. 308. 2 Str. 1262.

duce, had an opportunity of opposing them by false witnesses.^(cc) To remedy this mischief, it was enacted by the statute 43 Eliz. c. 5, that "no writ of *habeas corpus*, or other writ, to remove any cause depending in an inferior court having jurisdiction thereof, shall be received or allowed by the judges or officers of such court, but they may proceed therein as if no such writ were sued forth or delivered, except the said writ be delivered to such judges or officers, before the jury have appeared, and one of them is sworn." And still further to avoid vexatious delays, by the removal of causes out of inferior courts, it was enacted by the statute 21 Jac. I. c. 23, § 2, that "no writ of *habeas corpus*, *certiorari*, or other writ, except writs of error or attain, to stay or remove any cause depending in an inferior court of record, having jurisdiction thereof, where the same arises within its jurisdiction, shall be received or allowed by the judges or officers of such court, but they may proceed therein, &c. except the said writ be delivered to such judges or officers, before *issue* or *demurrer* joined in the said cause; so as the same be not joined within *six* weeks next after the arrest, or appearance of the defendant." This statute is confined to inferior courts of record; and does not extend the case of an interlocutory judgment: therefore, the practice in that case is to allow the *habeas corpus* or *certiorari*, in like manner as upon the 43 Eliz., provided it be delivered at any time before the jury are sworn; ^(d) which is also the practice, where *issue* is joined within *six* weeks next after the defendant's arrest or appearance.

By the statute 21 Jac. I. c. 23, ^(e) it is further provided, that "if in any cause, not concerning freehold or inheritance, or title of land lease or rent, commenced or depending in any such inferior court of record, it shall appear or be laid in the declaration, that the debt damages or things demanded do not amount to or exceed the sum of *five* pounds, then such cause shall not be stayed or removed by any writ or writs whatsoever, other than writs of error or attain: And if any writ or writs shall be granted or sued forth contrary to the intent and meaning of this act, the judges of the inferior court may disallow and refuse the same, and proceed as if no such writ had been granted or sued forth: provided *there be an utter barrister of *three* years standing at the [*406] bar of one of the four inns of court, steward or under-steward, town-clerk, judge or recorder of such inferior court, or assistant to the judge or judges of the same, who is not an utter barrister of that standing, there present, and not of counsel in any action or suit there depending."^(a) If this proviso be not complied with, the cause may be removed at any time:^(b) and the court will not grant a *procedendo*, where the judge is a barrister, if he be not present at the trial.^(c)

Soon after the making of this statute, a method was contrived of removing causes for sums not exceeding *five* pounds, by setting up an action for a fictitious demand to a larger amount; and then upon suing out a *habeas corpus*, all the causes were removed together.^(dd) To defeat this contri-

^(cc) See the preamble to the statute 43 Eliz. c. 5. But if the *certiorari* had been delivered after the jury were charged with the evidence, the inferior court might have proceeded to take the verdict, and then certified; because the jury were sworn to speak the truth, and the intent of the *certiorari* in such case was not to stop the trial. Gilb. Exec. 144.

^(d) 2 Bur. 759; but see Pr. Reg. 217. Barnes, 221, S. C. *contra*.

^(e) § 4.

^(a) § 6.

^(b) Cro. Car. 79. 3 Mod. 85.

^(c) 1 Bur. 514.

^(dd) Palm. 403.

vance, it was enacted by a subsequent statute, *(ee)* that “the judges of such inferior courts as are decreed in the statute of *James*, may proceed in such cases as are therein specified, which appear or are laid not to exceed the sum of five pounds, although there may be other actions against the defendant, wherein the plaintiff’s demands may exceed the sum of five pounds.” And lastly, by the statute 19 Geo. III. c. 70, § 6, which takes away the arrest under *ten* pounds in inferior courts, it is provided, that “no cause, where the cause of action shall not amount to the sum of *ten* pounds or upwards,” (since extended to *twenty* pounds, by the statute 7 & 8 Geo. IV. c. 71, § 6,) “shall be removed or removable into any superior court, by writ of *habeas corpus* or otherwise, unless the defendant shall enter into a recognizance to the plaintiff, in the inferior court, with two sufficient sureties, in double the sum due, for the payment of the debt and costs, in case judgment shall pass against him.” *(f)* This statute is not confined to actions of *debt*, or for the recovery of liquidated damages; but extends to all actions brought for the recovery of debts and damages, under an arrestable sum: and therefore, where an action was brought in an inferior court for *defamation*, and the defendant after entering a common appearance, and suffering judgment by default, removed the proceedings by *certiorari* into the King’s Bench, without entering into any recognizance; the court held, that the case was within the statute, and awarded a *procedendo*, for the defendant’s default in not entering into the recognizance thereby required, the damages being laid under an arrestable sum. *(g)* But where an action was brought in an inferior court for 8*l.* 17*s.* 3*d.* and the damages were laid in the declaration at 20*l.* and the defendant after interlocutory judgment signed against him, removed the cause into the King’s Bench by *habeas corpus cum causa*, without entering into the recognizance required by the statute 19 Geo. III. c. 70, § 6, the court refused to award a *procedendo*. *(h)* A similar recognizance [*407] is required, on the removal of causes from any court of inferior jurisdiction into the court of Common Pleas at *Lancaster*, where the cause of action does not amount to the sum of 10*l.* or upwards, by the statute 34 Geo. III. c. 58 § 2. And *two* days’ notice exclusive must be given of the bail, in the court below, in order that the plaintiff may have an opportunity of inquiring into their sufficiency. *(a)*

On a *certiorari*, the record itself is returned, in the condition in which it was when the writ came to the court below: *(b)* And this writ removes all things done in that court, between the *teste* and return of it. *(c)* But upon a *habeas corpus*, the record itself is never removed, as it is upon a *certiorari*, but remains below; and the return is only an account or history of the proceedings, stated and sent up to the superior court, to enable them to judge and determine the matter there. *(d)* It is not deemed a sufficient

(ee) 12 Geo. I. c. 29, § 3.

(f) For the form of a *scire facias*, on a recognizance of bail on this statute, see Append. Chap. XLIII. § 16.

(g) 4 Dowl. & Ry1. 350.

(h) *Id.* 362. 2 Barn. & Cres. 802, S. C.

(a) Imp. K. B. 10 Ed. 650. Imp. C. P. 7 Ed. 699.

(b) Gilb. Exec. 144, 200. Gilb. Repl. 117, S. P. 1 Salk. 352. 6 Mod. 177, S. C. 2 Ld. Raym. 1102. 2 Atk. 317. 4 Barn. & Cres. 401. 6 Dowl. & Ry1. 497, S. C. For the forms of returns of proceedings in a borough court, see Append. Chap. XVI. § 2; in the Mayor’s court of *London*, by foreign attachment, *id.* § 4; and in the Great Sessions, *id.* § 15.

(c) 1 Salk. 149. 2 Ld. Raym. 838, S. C.

(d) 1 Salk. 352. 6 Mod. 177, S. C. Skin. 244. And for the form of a return that the de-

return to a *habeas corpus*, that before the coming of the writ, the party was bailed; for he is still in custody in contemplation of law: (e) And when the writ is disallowed by the inferior court, for any of the causes before mentioned, (f) it must still be returned to the superior court, with the special matter. (g)

On the return of the *certiorari* or *habeas corpus*, if the defendant be in actual custody on mesne process, the court will not discharge him, until bail be put in and perfected above; (h) and therefore, in such case, the usual way of gaining the defendant his liberty, is to put in and perfect bail below, before the writ is brought. (i) When the defendant is not in actual custody, at the return of the *certiorari* or *habeas corpus*, he must put in bail, if called upon, in the court above; which bail is either *common* or *special*, as in the court below.

Before the statute 12 Geo. I. c. 29, every defendant, not being an executor or administrator, must have put in *special* bail upon a *certiorari* or *habeas corpus*, in all actions whatsoever, except actions for words, and trilling assaults, unless a judge had otherwise ordered. (k) By that statute, "no person shall be holden to *special* bail, upon process issuing out of an inferior court, where the cause of action shall not amount to the sum of *forty shillings* or upwards." And, by a subsequent statute, (l) "no person shall be arrested, or holden to *special* bail, upon such process, *where the cause of action shall not amount to the sum of *ten* [*408] pounds or upwards." This provision has been since extended, by the statute 7 & 8 Geo. IV. c. 71, § 6, to "all actions in inferior courts, where the cause of action shall not amount to *twenty* pounds, exclusive of any costs, charges and expenses, that may have been incurred, recovered, or become chargeable, in or about the suing for or recovering the same, or any part thereof:" Therefore, at this day, unless there be a cause of action to that amount, the defendant need not put in *special* bail, upon a *certiorari* or *habeas corpus*, in the court above: though, if it be under that amount, he must enter into a recognizance with two sureties to the plaintiff in the court below, pursuant to the statute 19 Geo. III. c. 70, § 6, (a). On a recognizance to render in an inferior court, if the proceedings are removed into the King's Bench by writ of error, a render in that court has been deemed a good performance of the condition. (b)

At the return of the writ of *certiorari*, (c) or *habeas corpus*, the plaintiff should obtain a rule or order from a judge, for a *procedendo*, unless the defendant put in bail within *four* days after notice of the rule, if in *term*; or, in *vacation*, within *six* days after notice thereof. (d) But it is a rule in the King's Bench, that "no bail shall be put in upon any writ of *habeas corpus*, before the writ is returned; and that such bail shall not be taken

defendant was taken, &c., on a plaint levied in the sheriff's court of *London*, see Append. Chap. XVI. § 17.

(c) *Salmon & Slade*, II. 25 & 26 Car. II. cited in 2 Crompt. 3 Ed. 402.

(f) *Ante*, 405, 6.

(g) 1 Mod. 195. 3 Mod. 85. Carth. 59. 2 Crompt. 3 Ed. 402.

(h) R. M. 1654, § 7. R. II. 2 Jac. II. (a), K. B. R. M. 1654, § 10, C. P.

(i) New Guide, K. B. 244.

(k) R. M. 1654, § 9. R. II. 2 & 3 Jac. II. K. B. R. M. 1649, reg. 2. R. M. 1654, § 12, C. P.

1 Salk. 98, 102.

(l) 19 Geo. III. c. 70, § 1.

(a) *Ante*, 406.

(b) 1 Str. 49.

(c) 1 Lil. P. R. 252.

(d) R. II. 10 W. III. (a), K. B.; and see R. M. 1654, § 8, K. B. R. M. 1649, reg. 2. R. M. 1654, § 11, 12. R. II. 13 & 14 Car. II. C. P. Append. Chap. XVI. § 19.

by any justice of this court, unless that writ, with the return thereof, shall be offered before the said justice to be filed, at the time of putting it in.”(e) If a defendant be arrested by process of the King’s Bench, and removed by *habeas corpus* to the Common Pleas, he may put in and justify bail in either court.(ff)

The bail upon a *habeas corpus* are taken on a *bail-piece*, which is annexed to the writ and return, setting forth, in the King’s Bench, that the defendant is delivered to bail upon a *habeas corpus*, at the suit of the plaintiff or plaintiffs in the *plaint* ;(g) in which respect it differs from the bail-piece upon a *cepi corpus* : In the Common Pleas, the bail-piece contains a short statement or abstract of the *habeas corpus*, with the names and additions of the bail, and the sum sworn to; and in that court, it is filled up by the clerk of the dockets, who attends one of the judges to put in the bail, and to render the principal, if necessary.(h) When *common* bail are sufficient, the bail-piece(i) should be filled up, annexed to the *habeas corpus* and return, and filed by the defendant’s attorney at a judge’s chambers, within the time allowed by the rule ;(k) and notice(l) thereof given to the plaintiff’s attorney. When *special* bail are required,

[*409] they may be put in at any time pending the rule, before a judge in town, commissioner in the country, or judge of assize in his circuit : (a) and they are either *absolute*, or *de bene esse*, as upon a *cepi corpus*.(b) The recognizance of bail, in the King’s Bench, is general, that if the defendant be condemned at the suit of the plaintiff, (or plaintiffs) in the *plaint*, he shall satisfy the costs and condemnation, or render himself to the custody of the marshal : (c) but, in the Common Pleas, it is taken in a *penalty* or sum certain, being double the amount of the sum sworn to, upon condition that the defendant do appear to a new original, to be filed within two terms ; and that if he be condemned in the action, he shall pay the condemnation money, or render himself a prisoner to the Fleet ;(d) and in that court, on a removal by *habeas corpus*, the *original* should it seems be shown, upon tendering the declaration if insisted on ; and agree in the nature of the action, the sum in demand, and the county, otherwise the bail are not liable.(ee)

When special bail are put in upon a *habeas corpus*, notice thereof should be given in writing, before the expiration of the rule, to the plaintiff’s attorney ;(f) who is allowed *twenty eight* days in the King’s Bench, or in the Common Pleas *twenty* days,(gg) after they are put in, to except to them : and if he do not except to them for insufficiency within that time, the bail-piece should be filed by the defendant’s attorney, within *four* days after.(hh) If the bail in an inferior court offer to become bail in the action in the King’s Bench, the plaintiff is in general compellable to take them ; because he might, but did not except to them below : But it is

(e) R. H. 10 W. III. ; and see R. M. 1651. R. E. 29 Car. II. K. B.

(ff) 1 Bos. & Pul. 311. *Ante*, 246, 356.

(g) R. T. 8 W. III. *reg.* 3, § 1, K. B. ; and see *Append. Chap. XVI. § 23, &c.*

(h) *Imp. C. P.* 7 Ed. 700, 706.

(i) *Append. Chap. XVI. § 20, 21.*

(k) *New Guide*, K. B. 250, 51.

(l) *Append. Chap. XVI. § 22.*

(a) R. T. 8 W. III. *reg.* 3, § 1, K. B.

(b) R. M. 1654, § 7, 8, K. B. K. M. 1654, § 11. R. H. 13 & 14 Car. II. C. P. *Ante*, 253.

(c) *Append. Chap. XVI. § 25.*

(d) *Id.* § 26.

(e) R. M. 1654, § 12, C. P.

(f) *Append. Chap. XVI. § 27.*

(gg) R. M. 1654, § 11. R. H. 13 & 14 Car. II. C. P.

(hh) R. M. 1654, § 8. R. M. 16 Car. II. and note, (b). 1 Salk. 93, K. B. R. M. 1654, § 11. R. H. 13 & 14 Car. II. C. P.

otherwise, when a cause comes hither out of *London*; for the sufficiency of the bail there is at the peril of the clerk, and he is responsible to the plaintiff; so that the plaintiff had not the liberty of excepting to them; and the clerk is not responsible, if they be deficient in this court, though he was in *London*.(ii)

If the plaintiff be dissatisfied with the bail put in by the defendant, he should obtain a rule or order from a judge, for better bail, which will entitle him to a *procedendo*, unless they are perfected in *four* days after service of the rule:(k) and thereupon the *same* or *different* bail must justify, (as in other cases,) within the *four* days, if the rule be served in *term*; but if served in *vacation*, it is sufficient for the defendant to give notice, within the time allowed by the rule, of an intended justification on the first day of the ensuing term.(l) The court of King's Bench, we have seen,(m) will not give time to correct a *misnomer* in the notice of justification of bail; and it is a rule in that court, not to allow time for justifying [*410] *bail on a *habeas corpus*, on account of the delay,(a) except in case of unavoidable accident, such as the unexpected illness of the bail.(b) Where the rule for better bail was served on the 14th of *January*, and the bail did not justify until the 19th, the court held, that the plaintiff's *procedendo* was regular:(c) But where the rule expired in *vacation*, a render on the first day of the ensuing term, *sedente curiâ*, was deemed good: though notice was not given till afterwards on the same day, and after a writ of *procedendo* had issued to an inferior court, where the cause originated.(d)

The bail upon a *habeas corpus* are liable to all the actions mentioned in the return of it, wherein the plaintiff or plaintiffs shall declare within *two* terms.(e) But this must be understood of the bail upon a *habeas corpus* before declaration; for it is said, that if the plaintiff had declared before the *habeas corpus* delivered, in one action which requires *special* bail, and in another wherein *common* bail is sufficient, the bail shall be *special* only as to that action which requires special bail, and *common* to the other.(f) On a removal after declaration, special bail are liable, though the plaintiff declare in a *different* kind of action in the court above, so as it be for the same cause.(g) And where one of the Yeomen of the King's guard had been arrested, without leave from the Lord Chamberlain, by process issuing out of the Palace court; and that court had refused to discharge him out of custody, on filing common bail; and, bail above having been put in and perfected in that court, the defendant, after interlocutory judgment signed, removed the cause into the King's Bench by *habeas corpus*, and put in and perfected bail; the court, under these circumstances, refused to order an *exoneretur* to be entered on the bail-piece.(h)

If bail be not put in and perfected in due time, a *procedendo* may be

(ii) 1 Salk. 97.

(k) R. M. 16 Car. II. (c), K. B. Append. Chap. XVI. § 28.

(l) New Guide, K. B. 249; and see Append. Chap. XVI. § 29.

(m) *Ante*, 266.

(a) 1 Chit. Rep. 76, (a). *Ante*, 273.

(b) 2 Chit. Rep. 107. 9 Dowl. & Ry. 6. *Ante*, 273.

(c) 1 Chit. Rep. 130.

(d) 5 East, 533; and see 16 East, 387.

(e) R. H. 2 Jac. II. (a), K. B.

(f) *Serle v. Newton*, II. 25 & 26 Car. II. 2 Cromp. 3 Ed. 409.

(g) 1 Wils. 277.

(h) 1 Barn. & Cres. 139. 2 Dowl. & Ry. 250, S. C. And see further, as to bail on the removal of causes from inferior courts, Petersd. Part I. Chap. XVII.

awarded :(*i*) which is a judicial writ, directed to the judges of the inferior court, commanding them to proceed in the cause, (*kk*) notwithstanding the writ before delivered to them. The *procedendo* removes the suspension created by the *certiorari*, or *habeas corpus* :(*ll*) and this writ may also be awarded where it appears upon the return of the *habeas corpus*, that the court *above* cannot administer the same justice to the parties as the court *below* : as in the cases before mentioned, (*mm*) where an action is brought in *London*, for calling a woman *whore* ; or upon a custom or bye-law, which is only suable in the inferior court. So, where a *habeas corpus* was brought after interlocutory and before final judgment in an inferior court, and the defendant died before the return of it, a *procedendo* was awarded : because,

by the 8 & 9 W. III. c. 11, § 6, the plaintiff may have a *seire* [*411] *facias* *against the executors, and proceed to judgment, which he cannot have in another court ; and by this means he would be deprived of the effect of his judgment, which would be unreasonable. (*a*) So, where an action was brought in the sheriff's court of *London*, against two partners, and one of them brought a *habeas corpus*, and put in bail for himself only, a *procedendo* was granted : for otherwise the plaintiff would have been disabled from going on in either court. (*b*) And a *procedendo* was awarded in an action brought in the Palace court, on a bail bond given to the officer, on process issuing out of that court : for, by the statute 4 Anne, c. 16, § 20, the action on the bail bond ought to be brought in the same court where the original action was commenced, in order that the court may give such relief, in a summary way, to the plaintiff and defendant in the original action, and to the bail upon the bond, as is agreeable to justice. (*c*) But the plaintiff in an inferior court, from which a cause is removed by *habeas corpus*, is not entitled to a *procedendo*, after render of the defendant, and notice of such render ; although the render be made after the day on which the rule for better bail expires. (*d*) And a *procedendo* cannot issue after service of the rule for the allowance of bail, on the ground that the plaintiff was called by a wrong name in the notice of bail ; but the rule for the allowance should be first set aside. (*e*)

In causes removed from the Mayor's court of *London*, the court above will allow the validity of the custom or bye-law, upon which the action is founded, to be discussed in a summary way, upon the return of the *certiorari* or *habeas corpus*, and before it is filed : (*f*) but where an action was brought in that court, and the defendant, who was an attorney of the King's Bench, sued out a writ of privilege, a *procedendo* was awarded, without prejudice to the defendant's pleading his privilege in the court below. (*g*) So, where a cause was removed from the Mayor's court of *London* by *habeas corpus*, to which a return was made, stating a custom under which the defendant was sued and arrested, error being suggested in the proceedings below, the court above would not stay the *procedendo* merely on that grounds ; but said, they would leave the defendant to his writ of error. (*h*)

(*i*) R. M. 1654, § 8, K. B. R. M. 1654, § 11. R. II. 13 & 14 Car. II. C. P.

(*kk*) Append. Chap. XVI. § 31, 2, 3.

(*ll*) 1 Salk. 352. 6 Mod. 177, S. C.

(*mm*) *Ante*, 393.

(*a*) 1 Salk. 352.

(*b*) 1 Str. 527.

(*c*) 8 Durnf. & East, 152.

(*d*) 16 East, 387. 4 Barn. & Ald. 535. *Ante*, 410.

(*e*) 1 Chit. Rep. 575.

(*f*) 1 Ld. Raym. 581.

(*g*) Say. Rep. 156, 7.

(*h*) 6 Durnf. & East, 760 ; and see 2 Bos. & Pul. 93.

But, except in causes removed from *London*, the court above will not enter into the validity of a custom or bye-law in a summary way, on the return of the *certiorari* or *habeas corpus*; but put the parties to declare upon it in that court, and demur.(i)

If a record be filed in the King's Bench, upon a *certiorari*, it can never be sent back or remanded, either in the term in which it is filed, or any other; and that is plain by the act of 6 Hen. VIII. c. 6, which enables this court to remand it in case of felony, which otherwise they could not have done:(k) and therefore the *procedendo* must be moved for on the *return of the *certiorari*, and before it is filed: But upon a *habeas* [*412] *corpus* it is otherwise; for the very record below is not returned thereon, and therefore cannot be filed: consequently a *procedendo* may be granted on this writ, after the return is filed; because it will not send out any record filed in this court, but only takes off the suspension created by the *habeas corpus*.(a) After the cause has been once remanded, by writ of *procedendo*, it cannot be again removed, or stayed by any writ before judgment:(b) And if, after a *procedendo* to carry a cause back to an inferior court, the plaintiff recover, and then sue out a *scire facias* against the bail below, and they remove the proceedings against them into the King's Bench by *habeas corpus*, this court will award a *procedendo* in the suit against the bail.(c)

A *certiorari*, as we have already seen,(d) removes the record in a civil cause from the inferior court; but though the record be brought up on this writ, into the court above, yet they do not take up the cause where the record leaves off, but begin the whole proceedings *de novo*; for there is no continuance from the inferior to the superior court, and therefore they cannot proceed on that record which was below: and though a *certiorari* removes the record in the condition in which it was at the time of the service of the writ, and thereby transfers the same into the superior court, yet it cannot make the roll of the inferior court a record of the superior one, but only brings up the record from the inferior to the superior court;(e) and nothing is recorded here but the original:(f) Therefore, where the proceedings in an inferior court of record were removed by *certiorari*, into the Common Pleas, and the question was, whether the plaintiff should declare *de novo*; it appearing by the return, that the parties were at issue in the court below, it was holden that the plaintiff must declare *de novo*.(g) On the removal of a cause from an inferior court, by writ of *certiorari*, the plaintiff need not file his declaration, until the end of the term after that in which the writ is returnable.(h) And, on a *certiorari* or *habeas corpus*, the plaintiff may declare in this court, as he pleases; and is not confined to the same species of action as he declared in below.(ii) When a defendant, however, removes a cause from an inferior court by *certiorari*, the plaintiff is not bound to follow the suit; and the defendant cannot sign judgment of *non-pros*, for want of a declaration.(kk)

(i) 2 Bnr. 775. 2 Ken. 469 S. C.

(k) 1 Salk. 352. 6 Mod. 177, S. C.; and see Gilb. Exec. 144, 5; but see 4 Dowl. & Ry. 350.

(a) 1 Salk. 352. 6 Mod. 177, S. C.; and see Gilb. Exec. 144, 5; but see 4 Dowl. & Ry. 350.

(b) Stat. 21 Jac. I. c. 23, § 3.

(c) 6 Durnf. & East, 365.

(d) *Ante*, 467.

(e) Gilb. Exec. 144, 200. F.N.B. 71. C. Gilb. Repl. 117; but see 2 Atk. 317. Barnes, 421.

(f) Bro. Abr. tit. *Cause de remover Plea*, pl. 47.

(g) Barnes, 345; and see 6 Dowl. & Ry. 490, 91, *per* Abbott, Ch. J.; but see Barnes, 421.

(h) 4 Moore, 190.

(ii) Pr. Reg. 221. 2 Chit. Rep. 517.

(kk) 4 Barn. & Cres. 649. 7 Dowl. & Ry. 104, S. C.

On a *habeas corpus*, the parties have no day in court: and, as the record is not removed upon this writ from the inferior court, but only [*413] an *account or history of their proceedings, the plaintiff must begin *de novo*, and declare against the defendant as in custody of the marshal.(aa) But it is otherwise where *conusance* is demanded and allowed; for there the superior court gives a day to the parties in the inferior one, and transfers the roll itself into that court. And the reason of the difference is, that the inferior court which has *conusance*, being taken out of a superior one, the judges continue the cause into the inferior court, as into a court erected by the king, and taken out of the ordinary jurisdiction; and therefore, the proceedings go on as in the court in which they were commenced; but where the cause is taken from the inferior to the superior court, they do not proceed as in the same court; for it would be below the higher jurisdiction not to proceed on it as *res integra*, or to suffer any continuance to be made from a subordinate power to theirs.(b)

The declaration upon a *habeas corpus* must be delivered, if at all, before the end of the second term after putting in bail, including the term in which it was put in:(c) If the plaintiff do not declare within that time, the defendant's attorney is not bound to accept a declaration; though the plaintiff cannot be non-prossed for want of it.(d) And if a cause be removed by the defendant, by *habeas corpus*, out of an inferior court, the plaintiff is not bound to declare in the court above, if he has taken no other step than compelling the defendant to put in and justify bail there.(e) On the removal of a cause by *habeas corpus*, out of the courts of *Canterbury*, *Southampton*, *Hull*, *Litchfield*, or *Poole*, which are counties where the judges of *nisi prius* seldom come, if the action be transitory, the venue must be laid in the county of *Kent*, *Southampton*, *York*, *Stafford*, or *Dorset*, where the town and county lies.(f) And, on a *habeas corpus* returnable in *Michaelmas* or *Easter* term, if the declaration be delivered before the third return, the defendant is not entitled to an imparlance.(g) So, when a defendant removes the cause by *habeas corpus* from an inferior court, and the plaintiff does not declare until the next term, an imparlance is not allowed; for such removals being in general considered as dilatory, it would only be adding to the delay if an imparlance were granted.(h)

If a plaint be levied in an inferior court, within *six* years after the cause of action arose, and then it be removed into the King's Bench by *habeas corpus*, and the plaintiff declare here *de novo*, and the defendant plead the statute of limitations, the plaintiff, we have seen,(i) may reply, and show the plaint in the inferior court, and that will be sufficient to avoid [*414] *the statute. And it is a rule, that upon a cause removed by *habeas corpus* out of an inferior court, having jurisdiction of the cause, if judgment be given for the plaintiff, the costs below are to be con-

(aa) 1 Salk. 352. 6 Mod. 177, S. C.; and see R. M. 16 Car. II. (c). Skin. 215. 2 L. Raym. 1102, 3. 2 Atk. 317. Gilb. Repl. 114. 1 Durnf. & East, 372.

(b) Gilb. Exec. 144, 200. F. N. B. 71, C. Gilb. Repl. 117.

(c) 1 Str. 631. Barnes, 90; but see Cro. Jac. 620, by which it appears, that anciently the plaintiff had *three* terms to declare, after bail put in; and see 6 Durnf. & East, 752. 4 Moore, 190.

(d) R. M. 16 Car. II, (c), K. B. Cowp. 117. 1 Durnf. & East, 372.

(e) 3 Maule & Sel. 93.

(f) R. M. 1654, § 9, K. B. R. M. 1654, § 12, C. P.

(g) 1 Mod. 1. 2 Salk. 515. 1 Wils. 154.

(h) 6 Durnf. & East, 752; but see 2 Bos. & Pul. 137.

(i) *Ante*, 27, 8.

sidered, and cast into the judgment; if for the defendant, the charges of putting in bail.(a)

When the inferior court from which the cause is to be removed is not of record, the means of removing it, we may remember, are by *pone, recordari facias loquelam, accedas ad curiam*. These writs are chiefly calculated for the removal of actions of *replevin* from the county court, or court of some lord authorized to grant replevins; for it is beneath the dignity of a superior court to proceed in other actions, if the debt or damages appear to be under *forty* shillings; and therefore, in such case, if the cause were removed, the court would remand it by *procedendo*. A plaint in *replevin* cannot, we have seen,(b) be removed from a county court in *Wales*, into the King's Bench, by *certiorari*. And a writ of *accedas ad curiam*, issued to a court of requests, which proceeds equitably, may be set aside on motion.(c)

If a *replevin* be sued by *writ* out of Chancery, then if the plaintiff or defendant would remove the cause out of the county court, into the King's Bench(d) or Common Pleas, he ought to sue out a writ of *pone*;(e) which is an *original* writ, issuing out of Chancery, directed to the sheriff of the county where the *replevin* is brought; and when returnable in the King's Bench, it commands the sheriff to *put* before the king on a general return day, wheresoever, &c. the plea which is in his county, by the king's writ, between the parties, of the cattle or goods taken and unjustly detained, &c. The writ of *pone*, if taken out by the *plaintiff* in *replevin*, hath a clause in it, commanding the sheriff to *summon* the defendant to appear in the court above at the return day, that he be then there, to answer the plaintiff thereupon.(e) If the *replevin* be removed by the *defendant*, then the *pone* commands the sheriff, that he warn the plaintiff to be there, to prosecute his plaint thereupon against the defendant, if he shall think proper:(f) and by this means, both parties have a day in the court above.(g)

When the plaint is in the county court, and the *replevin* sued there *without writ*, then if the plaintiff or defendant would remove it, he ought to sue out a writ of *recordari facias loquelam*; which is an original writ, issuing out of Chancery,(h) on a proper *præcipe*,(i) directed to the sheriff in whose court the plaint is entered,(k) commanding him that in his full *county, he cause to be recorded the plaint which is in [*415] the same county, without the king's writ; and that he have that record in the court above, on a general return day, under his seal, and the seals of four lawful knights of his county who were present at that recording; and that he prefix the same day to the parties, that they be then there, to proceed in the action.(aa) And if a *replevin* be sued by

(a) R. M. 1654, § 22, K. B. R. M. 1654, § 25, C. P.

(b) *Ante*, 490.

(c) 10 Moore, 32. *Id.* 171. 2 Bing. 463, S. C.

(d) Bro. Abr. tit. *Cause de Remover Plea*, pl. 50. Trye, 94.

(e) F. N. B. 69, M. Gilb. Repl. 102. Append. Chap. XLV. § 26.

(f) Append. Chap. XLV. § 27.

(g) F. N. B. 70, A. Gilb. Repl. 106, 7, 8. 2 Ld. Raym. 1102, 3. 1 Durnf. & East, 371.

(h) F. N. B. 70, B. Gilb. Repl. 108.

(i) Append. Chap. XLV. § 34.

(k) Trye, 39.

(aa) F. N. B. 70, B. Append. Chap. XLV. § 35.

plaint in the court of any lord, other than in the county court before the sheriff, then the *recordari* has a clause therein commanding the sheriff, that taking with him four discreet and lawful knights of his county, he go in his proper person to the court of the lord; and in that full court, cause to be recorded the plaint, &c.:(*bb*) and from this clause in the writ, it is called an *accedas ad curiam*.(*cc*) On this writ the sheriff must go in person to the lord's court, and take with him four men of his county; but it is not necessary that they should be knights.(*dd*) When a sheriff, or his deputy, neglects to enter a plaint in *replevin*, in the county court, for *damage feasant*, the court of King's Bench will not compel him to do so, on motion; but the only remedy, if any, is by writ of *mandamus*.(*e*)

The *plaintiff* may remove the plea out of the *county court*, either by *pone*, or *recordari*, without cause shown; for it is in his own delay: but the *defendant* cannot remove it without cause shown; for since it is in delay of the plaintiff, a just cause ought to appear on record for such removal.(*f*) The cause of removal usually assigned is, that the sheriff or his clerk is related to one of the parties:(*g*) and the sheriff cannot return that the cause is not true. But if either the plaintiff or defendant remove a suit out of the *lord's court*, they ought to show cause; because they should not oust the lord of the profits of his jurisdiction, without apparent reason:(*h*) And it seems that such causes were anciently examined before the writ was granted, as in Chancery they used to examine the cause of action, before the granting of original writs; but this in both cases is now neglected, and such writs are issued as a matter of course.(*i*)

The writ of *pone*, *recordari*, or *accedas*, like the *certiorari* or *habeas corpus*, when delivered to the sheriff or lord to whom it is directed, instantly suspends his power; so that if he afterwards proceed, he is liable to an attachment, and the proceedings are void, and *coram non judice*.(*k*) And it has been adjudged, that the officer of an inferior court cannot refuse paying obedience to the writ, under pretence of not being paid his fees; for he is obliged to obey the writ, and has a proper remedy for such fees as are due to him.(*l*) On the receipt of the writ therefore, it should be forthwith allowed and returned, under the peril of an attachment. The return

to the *pone* or *recordari*, &c. should be made and filed by the
 [*416] *party suing it out, with the filacer of the court above, in *two* terms after it is returnable;(a) or, upon the filacer's certificate, the cursitor will issue a *procedendo*.(*b*) The *recordari* and *accedas ad curiam* should be returned under the sheriff's seal, and the seals of four suitors of the court: And it is a good return for the sheriff to say, that after the receipt of the writ, and before the return thereof, no court was holden; and also, that he required the lord to hold his court, and he would not, so that he could not execute the same; and thereupon the justices shall award a *distringas*, directed unto the sheriff, to distrain the lord to

(*bb*) F. N. B. 70, A. Gilb. Repl. 112.

(*cc*) Append. Chap. XLV. § 47; and see 2 Bos. & Pul. 138, (*a*).

(*dd*) F. N. B. 10, E.

(*e*) 2 Dowl. & Ryl. 13.

(*f*) Gilb. Repl. 103, cites F. N. B. 69, M. 70, B.; and see 2 Moore, 643.

(*g*) Append. Chap. XLV. § 27.

(*h*) F. N. B. 70, A. Gilb. Repl. 103.

(*i*) Gilb. Repl. 105.

(*k*) F. N. B. 4, E.

(*l*) 2 Bur. 1151, 2. Gilb. Repl. 115. *Ante*, 404, 5.

(*a*) For the form of a return to a *recordari*, see Append. Chap. XLV. § 38.

(*b*) *Id.* § 46, 49.

hold his court; and *sicut alias*,^(c) &c. When the return is filed, the cause it seems cannot afterwards be remanded;^(d) unless it was removed from a court of ancient demesne.^(ee)

If the *pone* or *recordari*, &c. bear date before the plaint entered in the county, yet the cause is well removed; because both are the king's courts.^(ff) But if the cause be removed out of the court of any other lord, by a writ which bears date before the entry of the plaint, is not good.^(ff) The reason of the difference is, because the sheriff, by whom the county is held or farmed, being the king's immediate deputy, the king may remove the replevin out of the sheriff's court into his own, without showing cause; and therefore it is not material whether the *recordari* be tested before the plaint or not: and although the defendant cannot remove the plaint without cause, yet this is not in order to prevent the sheriff from being ousted of his jurisdiction, but that the plaintiff may not be delayed without good cause shown: But when the record is removed out of the lord's court, which has a jurisdiction by grant or prescription, there must be cause shown for such removal; and the cause will be absurd, if the *accedus ad curiam* bear date before the plaint, for that cannot be a cause to oust the lord of his jurisdiction, which was not in being at the time of the writ issued.^(g) So, the plaint is well removed by *certiorari*, where it ought to have been by *pone* or *recordari*:^(h) So, if one plaint be removed, where another ought to have been; or where there is a variance between the plaint and the writ.^(h) If the plaintiff has already declared in the county court, yet nothing shall be removed but the plaint:⁽ⁱ⁾ And though the plea be discontinued in the county, yet the plaintiff or defendant may remove the plaint into the King's Bench or Common Pleas, by *recordari*, &c., and he shall declare, and the court shall hold plea, upon the same plaint.⁽ⁱ⁾

If the writ of *pone* or *recordari*, &c., be brought by the plaintiff, and the defendant do not appear, on or before the appearance day of the return, the plaintiff, having previously filed the writ and return with the filacer,^(k) should give a rule with that officer, for the defendant to appear,^(l) *which expires in four days;^(a) and upon his non-appearance [*417] within that time, sue out a *pone per vadios*;^(b) upon which a summons^(cc) is made out, and served upon the defendant: and if he do not appear, the plaintiff, on the return of *nihil*, should sue out a *distringas*;^(dd) and afterwards, if necessary, an *alias* or *pluries distringas*;^(e) upon which issues are levied from time to time, until the defendant appear, when he must pay the costs of the different writs:^(f) or, if *nulla bona* be returned, the plaintiff may have a *capias*,^(gg) and process of outlawry. If the cause be removed by the defendant by *pone*, and the plaintiff appear, but the defendant make default, a *distringas* is the first process for compelling his

(c) F. N. B. 18, E.

(d) *Id.* 69, M, (a). Gilb. Repl. 10.

(ee) Gilb. Repl. 111.

(ff) F. N. B. 71, D. Gilb. Repl. 118.

(g) Gilb. Repl. 118, 19.

(h) F. N. B. 69, M, (a). Cro. Eliz. 543. Gilb. Repl. 108; but see Moore, 30.

(i) F. N. B. 71, A. Gilb. Repl. 113.

(k) Barnes, 222.

(l) Pr. Reg. 371. Append. Chap. XLV. § 50.

(a) 2 Bos. & Pul. 138.

(b) 21 Hen. VI. 50. F. N. B. 70, A. Gilb. Repl. 107. Append. Chap. XLV. § 41.

(cc) Append. Chap. XLV. § 42.

(dd) *Id.* § 43.

(e) *Id.* § 44.

(f) 3 Sel. Pr. 2 Ed. 161. Imp. C. P. 7 Ed. 745. *Ante*, 110, 11.

(gg) 3 Hen. VI. 54, 5. F. N. B. 70, A. Gilb. Repl. 106, 7. Pr. Reg. 371. *Thes. Brev.* 37. Append. Chap. XLV. § 45.

appearance;(*hh*) and on a *nulla bona* returned, a *capias* may be issued.(*gg*) The appearance of the defendant is entered with the filacer;(*ii*) after which, the next step is for the plaintiff to declare: and though he has already declared in the inferior court,(*kk*) yet as nothing is removed but the plaint, he must declare *de novo* in the court above.(*ll*) But the declaration, in the Common Pleas, should regularly be delivered before the end of the *second* term after the return of the *recordari*, &c., unless the plaintiff has obtained a rule for time to declare, which it seems he may do in *replevin*, as well as in other actions;(*m*) and if it be not delivered till the *third* term, the court will set it aside for irregularity.(*n*) After a writ of *recordari facias loquelam*, and several writs of *pone* issued thereon to compel the defendant's appearance, if the plaintiff file a declaration, entitled of an intermediate term between that in which the *recordari facias loquelam* is returnable and the term in which the declaration is filed, with notice to plead in the following term, both the declaration and notice to plead are irregular.(*o*)

When the writ of *pone* or *recordari*, &c., is brought by the *defendant*, he should file it and the return with the filacer; and having entered his appearance, give a rule for the plaintiff to declare,(*p*) with the master in the King's Bench, or filacer in the Common Pleas: and if the return be filed on or before the appearance day, there is no occasion to demand a declaration in writing;(*q*) but otherwise a written demand is necessary.(*r*)

The rule to declare may be given, in the King's Bench, within [*418] *fourteen* days,(*s*) *or in the Common Pleas within *four* days,(*a*) after the end of the term, and served on any day before the time in the rule has expired; and the plaintiff, in the King's Bench, must declare within *four* days after such service.(*b*) But the demand of declaration, when necessary, should not be made before the return of the writ.(*c*) The same mode of proceeding may be adopted, to compel the plaintiff to declare, where he neglects to do so, after having sued out and filed the writ of *recordari*, &c.: And if he do not declare within the time limited by the rule, or obtain a rule for time to declare, the defendant may sign a judgment of *non-pros*,(*d*) upon which he is entitled to costs;(*e*) and in *replevin*, he may sue out a writ of *retorno habendo*,(*f*) or, if the distress was for rent, proceed to execute a writ of inquiry, on the statute 17 *Car. II. c. 7*.(*g*) If the party suing out a *recordari*, &c., do not get it returned and filed within *two* terms, the other party should apply to the filacer, for

(*hh*) 21 Hen. VI. 50. F. N. B. 70, A. Gilb. Repl. 106, 7; and see 2 Bos. & Pul. 137, where a *distingas* issued, for compelling the defendant's appearance, on the removal of a cause by the plaintiff, by *accedas ad curiam*.

(*gg*) Ante, p. 416, note (*gg*).

(*ii*) Trye, 94.

(*kk*) For the form of a declaration in the county court, see Append. Chap. XLV. § 22.

(*ll*) E. N. B. 71, A. Gilb. Repl. 113.

(*m*) 1 Durnf. & East, 371. 5 Taunt. 35.

(*n*) 5 Taunt. 649; and see *Allen v. Millward*, H. 30 Geo. III. C. P. Imp. C. P. 7 Ed. 533, 4.

(*o*) 5 Taunt. 771. 1 Marsh. 341, S. C.

(*p*) Pr. Reg. 371; and see 2 Moore, 642. Append. Chap. XLV. § 54.

(*q*) 1 H. Blac. 281. 2 Moore, 643, (*c*).

(*r*) Pr. Reg. 370. Cas. Pr. C. P. 55, S. C. Append. Chap. XLV. § 52.

(*s*) 11 East, 183.

(*a*) *Allen v. Millward*, H. 30 Geo. III. C. P. Imp. C. P. 7 Ed. 533, 4.

(*b*) 11 East, 183.

(*c*) 10 Moore, 32.

(*d*) F. N. B. 70, A. Gilb. Repl. 106, 7. Append. Chap. XLV. § 55, &c.; but see 2 Moore, 642.

(*e*) 1 Durnf. & East, 371.

(*f*) Append. Chap. XLV. § 92.

(*g*) *Id.* § 59, 77.

a certificate that the same is not returned and filed; which will be a sufficient warrant for the cursitor to make out a writ of *procedendo*, for remanding the cause to the inferior court: (h) Or if either party, having sued out a *recordari*, &c., neglect to file it, the other party, for the sake of expedition, may, without waiting till the end of the *second* term, sue out another writ of the same nature, and get it returned and filed, for removing the proceedings into the court above.

After the plaintiff has declared, he should give a rule for the defendant to avow or make cognizance; and, in the Common Pleas, if the writ by which a cause is removed, be returnable on the first return of the term, and the plaintiff do not declare within *four* days before the end of that term, the defendant is entitled to an imparlance, though he has not appeared within the term. (i) The subsequent proceedings are similar to those in common cases.

(h) Barnes, 222. 2 Sel. Pr. 2 Ed. 162. Imp. C. P. 7 Ed. 747. Append. Chap. XLV. § 46, 49.

(i) 2 Bos. & Pul. 137.

NOTE. An important removal of causes sometimes takes place here under the power of the Federal Constitution. A recent case in the Supreme Court of Pennsylvania, *Wheeden v. The Camden & Amboy Rail Road Co.*, 4 Am. Law Reg. 296, discusses the subject matter so fully that the reader is presented with the opinion of Mr. Just. Woodward, as the most recent and satisfactory discussion that is to be found. "The Constitution of the United States, art. 3, sect. 2," says he, "extends the judicial power of the federal union to various classes of cases, and among others to all cases in law and equity 'between citizens of different states.' The 11th section of the Act of Congress, 1789, commonly called the Judiciary Act, vests original cognizance in the Circuit Courts of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, five hundred dollars, and where 'the suit is between a citizen of the state where the suit is brought, and a citizen of another state;' and the 12th section provides that if a suit be commenced in a State court by a citizen of the state in which the suit is brought, against a citizen of another state, and the matter in dispute exceeds five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court, and the defendant shall, at the time of entering his appearance in such State court, file a petition for the removal of the cause for trial into the next circuit court, to be held in the district where the suit is pending, and offer good and sufficient surety for his appearance in said court, and entering special bail if necessary, 'it shall then be the duty of the state court to accept the surety and proceed no further in the cause,' but the same is to proceed in the Circuit Court of the United States, in the same manner as if it had been brought there by original process.

"It will be observed that the legislative language, descriptive of the parties who may sue or remove into the circuit court, is a little more restricted than that employed in the constitution, but if any difference of meaning be indicated by the difference in phraseology, it is unimportant in the cause before me, for if this be a removable case, it is because it is within the words of the legislature, and of course within those of the constitution.

"What, then, is the case? James C. Wheeden brought suit in the Supreme Court of Pennsylvania against the Camden and Amboy Railroad and Transportation Company, for the recovery of damages claimed to exceed five hundred dollars, and which resulted, it is understood, from the late calamity, well known as the 'Burlington disaster.' The Company, at the time of appearing, filed a petition, setting forth that they were a corporation solely created and established by laws of the State of New Jersey, and having their chief place of business within the State of New Jersey, and that the corporation was and is a citizen of said state, and that the plaintiff is a citizen of Pennsylvania. Security was tendered and the removal of the cause into the circuit court was prayed for.

"The plaintiff puts in an answer to the petition and alleges that the company own property and transact a large part of their business in the city of Philadelphia. Several of the specifications in the plaintiff's answer are qualified and some of them contradicted by counter affidavits on the part of the company; but I do not consider the facts alleged in the answer, whether disputed, qualified or admitted, as of much moment to the present inquiry, for the defendant being a corporation created by the Legislature of New Jersey, and having no vitality or existence, save such as is derived from that source, cannot be, whatever their business transactions in this state, a citizen of Pennsylvania in any sense of either the constitution or the judiciary act. 'That invisible, intangible and artificial being, that mere legal entity, a corporation aggregate,' if capable of becoming a citizen of a state for any purpose, must be made so by the legislative power of the state. It is impossible that New Jersey should make a citizen of Pennsylvania, even of a natural person, much less of an artificial.

And if the legislative faculty of that state is incompetent for this purpose, a corporation existing solely by her will, cannot make itself a citizen of Pennsylvania. No amount of business carried on, or property held here, can naturalize such a corporation. Its rights amongst us are permissive merely, resting entirely in the absence of prohibitory legislation. That we regard every corporation 'not holding its charter under the laws of this Commonwealth,' as *foreign*, may be seen by reference to the 3d section of our act of Assembly of 21st March, 1849, (Brightly's Purdon, 169,) which provides that suit may be brought against 'any such foreign corporation' by process served upon 'any officer, agent, or engineer of such corporation, either personally or by copy, or by leaving a certified copy at the office, depot, or usual place of business of said corporation.' It was under this act of Assembly the present defendant was sued, as a foreign corporation. The answer does not allege any legislative recognition by Pennsylvania of this corporation defendant, and therefore, if all that is alleged were admitted, it would not be a step in the process of proving a Pennsylvania citizenship for it. We subject it to suit through its agents when they are found here, and we seize, in execution of our judgments, any property it may have within our borders; but in no sense or degree can it ever become a local institution, except by express legislative recognition.

"But further. If the facts alleged in the answer are insufficient to prove a Pennsylvania citizenship, so also do they fail to disprove this corporation a citizen of New Jersey. If it have a local habitation it is in New Jersey, and, to borrow the language of Ch. J. *Taney*, in *Bank of Augusta v. Earle*, 13 Peters, 588, it must dwell in the place of its creation; and cannot migrate into another sovereignty. But as natural persons, through the intervention of agents, are continually making contracts in countries in which they do not reside, and where they are not personally present when the contract is made, so may this artificial person by its agents make contracts within the scope of its limited powers in a sovereignty in which it does not reside, provided such contracts are permitted to be made by the laws of the place.

"And as the natural person does not transfer his citizenship from one sovereignty to another by such dealings, neither does the artificial. Nor do such dealings constitute, for either the natural person or the corporation, a double citizenship, one in the place of the domicile, and another where business is carried on through agencies.

"It is obviously proper, therefore, for me to lay out of view, in the further consideration of this case, all the business arrangements and transactions which the answer charges the company with maintaining in Pennsylvania. A foreign corporation doing business in this state becomes not thereby a citizen of Pennsylvania, and loses not any citizenship it may have in the state of its creation.

"But still the question remains, is this company a citizen of New Jersey? Incorporated solely by that state, doing business therein, its principal officers resident there, and its railroad, the great instrument of all its operations, lying wholly in that state, this company is a citizen of New Jersey in so far as an artificial being can become such. If any company can be in the sense of the constitution a citizen of a sovereign state, the Camden and Amboy Railroad Company is a citizen of New Jersey, and the plaintiff being confessedly a citizen of Pennsylvania, the jurisdiction of the circuit court would follow as a necessary consequence. The suit might have been brought in that court in the first instance, and is removable there at the instance of the defendant.

"But can a corporation be a citizen? For general purposes it is impossible. The rights and privileges guaranteed to citizens in the federal constitution are inconsistent with the nature, properties and purposes of corporations. Take, for instance, that provision of the fourth articles, 'that the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states.' If corporations created by state authority were held to be within the provision, their rights and powers would no longer be measured by the grants of their charters, but by the constitutional rights of an American freeman; they would overrun state lines, seize upon political power, and ultimately devour one another.

"The framers of the federal constitution were well acquainted with corporations. They existed in England and in several of the states, and whilst no power to create them was expressly delegated to Congress, no restraint was imposed on the power of the states to multiply them indefinitely. They were left out of the federative system altogether, and that, doubtless by design, and on good reason, and not by accident. So was the word citizen well understood as it is now understood, to mean a human being—a natural person capable of acting, contracting, suing and being sued without legislative aids—a person of whom allegiance is predicable, and who, may be guilty of treason. In all these points and many others, corporations are distinguishable from citizens, and no body of men probably were ever assembled on earth who understood the distinction better, or were more capable of expressing their thoughts accurately, than the framers of the Constitution of the United States. When they used the word citizen to define the character of the parties who might resort to the judicial power of the Union, did they then mean corporations? The received rules of interpretation would require us to understand the same word in the same sense throughout the instrument, if not controlled in certain places by the context, and if the word citizen, when used in the fourth article did not include corporation, how, it might be

asked, can it be construed in the third article to embrace them? There is nothing in the context of either article to impart a shade of meaning to the word different from the common understanding of its sense. It would seem to me to mean the same thing in both articles, and in both to mean natural and not artificial persons.

"For these reasons, and others which it is not worth while to take time to state, I should be very apt, if the question were new, to reach the conclusions so repeatedly stated and ably defended by the dissentient members of the Supreme Court of the United States, when cases involving the question have been before that tribunal; but sitting here as a judge in a state court, I am not to follow dissenting opinions, nor, on a constitutional question, my own ideas of the meaning of the organic law, but am to take the instrument in the sense in which it is received by the majority of the Supreme Court of the United States.

"Among the judicial tribunals of the country, if not in other departments and places, that court is the supreme and final arbiter of questions under the federal constitution. The respect entertained for the members of that bench makes the duty of following them, on a constitutional question, easy and pleasant, which the theory of the government makes imperative.

"In the case of the *Bank of the United States v. Deveaux*, 5 Cranch, 61, decided in 1809, the record contained an averment that the plaintiffs were citizens of the State of Pennsylvania, and that the defendants were citizens of Georgia. The defendants pleaded to the jurisdiction that the body corporate was not competent to sue in the Circuit Court of the United States. The Supreme Court overruled the plea, and sustained the jurisdiction, not on the ground that corporations were citizens, for this Chief Justice *Marshall* most emphatically denied, but on the ground that the members of the corporation, who were natural persons, and the substantial parties on the record, were citizens of Pennsylvania, and the court felt itself authorized to look to the character of the individuals composing the corporation, for the purpose of sustaining a jurisdiction which had been often exercised without question.

"In *Sullivan v. The Fulton Steamboat Company*, 6 Wheaton, 450, the defendants were described as a corporate body, incorporated by the legislature of New York, and it was held that the court had not jurisdiction.

"*The Bank of Vicksburg v. Slocomb*, 14 Peters, 60. Here a Mississippi corporation was sued by a citizen of Louisiana, and the successful plea to the jurisdiction was that two of the corporators were citizens of Louisiana.

"That plea, admitted by the demurrer, was held sufficient to oust the jurisdiction. This case interprets that of the *Bank v. Deveaux*, where Ch. J. *Marshall* ruled that the court would look beyond the charter to the members of the corporation, without defining what was meant by members—whether corporators merely, or official and governing members. Taking the two cases together, the doctrine is, that, if all the corporators are citizens of the state from which the charter of incorporation is obtained, the corporation may be sued in the Circuit Court by a citizen of another state, but if any of them are citizens of the state to which the corporation belongs, jurisdiction is denied. This case in 14 Peters also rules what has been admitted in subsequent cases, that the act of Congress of 28th Feb., 1839, wrought no change in the jurisdiction of the Circuit Courts as respects the character of parties.

"The doctrine deduced from these two cases (*Deveaux's* and *Slocomb's*) is in exact accordance with that laid down by Chancellor *Kent*, as the result of all the authorities, (1 Com. 378,) and by Judge *Story*, in the *Bank of Cumberland v. Willis*, 3 Sumner, 472. In this case, a bank incorporated by the State of Maine, sued a customer who was a citizen of Massachusetts, and was turned out of the Circuit Court because a citizen of Boston was the owner of ten shares of the capital stock of the bank. See also 1 Peters, 238. 3 Dallas, 382. 4 Dallas, 708; and 3 Cran. 267.

"I come now to the case of the *Louisville Railroad Company v. Letson*, 2 Howard, 497. Letson, a citizen of New York, sued in the Circuit Court of the United States for the District of South Carolina, the Louisville, Cincinnati and Charleston Railroad Company, a corporation created by and transacting business in the State of South Carolina. The jurisdiction was objected to on several grounds.

"1st. That all the members of said corporation were not citizens of South Carolina, but that two of them were citizens of North Carolina.

"2d. That South Carolina herself was a member of said corporation.

"3d. That the Bank of Charleston, another South Carolina corporation, was a member of the corporation sued, and that two citizens of New York were members of the said banking corporation.

"4th. That the Charleston Insurance and Trust Company was also a member of the corporation sued, and that three members of said Trust Company were citizens of New York.

"These objections were all overruled, the cause tried, and judgment rendered by the Circuit Court for the plaintiff, and the judgment affirmed in the Supreme Court, after arguments by counsel, which are remarkable for their fulness and ability.

"Mr. Justice *Wayne* delivered the opinion of the Supreme Court, and after reviewing and

limiting the effect of prior decisions, indicated the ground on which the decision in this case was altogether rested by the following language: 'It is, that a corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation capable of being treated as a citizen of that state as much as a natural person. Like a citizen, it makes contracts; and though in regard to what it may do in some particulars, it differs from a natural person, and in this especially, the manner in which it can sue and be sued, it is substantially within the meaning of the law, a citizen of the state which created it, and where its business is done, for all the purposes of suing and being sued.'

"Here, it will be observed, there was no looking beyond the charter to fix the citizenship of the members. Incorporation by and doing business in a particular state, constitute citizenship 'for all the purposes of suing and being sued.' These words seem to be added by way of qualification, but when it is considered that the Constitution and act of Congress use the word citizen in connection with the judicial powers of the courts only for the purpose of defining who may sue and be sued, it is apparent that the words of the learned judge are no qualification of the constitutional and legislative rule.

"The next case is *Marshall v. The Baltimore and Ohio Railroad Company*, 16 Howard, 314—a suit by a citizen of Virginia against a corporation which was described as a 'body corporate by an act of the General Assembly of Maryland,' and without any averment as to the place of business or residence of officers or corporators. The jurisdiction of the Circuit Court was affirmed in the Supreme Court by an opinion by Grier Justice, who cited with approbation *Letson's case*, and the opinion of Mr. Justice Catron, in *Rundle v. The Delaware and Raritan Canal Company*, 14 How. 80.

"The point of distinction between *Letson's case* and that of *Marshall* is, that in the former it was averred of record that the corporation was doing business in the state which created it; in the latter it was not. In the former, the language of the judge implies that the corporation, in its artificial and legal character, is to be regarded as a citizen for purposes of suit; in the latter, that the officers, who are *curators*, or trustees of the corporation, are the substantial party in a suit, and that their residence and citizenship determines the jurisdiction. In this respect, the opinion in *Marshall's case* is coincident with what Catron, Justice, said in *Rundle v. The Canal Company*.

"My opinion is, and long has been,' said the learned judge, 'that the mayor and aldermen of a city corporation, or the president and directors of a bank, or of a railroad company (and of other similar corporations,) are the true parties that sue and are sued as trustees and representatives of the constantly changing stockholders. If the president and directors are citizens of the state where the corporation was created, and the other party to the suit is a citizen of a different state, or a citizen or subject of a foreign government, then the courts of the United States can exercise jurisdiction under the third article of the constitution. In this sense I understood *Letson's case*, and assented to it when the decision was made; and so it is understood now.'

"These views were repeated by Judge Catron, in a dissenting opinion, in *Marshall's case*, and his dissent in that case was rested on the ground that there was no averment on record of the citizenship of the president and directors. According to Mr. Justice Grier, speaking for the majority, this is to be inferred from an averment of the act of incorporation.

"If *Letson's case* is to be received as Judge Catron understood it, the result of all the cases, the earlier taken in connection with the modern, may be stated thus:—

"1. A corporation is not *per se* a citizen within the meaning of the third article of the constitution.

"2. But when it sues or is sued, the governing officers, by whatever name called, are the substantial party; and if they are citizens of the state which created the corporation, and the other party is a citizen of another state, the federal courts have jurisdiction.

"This is according to Judge Marshall's principle, of looking beyond the charter to the citizenship of members of the corporation, but it defines the members to be looked to differently from what was done in the *Vicksburg Bank v. Stocum*. It is no longer the stockholders or corporators in general, but the president and directors, to whose citizenship the court will look.

"This rapid review of the cases is sufficient to show that, if the question before me had arisen whilst the doctrine obtained in the Supreme Court, which was expounded in the *Vicksburg Bank case*, the fact alleged here, and not controverted, that some of the stockholders of the Camden and Amboy Company are resident in and citizens of Pennsylvania, would be decisive against the jurisdiction of the Circuit Court. That doctrine passed into the text of Chancellor Kent and other writers, and many cases were ruled upon it. It was, nevertheless, subject to serious objections, as may be seen by the criticisms of counsel and judges in subsequent cases, and particularly in *Letson's case*. Whether the doctrine that was substituted for it will not be found more objectionable, and the court be brought to the broad ground of declaring, either that corporations, as such, are citizens within the

meaning of the constitution, or that they are not citizens, and cannot be parties to litigation in the federal courts, are subjects not fit for present speculation, and which must await the developments of judicial history.

"My present duty is to apply the law as I find it settled now. And, as I understand it, the fact that some of the stockholders of the company reside in the same state as the plaintiff, is a circumstance of no importance whatever. Though they may be affected by the judgment in the case, they are not to be considered parties to the record. The president and directors are the substantial parties sued, under the shadow of the corporate name, and I am to presume them citizens of New Jersey, because it is shown that the company was incorporated by that state, and is doing business therein. Nor is that presumption rebutted by their holding property and transacting business through agencies in Pennsylvania. The jurisdiction of the Circuit Court results, therefore, out of the citizenship of these governing members of the corporation.

"Under the act of Congress, it is to be made to appear to the satisfaction of this court, that the matter in dispute exceeds five hundred dollars, exclusive of costs. An affidavit to that effect is appended to the petition of the company, which, though objected to, I deem sufficient, and I also consider the surety offered, 'good and sufficient.'

"It is therefore ordered that the prayer of the petitioner be granted, that the security be accepted, and that this court will proceed no further in the cause."

* CHAPTER XVII.

[*419]

Of the DECLARATION.

HAVING stated, in the preceding chapters, the various means of bringing the defendant into court, when at large, in actions commenced by *original* writ, or by bill of *Middlesex* or *latitat*, in the King's Bench, or *capius quare clausum fregit*, &c. in the Common Pleas, or by *venire facias*, *subpœna*, or *quo minus*, in the Exchequer, and also whatever is peculiar to the proceedings in actions by or against *attorneys* and *officers*, who are supposed to be already in court, and *prisoners* in actual custody of the sheriff, &c. or of the marshal of the King's Bench or warden of the *Fleet* prison, with the removal of causes from *inferior* courts, I shall, in the present chapter, treat of the *declaration* in ordinary cases; where the defendant, having been arrested upon or served with process, either appears and puts in and perfects special bail, when necessary, or files common bail, or an appearance is entered or common bail filed for him by the plaintiff, according to the statutes.(a)

The declaration is a specification, in legal form, of the circumstances which constitute the cause of action; and, in actions by *original*, is an exposition of the writ, with the addition of time, place, and other circumstances:(b) and it is either *in chief*, or *by the bye*. A declaration *in chief* is at the suit of the *same* plaintiff, for the *principal* cause of action, or that for which the writ was sued out: A declaration *by the bye* is at the suit of a *different* plaintiff, or of the *same* plaintiff for a *different* cause of action.

The plaintiff can in no case declare against the defendant, until the return day of the writ: and, except against *attorneys* or *prisoners*, the declaration cannot be delivered or filed *absolutely*, until the defendant has

(a) 12 Geo. I. c. 29, § 1, altered by 5 Geo. II. c. 27. 43 Geo. III. c. 46, § 2. 45 Geo. III. c. 124, § 3. 51 Geo. III. c. 124, § 2 & 7 & 8 Geo. IV. c. 4 & 130, c. 5, § 71, c. 71, § 2, 5. *Ante*, 114, 120, 21; 228, 241, 2, 3, 4.

(b) Co. Lit. 303; and see 1 Chit. Pl. 4 Ed. 222.

appeared, and put in and perfected special bail, when necessary, or filed common bail, or an appearance has been entered or common bail filed for him by the plaintiff, according to the statutes.(c) So, in an *inferior* court, a custom to declare against a defendant, before an appearance entered by him, or by some person for him, is bad in law.(d) But when the defendant has been arrested upon, or served with a copy of process against his person, the plaintiff may declare *de bene esse*, or *conditionally*, on the return of the

writ, before the defendant has appeared, or put in and perfected [*420] special bail, &c.: and the declaration, or copy of the bill, is usually *delivered before appearance, in actions against *attorneys* and officers of the court of King's Bench, and *prisoners* in actual custody of the sheriff, marshal, or warden.(aa) When there are several defendants, against whom it is intended to proceed jointly, the plaintiff cannot declare until they are all in court:(aa) And, in cases of *contract*, where *bailable* process is taken out against several defendants, for a joint cause of action, the plaintiff cannot declare against them severally;(b) but it is otherwise in the Common Pleas, where the process is *not bailable*;(cc) for in that case, we have seen,(dd) the plaintiff is allowed to join *four* defendants, for separate causes of action, in one writ, and to declare against them severally; and if they do not appear, he may bring them into court, by entering an appearance for them, according to the statute. So, in actions of *tort*, a party suing out *bailable* process against several defendants jointly, may it seems declare separately against one of them.(e)

In actions by *bill* in the King's Bench, if the defendant appeared personally at the return of the writ, the plaintiff was anciently obliged to declare against him within *three days*;(f) or, if he appeared by attorney, the plaintiff must have declared before the end of the term.(g) Afterwards, the time for declaring was extended; and a rule was made by *Coke*, Ch. J. and the court, in the reign of *James* the first, that the plaintiff ought to declare the *same term*, or the term after bail was filed;(h) and in a subsequent case, the course of the court was certified by the secondary and clerks to be, that no declaration should be taken upon any bail, but within *three terms* after the bail filed; and it was said that Lord Ch. J. *Popham* and the court, in his time, made an express order accordingly; for before then the usage was often otherwise: and the court in that case held it to be a very good course, and that it should not be altered.(i) In the case of *prisoners*, the plaintiff, agreeably to this practice, was allowed *three terms* after the arrest, to remove the defendant, in order to charge him with a declaration.(k) At length, by the statute 13 Car. II. stat. 2, c. 2 § 3, the time for declaring upon a bill of *Middlesex* or *latitat*, in the King's Bench,

(c) Lofft, 333. 2 Durnf. & East, 719; and see Forrest, 33. 2 Chit. Rep. 165.

(d) 3 Barn. & Cres. 772. 5 Dowl. & Ryl. 719, S. C.

(aa) For the distinctions as to declaring *absolutely* and *de bene esse*, in *chief* and by the *bye*, see the valuable Suggestions of Mr. Serjeant *E. Laves*, for some alterations of the law, on the subjects of Practice, Pleading, and Evidence, &c., p. 16.

(b) 5 Durnf. & East, 722. 4 East, 589. 1 Maule & Sel. 55. 3 Dowl. & Ryl. 247, K. B. 2 Blac. Rep. 759. 1 Bos. & Pul. 49. 2 New Rep. C. P. 82. 1 Marsh. 274. 7 Moore, 301, 362. 1 Bing. 48, 68, S. C. C. P. Forrest, 31, Excheq.

(cc) 1 Bos. & Pul. 19, 49; but see R. E. 8 Geo. IV. K. B.

(dd) *Ante*, 148.

(e) 3 Barn. & Cres. 734. 5 Dowl. & Ryl. 622, S. C.

(f) Stat. 8 Eliz. c. 2, § 2. Hans. *Introd.* 2.

(g) Gilb. C. P. 40.

(h) 3 Bulst. 214; and see Hans. *Introd.* 2.

(i) Cro. Jac. 620, 21. *Ante*, 413, (c).

(k) 2 Keb. 478.

was limited to the end of the *next* term after the defendant's appearance; and a rule was made by *Hale*, Ch. J. that the court would discharge *prisoners* on common bail, in *two terms*:^(l) and in the time of *Holt*, Ch. J. the course of the court was, that if a declaration were not delivered on or before the last day of the *second* term, *sedente curiâ*, the defendant *might sign a *non pros*; and if he did not immediately sign [*421] it, though he might afterwards receive a declaration, yet he was not compellable to do so, but he might well refuse it;^(a) and accordingly, as the practice of the court then stood, if the declaration was tendered at any time after the end of the *second* term, and before the *non pros* was signed, the defendant was not bound to accept it, but might sign his *non pros* at any time after the end of the *second* term.^(bb) But Mr. Justice *Buller* having expressed an opinion, that by the general rules of law, a plaintiff must declare against a defendant within *twelve months* after the return of the writ, though, by the rules of the court, if he do not deliver his declaration within *two terms*, the defendant may sign a judgment of *non pros*; ^(cc) it is now settled, agreeably to that opinion, that unless he take advantage of the plaintiff's neglect, by signing a judgment of *non pros*, the plaintiff may deliver his declaration, at any time within a *year* next after the return of the writ.^(d)

In the Common Pleas, or in actions by *original* in the King's Bench, when the proceedings were *ore tenus* at the bar of the court, the plaintiff was anciently demandable on the defendant's appearance; and if he did not appear, or would not count against him, he might have been immediately nonsuited.^(e) But the parties by consent, might have obtained a day before declaration, which was called a *dies datus prece partium*; ^(f) for the consent of the defendant exempted the plaintiff from the necessity of declaring immediately. In that case, if the defendant had made default at the day given, since there was no declaration, the plaintiff could not have had judgment, but was obliged to bring him in again by process; ^(g) for none could have judgment, but upon complaint exhibited against the defendant whilst in court. But after declaration, if the defendant had made default, judgment was given against him; because, having deserted the court, he ceased to oppose the plaintiff's demand, and so submitted that the court should give judgment.^(h)

In process of time, when the proceedings were no longer *ore tenus*, but the defendant was at liberty to appear by attorney, the defendant could not have nonsuited the plaintiff, in the Common Pleas, without giving a rule to declare, and calling for a declaration. If the writ were returnable in *five weeks of Easter*, or on the *last* return of any term, the defendant, having given a rule, and called for a declaration, might have entered a nonsuit, if it were not delivered *four* days or more before the *essoin*-day of the ensuing term:⁽ⁱ⁾ and if the writ were returnable on any other

(l) *Id.* 812.

(a) 12 Mod. 217.

(bb) R. M. 10 Geo. II. *reg.* 2, (b), K. B.

(cc) 2 Durnf. & East, 112.

(d) *Id.* *ibid.* 3 Durnf. & East, 123, 4. 5 Durnf. & East, 35. 7 Durnf. & East, 7; but see 2 New Rep. C. P. 404.

(e) 2 Hen. IV. 15, 23. 22 Edw. IV. 1.

(f) Hardr. 365. Gilb. C. P. 41, 2; and see *Doc. Pl.* 222.

(g) 19 Hen. VIII. 6 Moor, 79. 3 Leon. 14. Benl. & Dalis, 153, S. C. 6 Mod. 6, 7, 8. 1 Salk. 216, S. C.

(h) Gilb. C. P. 40, 41.

(i) R. M. 1654, § 15, K. B. & C. P.

return, the defendant, having in like manner given a rule, and called for a declaration, might it seems have entered a nonsuit, if it were not delivered some time during the same term.^(k) But if the defendant had appeared the first term, *and given no rule to declare, the defendant's attorney might have been compelled to accept a declaration, the second term, with an imparlance; and the declaration might have been entered as of that term, with an imparlance over to the next, or in the first term with an *incipitur*, as the case required.^(a) In such case however, if the plaintiff had not declared the second term, a nonsuit might have been entered at the end of that term, upon a continuance over by *dies datus*, but not the third term or after.^(a)

At length it was settled, agreeably to the statute 13 Car. II. stat. 2, c. 2, § 3, that "upon all process returnable the first or any other return in any term, the plaintiff shall have liberty, to the end of the next ensuing term, to deliver his declaration to the defendant's attorney, or leave the same in the office: and the defendant's attorney having entered his appearance with the proper officer, as of that term in which the process was returnable, and, in the Common Pleas, given a rule to declare in the proper office, at the end of the ensuing term, or in *four* days after the end thereof, and called on the plaintiff's attorney or clerk in court, if he can be found; the defendant may, at any time in the vacation of such ensuing term, after the rule for declaring is out, sign his *non pros* for want of a declaration, and afterwards: and the plaintiff shall not, without leave of the court, have any longer time to declare, other than the time to be limited by the defendant's rule."^(b) But if the plaintiff be not called upon by rule to declare, he hath all the vacation of the second term to declare in.^(c) If the plaintiff do not declare in that time, or obtain a rule for time to declare, his cause is out of court; and if he afterwards declare, the court will set aside the declaration for irregularity.^(d) So, where a writ was returnable the last return of *Trinity* term, and an appearance being entered, the plaintiff proceeded no further, nor obtained a rule for time to declare, upon which the defendant in *Hilary* term, being the third term after the return of the writ, gave the plaintiff a rule to declare, and for want of a declaration signed judgment of *non pros*; the court of Common Pleas held it to be irregular, because the plaintiff by his own default was out of court at the end of the second term, and the defendant therefore could not rule him to declare but at the end of the term, or within four days after.^(e) And where one of two defendants having been holden to bail in *Trinity* term, the plaintiff proceeded to outlawry against the other, and delivered a declaration against the former on the first day of *Easter* term following, not having obtained a rule for time to declare, it was holden that the cause was out of court, and the bail entitled to an *exoneretur*.^(f)

When the defendant is *outlawed* before judgment, the original is determined, so that the plaintiff cannot declare thereon while the outlawry remains in force, but is put to a new action:^(g) And if two defend-

(k) *Id.* § 15, C. P.

(a) R. M. 164, § 15. K. B. § 14, C. P.

(b) R. H. 9 Ann. reg. 3, C. P.; and see R. M. 10 Geo. II. reg. 2, (b), K. B.

(c) Cas. Pr. C. P. 13. Pr. Reg. 121, S. C.

(d) 5 Taunt. 649; and see 2 Blac. Rep. 876, 7. 3 Bos. & Pul. 221. 4 Taunt. 715.

(e) *Allan v. Millward*, H. 30 Geo. III. C. P. Imp. C. P. 7 Ed. 533, 4.

(f) 2 New Rep. C. P. 404.

(g) Cro. Eliz. 706. W. Jon. 442.

ants are *jointly sued, and one appears, and the other makes [*423] default and is outlawed, he who appears shall be charged with the whole.(a) But if a defendant be outlawed, and he reverse the outlawry and give bail, as he ought, the plaintiff may declare against him within *two* terms after the outlawry is reversed; and if he do not declare within that time, the declaration may be refused, but the plaintiff shall not be non-prossed:(bb) And it seems, that after the reversal of an outlawry, the plaintiff has his election, either to declare upon the first original, or to sue out a new one.(cc) In declaring against A. upon a joint contract by A. and B. it is not enough to allege that B. was in *due manner* outlawed, without adding that he was outlawed *in that suit*:(dd) But an allegation that a co-defendant was outlawed by due course of law, at the suit of the plaintiff, *in this plea and suit*, is sufficient, without a *prout patet per recordum*.(ee)

In the Common Pleas, the course of that court is, that although the original be laid in *London*, for expediting the outlawry, yet when the defendant comes in, the plaintiff may declare against him in any other county, be the action local or transitory:(ff) And where a writ of *capias quare clausum fregit* was issued against two defendants, with an *ac etiam* in *debt*, upon which one of them was arrested and put in bail, and the plaintiff proceeded to outlawry against the defendant, on an original writ issued against both, and afterwards declared against the former defendant only, alleging that he was outlawed in that suit; the court, upon reference to its officers, held that these proceedings were regular, and would not set aside the declaration:(g) observing, that it was founded on the original, on which one of the defendants was outlawed; and with respect to the writ with the *ac etiam*, on which the other defendant was arrested and put in bail, that writ was issued only for the purpose of bringing him into court, and having so done, it had answered its purpose; and that when a defendant is in court, the plaintiff may declare against him for any cause of action he may think proper.(h) In a subsequent case, they would not entertain a motion made on behalf of a defendant, who had been arrested and was in court by his bail, which went to impeach an outlawry against another defendant, who was not before the court.(i) The defendant in this court shall have his costs, to be taxed by the prothonotaries, if the plaintiff do not proceed within *two* terms next after notice of the reversal of the outlawry.(k)

If the plaintiff be not ready to declare, before the end of the next term after the return of the process, he may obtain a side-bar or treasury rule from the clerk of the rules in the King's Bench,(l) or one of the secondaries in the Common Pleas,(m) for time to declare, until the first day of the *ensuing term; a copy of which rule should be served on the [*424] defendant's attorney, or stuck up in the King's Bench or prothonotaries' office, if the defendant have not appeared: And, in the Common Pleas, there is no difference in this respect, between a rule for time to de-

(a) 5 Co. 119, (a). W. Jon. 442; but see 1 Maule & Sel. 242.

(bb) Com. Dig. tit *Pleader*, C. 4.

(cc) W. Jon. 443. March. 9.

(dd) 3 East, 144; but see Co. Lit. 128, b, 352, b.

(ee) 7 East, 50.

(ff) 3 Lev. 245.

(g) 2 Moore, 87. 8 Taunt. 187, S. C.

(h) 2 Moore, 89. 8 Taunt. 189, S. C.; and see 2 Moore, 301. 8 Taunt. 304, S. C.

(i) 2 Moore, 90.

(l) Append. Chap. XVII. § 1.

(k) R. T. 33 Car. II. C. P.

(m) *Id.* § 2.

clare in *replevin*, and in other actions. (a) This rule cannot in general be had, where the defendant is a prisoner. (b) But where, on a writ against three, one was arrested and lay in gaol, and the other two absconded, the court refused to discharge the prisoner; saying, that he must appear for all, or lie in gaol till the other two were outlawed. (c) In such case however, the plaintiff, in the Common Pleas, must move the court, or apply to a judge, for time to declare against the prisoner, until the outlawry or appearance of the other defendants; (d) and show that he is using all due diligence in proceeding against them. If the plaintiff be still unprepared, he may obtain rules for *further* time to declare, from the beginning to the end of the term, and from the end of one term to the beginning of another, alternately, as often as may be necessary. But after several rules have been obtained, the courts will make a *peremptory* one, for the plaintiff to declare before the end of the term in which the motion is made. (e) The rule for this purpose, in the King's Bench, is absolute in the first instance, and drawn up on a motion paper signed by counsel; but, in the Common Pleas, it is a rule to show cause: And, in the latter court, when the plaintiff does not declare, after having obtained time for that purpose, the defendant may sign judgment of *non pros*, without giving a rule to declare. (f)

In the King's Bench, when the defendant has appeared and filed bail upon a bill of *Middlesex* or *latitat*, &c. or the plaintiff has filed it for him according to the statute, the plaintiff may declare *by the bye*, in as many different actions as he thinks fit, at any time before the end of the next term after the return of the process: (g) And after a plea in abatement, if the plaintiff enter on the roll *quod billa cassetur, et defendens eat sine die*, he may at any time during the same term in which the process is returnable, deliver a declaration *by the bye* against the defendant. (h) It is also a settled point, that when bail is filed by the *defendant*, upon a bill of *Middlesex*, or *latitat*, &c. any other person besides the plaintiff may declare against him *by the bye*, at any time during the term wherein the process is returnable, *sedente curiâ*: (i) But where bail is filed by the *plaintiff* according to the statute, this is not such a general bringing of the defendant into court, as will warrant any person, except the plaintiff, in delivering a declaration *by the bye* against him. (k) The plaintiff in the original action must [*425] declare in *chief*, before he can declare *by the bye*: (l) but any other

*person may declare *by the bye*, before the delivery of a declaration in *chief*: (aa) And indeed, as the plaintiff is allowed *two* terms for declaring, another person who has only *one*, might otherwise be deprived of the opportunity of declaring *by the bye*. Where the plaintiff, having declared in his own right, afterwards declared as executor, without indorsing the declaration "*by the bye*," when delivered, but the defendant's

(a) 5 Taunt. 35. *Ante*, 417.

(b) Pr. Reg. 327.

(c) *Per Cur. E.* 12 Geo. III. K. B. 2 Crompt. 3 Ed. 8 Barnes, 396, 401. 2 Blac. Rep. 759.

(d) *Id. ibid.* 2 New Rep. C. P. 404.

(e) Append. Chap. XVII. § 5, 6.

(f) 1 H. Blac. 87.

(g) R. M. 10 Geo. II. *reg.* 1, (b), K. B.; but see Gilb. K. B. 310.

(h) 5 Durnf. & East, 634.

(i) Poph. 145. Carth. 377. 1 Salk. 2, S. C. Gilb. K. B. 310, 342. 4 Bur. 2181. 3 Durnf. & East, 627.

(k) 2 Str. 1027. *Cas. temp.* Hardw. 207, S. C. R. M. 10 Geo. II. *reg.* 1, K. B.

(l) 6 Durnf. & East, 158. 7 Durnf. & East, 80. But taking the declaration by the bye out of the office, is a waiver of the irregularity. 3 East, 342.

(aa) *Con. Phillip's case*, 1 Crompt. 3 Ed. 96.

attorney was told it was "*by the bye*," the court of King's Bench, on the opinion of the master, held it to be regular.(b)

In actions by *original* in the King's Bench, the practice of declaring by the bye is similar to that in the Common Pleas; where the *same* plaintiff is allowed to declare against the defendant by the bye, in as many different actions as he thinks fit, at any time before the end of the next term after the return of the process;(c) and he may so declare in the same term, though the debt and costs on the first declaration are paid:(d) but he cannot declare by the bye, after the end of that term;(e) nor can any other person declare by the bye, except the plaintiff.(f) If the plaintiff sue out a writ at the suit of himself and wife, he may deliver a declaration by the bye at his own suit:(gg) but if an action be brought by the husband only, and a declaration delivered in that action, he cannot declare by the bye at the suit of himself and wife, there being no process to warrant it.(hh) If the writ be special, the plaintiff cannot declare by the bye, till he has declared in the original action:(ii) but if it be with an *ac etiam* only, he may deliver as many declarations as he thinks fit thereon against the defendant, during the same term; though he will lose his bail, by declaring for a different cause of action from what is expressed in the *ac etiam*.(kk) So, on a *capias* with an *ac etiam*, at the suit of an executor, the plaintiff cannot deliver a declaration by the bye at the suit of himself personally; but if the writ be a general *quare clausum fregit*, the plaintiff may declare by the bye as executor, or *qui tam*, or as assignee of the sheriff.(ll)

The *parts* of a declaration are, first the *title*; secondly, the *venue*; thirdly, the *commencement*; fourthly, the statement of the *cause of action*; and lastly, the *conclusion*.(m) The declaration by *bill*, in the King's Bench, *should regularly be *entitled* of the day on which the [*426] writ is returnable; for the bill, of which it is a copy, cannot be filed till the bail is put in, which cannot be till the return of the writ:(a) And where there are several defendants, who put in bail of different terms, the declaration should be entitled of the term when the last bail was put in.(bb) In practice it is usual, in both courts, when the cause of action will admit of it, to entitle the declaration *generally*, of the term in which the writ is returnable; and though filed or delivered, it cannot regularly be en-

(b) *Per Cur.* E. 21 Geo. III. K. B. Append. Chap. XVIII. § 4.

(c) *Pr. Reg.* 142.

(e) Barnes, 346.

(gg) *Id.* 132.

(ii) *Cas. Pr. C. P.* 58.

(ll) *Hainey v. Sparing*, E. 10 Geo. III. C. P. Imp. C. P. 7 Ed. 190.

(m) In Heath's Maxims, it is said that a count or declaration, being terms equivalent, ought principally to contain three things: first, the names of the plaintiff and defendant, who in actions *real* are called *demandant* and *tenant*, and the nature of the action; and this by some is termed the demonstration, or *demonstrative* part of the count: secondly, the time, the place, and the act; in which ought to be comprehended how and in what manner the action did accrue, or first arise between the parties; when, what day, what year, and what place, and to whom the action shall be given; which is called the *declarative* part of the count: and lastly, the *perclose* or conclusion, which is *unde deterioratus est*, &c.: in which the plaintiff ought to aver and proffer to prove his *suit*, and show the *damage* he hath sustained by the wrong and injury done by the defendant: And the declaration, according to this definition, consisting of a *tria*, somewhat resembling the logical *major*, *minor*, and *conclusion*, some of the ancients, (among whom none was more fond of it than Mr. Fleetwood, the famous recorder of London,) conceived to be a perfect syllogism. Heath's Max. 2. And see further, as to the several *parts* of a declaration. 1 Chit. Pl. 4 Ed. 234, &c.

(a) *Cas. temp.* Hardw. 141; but *vide ante*, 218, 282.

(bb) 1 Wils. 242.

(d) *Id.* 144.

(f) *Cas. Pr. C. P.* 6.

(hh) *Id.* 131. Barnes, 337. *Pr. Reg.* 142, S. C.

(kk) *Id. ibid.* *Pr. Reg.* 137, S. C. 3 Wils. 61.

titled, of a subsequent term: (c) And, in the Common Pleas, after the removal of a *replevin* cause by writ of *recordari facias loquelam*, the declaration must be entitled of the term in which the writ is returnable, or that of the appearance. (d) But the declaration should always be entitled after the time when the cause of action is stated to have accrued: therefore, when the cause of action is stated to have accrued after the first day of the term in which the writ is returnable, the declaration should be entitled of a subsequent day in that term, and not of the term generally; for a general title refers to the first day of the term, and upon such a title it would appear that the action was commenced before the cause of it accrued. Yet, where the cause of action was stated to have accrued on the first day of term, the court of King's Bench on demurrer held, that the declaration might be entitled of the term generally: for the delivery of the declaration is the act of the party, and in ancient times it could not have been delivered till the sitting of the court; so that the cause of action might well have accrued before the actual delivery of the declaration. (e) So, where a cause of action arose on the 29th of *January*, being the first day of the *fourth* year of the reign of his present majesty, and the declaration was entitled "*Saturday* next after 15 days of *St. Hilary* in *Hilary* term, in the *third* year of King *George* the 4th," which would be the 1st of *February*, in the *fourth* year of his reign, the court on demurrer held, that the declaration was properly entitled, though the plaintiff appeared in terms to have commenced his action, before the cause of it had arisen. (f) And it is now holden to be no error, to entitle the declaration of a term generally, though the cause of action is stated therein to have accrued after the first day of the term. (g)

When a declaration is improperly entitled, the plaintiff may have it corrected, on an affidavit of the fact: (h) And leave has been given to [*427] amend the declaration, by entitling it of the day on which it was actually delivered, instead of the term generally, in order to accord with an averment therein, that other defendants named in the writ were then outlawed. (a) So, in an action against the marshal for an escape, where the bill was entitled generally of *Michaelmas* term, and the escape was alleged to have taken place on the 15th *November*, the court, after special demurrer, allowed the plaintiff to amend, on payment of costs; although it appeared by affidavit that the prisoner had returned into the custody of the marshal, before any application for liberty to amend was made. (b) And the title of a declaration may be set right, at the instance of the defendant, if necessary for his defence: (cc) Thus, where the declaration is entitled of the term generally, and the defendant pleads *plene administravit*, (dd) or a *tender* made before the exhibiting of the bill, upon which he would give in evidence an administration of assets, or tender made, between the first day of the term to which the bill relates, and the day of suing out the

(c) 3 Durnf. & East, 624.

(d) 5 Taunt. 771. 1 Marsh. 341, S. C. Ante, 417.

(e) 1 Durnf. & East, 116; and see 3 Wils. 154. 2 Blac. Rep. 735, S. C.

(f) 2 Dowl. & Ryl. 868; and see 7 Barn. & Cres. 406.

(g) 10 Moore, 194. 2 Bing. 469. 1 McClel. & Y. 202, S. C.

(h) 1 Wils. 78. 2 Wils. 256. 7 Durnf. & East, 474; and see 2 Chit. Rep. 22; but see 6 Taunt. 19. 1 Marsh. 419, S. C.

(a) 1 East, 133.

(b) 6 Barn. & Cres. 196.

(cc) 5 Barn. & Cres. 151. 7 Dowl. & Ryl. 731, S. C.

(dd) Cas. temp. Hardw. 141. And see further, as to the mode of entitling the declaration, and the consequences of a mistake therein, 1 Chit. Pl. 4 Ed. 237, &c.

writ; he has a right to call upon the plaintiff to entitle his declaration properly.(e)

The *venue* in *personal* actions, or county where the action is laid and intended to be tried, is *local* or *transitory*.(f) When the action could only have arisen in a *particular* county, it is *local*, and the venue must be laid in that county: for if it be laid elsewhere, the defendant may demur to the declaration;(g) or the plaintiff, on the general issue, will be non-suited at the trial.(h) Such are all *real* and *mixed* actions, and actions of *ejectment*, and trespass *quare clausum fregit*, &c. And an action on the case for a nuisance is held to be local in its nature; and the nuisance must be proved to have been committed in the county where the venue is laid.(i) But where the action might have arisen in *any* county, as upon contracts, it is *transitory*, and the plaintiff may in general lay the venue wherever he pleases;(k) subject however to its being changed by the court, if not laid in the very county where the action arose.

To use the words of Lord Mansfield, in the case of *Fabrigas v. Moszyn*:(l) "There is a *formal* and a *substantial* distinction, as to the locality of trials. I state them," says he, as "different things: With regard to matters arising within the realm, the *substantial* distinction is, where the proceeding is *in rem*, and where the effect of the judgment could not be had, if it were laid in a wrong place. That is the case of all *ejectments*, where possession is to be delivered by the sheriff of the county; and as trials in *England* are in particular counties, and the officers are county*officers, the judgment could not have effect, if the action [*428] were not laid in the proper county."(aa)

With regard to matters that arise out of the realm, there is a *substantial* distinction of locality too; for there are some cases that arise out of the realm, which ought not to be tried any where but in the country where they arise: as if two persons fight in *France*, and both happening casually to be here, one should bring an action of *assault* against the other, it might be a doubt whether such an action could be maintained here; because, though it is not a criminal prosecution, it must be laid to be against the *peace* of the king; but the breach of the peace is merely local, though the trespass against the person is transitory. So, if an action were brought relative to an estate in a foreign country, where the question was a matter of title only, and not of damages, there might be a solid distinction of locality.

But there is likewise a *formal* distinction, which arises from the mode of trial: for trials in *England* being by jury, and the kingdom being divided into counties, and each county considered as a separate district or principality, it is absolutely necessary that there should be some county where the action is brought in particular, that there may be a process to the sheriff of that county, to bring a jury from thence to try it. This matter of form goes to all cases that arise abroad: but the law makes a distinction between *transitory* and *local* actions. If the matter, which is the cause of a transitory action, arise within the realm, it may be laid in any

(e) 1 Str. 638. 1 Wils. 39, S. C. cited. 1 Wils. 304, S. P.; and see 4 Esp. Rep. 73, 4.

(f) Gilb. C. P. 84.

(g) 1 Wils. 165.

(h) Cowp. 410. 2 Blac. Rep. 1033.

(i) 1 Taunt. 379; but see 2 Campb. 3. 1 Bos. & Pul. 225.

(k) Gilb. C. P. 84; and see 1 Wms. Saund. 5 Ed. 74, (2).

(l) Cowp. 176, 7; and see 2 Camp. 274. Steph. Pl. 306, &c.

(aa) 7 Durnf. & East, 587, 8.

county, the place not being material; as if an imprisonment be in *Middlesex*, it may be laid in *Surrey*, and though proved to be done in *Middlesex*, it does not at all prevent the plaintiff from recovering damages. The place in transitory actions is never material, except where by particular acts of parliament, it is made so; as in the case of churchwardens and constables, and other cases which require the action to be brought in the county. The parties, upon sufficient ground, have an opportunity of applying to the court in time to change the venue; but if they go to trial without it, that is no objection.

So, all actions of a transitory nature, that arise abroad, may be laid as happening in an *English* county.^(b) But there are occasions which make it absolutely necessary to state in the declaration, that the cause of action really happened abroad; as in the case of specialties, where the date must be set forth. If the declaration state a specialty to have been made at *Westminster* in *Middlesex*, and upon producing the deed, it bears date at *Bengal*, the action is gone; because it is such a *variance* between the deed and the declaration, as makes it appear to be a *different* [*429] instrument. *But the law has in that case invented a fiction; and has said, the party shall first set out the description truly, and then give a venue only for form, and for the sake of trial, by a *videlicet*, in the county of *Middlesex*, or any other county. In declaring on foreign bills, though it is usual to state that they were drawn at the place where they bear date, adding the venue under a *videlicet*,^(a) yet this does not seem to be necessary.^(bb)

In an action upon a lease for rent, &c., when the action is founded upon the privity of *contract*, it is *transitory*, and the venue may be laid in any county, at the option of the plaintiff; but when the action is founded upon the privity of *estate*, it is *local*, and the venue must be laid in the county where the estate lies.^(c) Thus, in an action of *debt* or *covenant*, by the lessor against the lessee, the action being founded on the privity of contract, is transitory.^(d) So, if an action of *debt* be brought by the lessor against the *executor* of the lessee, in the *detinet* only, it is transitory.^(e) And *debt* for use and occupation is not a local action.^(f) But if the action be brought, as it may, against the executor of the lessee, as *assignee*, upon the privity of estate, in the *debet* and *detinet*, it is local.^(g) In *covenant* by the grantee of the reversion against the lessee, the action being founded on the privity of contract, which is transferred from the lessor to the grantee, by the operation of the statute 32 Hen. VIII. c. 34, the action is transitory.^(h) But in *debt* by the assignee⁽ⁱ⁾ or devisee^(k) of

(b) In a replication to a plea of *ne unques accouple*, &c., in a writ of *dower*, alleging a marriage in *Scotland*, it is not necessary to state, by way of venue, that the marriage was had in any place in *England*. 2 H. Blac. 145. Nor is it necessary to lay a venue in a plea in abatement, that another person ought to have been sued jointly with the defendant; and if it be pleaded that such other person is alive, to wit, in *Spain*, it will be considered as pleaded without any venue. 7 Durnf. & East, 243; and see 1 Wms. Saund. 5 Ed. 8, a, (1). Steph. Pl. 306, &c.

(a) Bayley on Bills, 3 Ed. 175.

(bb) 3 Campb. 304, 5; but see 2 Barn. & Ald. 301. 1 Barn. & Cres. 16. 2 Dowl. & Ryl. 15, S. C.

(c) 1 Wms. Saund. 5 Ed. 241, b, (6.)

(d) 3 Lev. 154. 6 Mod. 194. 2 Str. 776; and see 2 Salk. 651.

(e) Gilb. *Debt*, 403. Gilb. C. P. 91.

(g) 2 Lev. 80. 3 Keb. 135, S. C. Gilb. *Debt*, 403. Gilb. C. P. 91.

(h) 1 Wms. Saund. 5 Ed. 238. Carth. 183. 1 Wils. 165.

(i) Cro. Car. 183. 1 Wils. 165.

(f) 5 Taunt. 25.

(k) W. Jon. 43.

the lessor, against the lessee, which is founded on the privity of estate, the action is local. So, if an action of *debt* or *covenant* be brought by the lessor, ^(l) or his personal representatives, ^(m) or by the grantee of the reversion, ⁽ⁿ⁾ against the assignee of the lessee, it is local, and the venue must be laid in the county where the land lies: and accordingly, in *covenant* against the assignee of the lessee of premises, described in the declaration as situate within the liberties of *Berwick* upon *Tweed*, the venue cannot be laid in *Northumberland*. ^(o)

There are some actions, however, of a *transitory* nature, wherein the venue, by act of parliament, must be laid in a particular county. Thus, by the statute 31 Eliz. c. 5, § 2, "in any declaration or information, the offence against any *penal* statute shall not be laid to be done in any other county but where the contract, or other matter alleged to be the offence, was in truth done; and every defendant in such action or information may traverse, and allege that the offence was not committed in the county where it is alleged: which being tried for the defendant, *or if the [*430] plaintiff be thereupon nonsuit, then the plaintiff shall be barred in that action or information." And, by the statute 21 Jac. I. c. 4, "in all informations to be exhibited, and in all bills, counts, complaints and declarations, to be commenced against any person or persons, either by or on behalf of the king or any other, for or concerning any offence committed or to be committed, against any penal statute, the offence shall be laid and alleged to have been committed in the county where such offence was in truth committed, and not elsewhere." The former of these statutes is holden to be still in force; and it extends to all actions or informations brought by common informers upon penal statutes, whether made before or after the 31 Eliz. ^(a) And hence it is a general rule, that the venue in such actions or informations must be laid in the county where the offence was committed. The latter statute also extends as well to offences of *omission*, as of *commission*. ^(b) There is an exception however, in the statute, that it shall not extend to any such officers of record as had, in respect of their offices, theretofore lawfully used to exhibit informations, or sue upon penal laws; which exception extends to informations by the attorney general, in the court of Exchequer; ^(c) and there are some other exceptions in the statute, relating to offences concerning champerty, &c. But the statute 21 Jac. I. c. 4, does not extend to offences created by *subsequent* statutes; ^(d) and neither this statute, ^(e) nor the 31 Eliz. c. 5, ^(f) extends to actions brought by the *party grieved*. In an action on the statute 1 & 2 Ph. & M. c. 12, for driving a distress out of the hundred, if the hundred in which the cattle were distrained be in one county, and the hundred into which they were driven in another, the venue may be laid in either county. ^(g) But an action on the statute 3 Geo. II. c. 26, for selling coals, as and for a sort which they really were not, must be brought in the county in which the

(l) 6 Mod. 194; and see 7 Durnf. & East, 583. 2 East, 580. (m) Latch, 197.

(n) Carth. 182. 3 Mod. 336. 1 Salk. 80. 1 Show. 191, S. C. 7 Durnf. & East, 583.

(o) 3 Bing. 459.

(a) Com. Dig. tit. *Action*, N. 10 Bul. Ni. Pri. 195. 4 Bur. 2467. 2 Durnf. & East, 238. 2 Bos. & Pul. 381. 4 East, 385. 9 East, 296. 5 Taunt. 754. 1 Marsh. 320, S. C. *Id.* 321, (a). 3 Maule & Sel. 429.

(b) 5 Maule & Sel. 427.

(c) Bunb. 236, 261. Parker, 182. 3 Anstr. 871.

(d) 1 Salk. 372, 3. Bul. Ni. Pri. 195. Sel. Ni. Pri. 6 Ed. 637. 3 Maule & Sel. 438, 9; 442, 3; 445.

(e) 1 Show. 354. Bul. Ni. Pri. 196. (f) *Ante*, 14. Bul. Ni. Pri. 195.

(g) 2 Campb. 266. 2 Taunt. 252, S. C.

coals were *delivered*, and not where they were contracted for.(*h*) And a penal action for *non-residence* must be brought in the county in which the living is situated.(*i*) In an action brought to recover penalties on the statute of *usury*, it appeared that the contract was made in one county, and the money paid in another; and the court held, that the venue ought to have been laid in the county where the usurious interest was received.(*k*)

There are also certain other actions, wherein the venue, which would otherwise be transitory, must by various acts of parliament, made for protecting officers in the execution of their duty, be laid in the county wherein the facts were committed, and not elsewhere. Such are actions upon the

case, or *trespass* against justices of peace, mayors or bailiffs of [*431] cities or *towns corporate, headboroughs, portreves, constables, tithing-men, church-wardens, &c., or *other* persons acting in their aid and assistance, or by their command, for anything done in their official capacity;(a) and also actions against any person or persons, for anything done by an officer or officers of the *excise*,(b) or *customs*,(cc) or *others* acting in his or their aid, in execution or by reason of his or their office; or for anything done in pursuance of the act for consolidating the provisions of the acts relating to the duties under the management of the commissioners for the affairs of taxes, or any act for granting duties to be assessed under the regulations of that act,(dd) &c.; against an officer of the army, navy, or marines, for anything done in the execution of, or by reason of his office;(ee) or against any person, for anything done in pursuance of the acts relative to larceny, &c., or malicious injuries to property.(ff) But an action against a constable is not confined to the proper county, where he does not act in execution of his office.(gg)

Also, by the 42 Geo. III. c. 85,(hh) the provisions of the statute 21 Jac. I. c. 12, with regard to the *venue*, &c., are extended to all persons having, holding or exercising, or being employed in any public employment, or any office, station or capacity, either civil or military, either in or out of this kingdom; and who under and by virtue or in pursuance of any act or acts of parliament, &c., have, by virtue of any such public employment, &c., power or authority to commit persons to safe custody: and "all such persons, having such power or authority as aforesaid, shall have and be entitled to all the privileges, benefits and advantages, given by the provisions of the said act, as fully and effectually to all intents and purposes, as if they had been specially named therein. Provided always, that when any action, bill, plaint or suit, upon the case, trespass, battery, or false imprisonment, shall be brought against any such person as is in this act described as aforesaid, in this kingdom, for or upon any act, matter or thing done out of this kingdom, it shall be lawful for the plaintiff bringing the same, to lay such act, matter or thing to have been done in *Westminster*, or in any county where the person against whom any such action, bill, plaint or suit shall be brought, shall then reside."

(h) 4 East, 385.

(i) 2 Chit. Rep. 420.

(k) 2 Barn. & Cres. 700. 5 Dowl. & Ryl. 616, S. C.

(a) Stat. 21 Jac. I. c. 12, § 5.

(b) 23 Geo. III. c. 70, § 34.

(cc) 24 Geo. III. sess. 2, c. 47, § 35, 39; which statute, however, is repealed by that of 6 Geo. IV. c. 105; and see stat. 28 Geo. III. c. 37, § 23. 6 Geo. IV. c. 108, § 97.

(dd) Stat. 43 Geo. III. c. 99, § 70.

(ee) Stat. 6 Geo. IV. c. 108, § 97.

(ff) Stat. 7 & 8 Geo. IV. c. 29, § 75, &c. 30, § 41.

(gg) 1 Str. 446. 3 Bur. 1742; and see 2 Esp. Rep. 542. 3 Esp. Rep. 226. 2 Stark. Ni. Pri. 445.

(hh) § 6.

On the other hand, the venue in a *transitory* action is in some cases *altogether* optional in the plaintiff; as where the action arises in *Wales* or beyond the sea, or is brought upon a bond, or other specialty, promissory note, or bill of exchange; for *scandulum magnatum*, or a libel dispersed throughout the kingdom; against a carrier, or lighterman; or for an escape, or false return; and in short, wherever the cause of action is not *wholly and necessarily confined to a single [*432] county.^(a) In these cases, the venue cannot be changed by the courts, but upon a special ground.

In actions by *original*, the venue, in the King's Bench, should in general be laid in the county where the writ was brought:^(b) and if it be not so laid, the court will set aside the proceedings for irregularity, and the plaintiff, we have seen,^(c) will lose his bail. But, in the Common Pleas, though the practice was formerly the same as in the King's Bench,^(d) where an arrest shall be by virtue of a *capias ad respondendum* in any county, and bail shall be put in thereupon, and the plaintiff shall think proper afterwards to declare in a different county, it shall not be deemed a waiver of the bail; but the recognizance of bail shall be as effectual for the benefit of the plaintiff, and he may proceed thereon against the bail, in the same manner as if the plaintiff had declared against the defendant in the same county in which the bail was put in.^(e) And it is a general rule, that the county in the margin will help, but not hurt:^(f) Hence, if there be no venue, or it be not laid with certainty,^(g) in the body of the declaration, reference must be had to the margin; but where a proper venue is laid in the body, the county in the margin will not vitiate it.^(h) In an action upon the case for a nuisance, if no place be alleged where the nuisance was committed, the county in the margin shall be intended.⁽ⁱ⁾ And, in stating transitory facts, it is enough to allege a county for a venue, without a parish.^(k)

In actions by *bill* against common persons, in the King's Bench, the declaration begins by stating the defendant to be in custody of the marshal;^(l) or, if he be in custody of the sheriff, or bailiff or steward of a franchise having the return and execution of writs, it should allege in whose custody he is, at the time of the declaration, by virtue of the process of the court, at the suit of the plaintiffs.^(m) If the action be brought by or against particular persons, as *assignees*, *executors*, &c. the special character in which they sue, or are sued, should be set forth in the beginning of the declaration: And in actions against *attorneys*, instead of stating that

(a) See the cases referred to in Chap. XXIV.

(b) But *vide ante*, 423.

(c) *Ante*, 294.

(d) Barnes, 116.

(e) R. H. 22 Geo. III. C. P.

(f) 1 Wms. Saund. 5 Ed. 308, (1) And note, Lord *Hardwicke* was of opinion, that the *ff* in the margin of the declaration, was not originally meant to signify the county, but was only a denotation of each section or paragraph in the record. *Cas. temp. Hardw.* 344.

(g) 2 Blac. Rep. 847. 3 Wils. 339, S. C.

(h) *Cas. temp. Hardw.* 343, 4. Barnes, 483. 3 Durnf. & East, 387.

(i) 1 Taunt. 379; and see 2 East, 497. 5 Taunt. 789. 1 Marsh. 363, S. C. And see further, as to the *venue* in personal actions, whether local or transitory, and the mode of stating it, with the consequences of a mistake, and when aided, 1 Chit. Pl. 4 Ed. 239, &c., 252, &c. Steph. Pl. 298, &c.

(k) 3 Maule & Sel. 148.

(l) Append. Chap. XV. § 19. Chap. XVII. § 16, &c. Chap. XLVI. § 26. And for the form of the beginning and conclusion of a declaration in the Exchequer, see Append. Chap. XVII. § 19, 20, 21.

(m) Append. Chap. XV. § 1, &c.

[*433] they are in custody of the marshal or sheriff, it should be stated that *they are *present* in court; (a) or, in actions against *peers* or *members* of the house of commons, that they have *privilege* of parliament. (b)

In *account*, *covenant*, *debt*, *annuity*, *detinue*, and *replevin*, where the original is a *summons*, the declaration by *original writ*, in the King's Bench or Common Pleas, begins by stating that the defendant was *summoned* to answer: in actions on the *case*, *trespass*, *ejectment*, &c. where the original is an *attachment*, it states that he was *attached* to answer. (c) But where by the declaration it appears that the defendant was *summoned*, instead of *attached*, or *vice versâ*, the defendant cannot demur, without craving *oyer* of the original, and setting it forth, in order to show that it does not warrant the declaration. (d)

It was formerly usual for the declaration by *original* to repeat the whole of the original writ. (e) But this practice being productive of great and unnecessary prolixity, a rule of court was made, that "declarations in actions upon the *case*, and *general* statutes, other than *debt*, repeat not the original writ, but only the nature of the action; as that the defendant was *attached* to answer the plaintiff, *in a plea of trespass upon the case*, or *in a plea of trespass and contempt, against the form of the statute*." (f) And in *trespass vi et armis*, commenced by original, it has been deemed sufficient, on a general demurrer, to state in the declaration, that the defendant was attached to answer the plaintiff, *in a plea of trespass*, without setting forth the circumstances. (g) It even seems, that the omission of the words "and thereupon the said plaintiff by — his attorney complains," in the beginning of a declaration of trespass on the case, in the Common Pleas, is no cause of special demurrer. (h) And it is no objection to a declaration, that the parties, having been once called by their names, are afterwards designated by the terms *plaintiff* and *defendant*; (i) which is now become the common mode of declaring.

In actions upon *contracts*, the declaration must in all cases state the *contract* upon which the action is founded, and the *breach* of it: And this alone, without more, is in some cases sufficient: as in action of *debt* on bond, by the obligee against the obligor. *Contracts* are either in [*434] *writing*, (k) *or by *parol*; if in writing, they are either by *deed* under seal, or by *agreement* without seal; and they are either *express* or *implied*; the former are created by the words, the latter by the

(a) Append. Chap. XIV. § 18, &c.

(b) *Id.* Chap. VI. § 12, &c.

(c) Com. Dig. tit. *Pleader*, C. 12. 2 Wms. Saund. 5 Ed. 1, (1). Append. Chap. XVII. § 7, &c. Chap. XLVI. § 20, &c.

(d) Cro. Jac. 108. Cro. Car. 91. 1 Wms. Saund. 5 Ed. 318. 1 Sid. 423. 2 Keb. 544. 1 Mod. 3, S. C. 4 Mod. 246. 2 Salk. 701. 6 Mod. 28, S. C. 2 Ld. Raym. 903. Fort. 341. Cas. temp. Hardw. 189. *Barnard v. Moss*, H. 28 Geo. III. C. P. Com. Dig. tit. *Pleader*, C. 12, 14, 3 M. 6; and see 2 Wils. 85, 395, 413. 1 H. Blac. 249. 11 East, 62. 1 Chit. Pl. 4 Ed. 256, 7. Steph. Pl. 424, 5. And as *oyer* cannot now be had of the original writ, it seems that the declaration is no longer demurrable for the above cause. 1 Wms. Saund. 5 Ed. 318, (3); but see 2 Chit. Rep. 638.

(e) Com. Dig. tit. *Pleader*, C. 12.

(f) R. M. 1654, § 12, K. B. R. M. 1654, § 16, C. P.

(g) Carth. 108; and see 1 Wms. Saund. 5 Ed. 318, (3).

(h) 1 Bos. & Pul. 366. And see further, as to the mode of *commencing* declarations, 1 Chit. Pl. 4 Ed. 254, &c. Steph. Pl. 420.

(i) 6 Taunt. 121. 2 Marsh. 101, S. C. 6 Taunt. 406.

(k) For the cases in which it is necessary that the contract should be in *writing*, see the statute of frauds and perjuries, 29 Car. II. c. 3, § 4, 17.

obvious meaning and intention of the parties. Thus, a covenant is implied, from the *habendum* in a lease, for quiet enjoyment; and from the *reddendum*, for payment of the rent.(a) So, on the indorsement of a note or bill, it is implied, that if the drawer or acceptor do not pay it, the indorser will, on having due notice of its non-payment:(b) And in general it may be remarked, that promises are implied, to pay money on legal liabilities.(c) With regard to their operation, contracts are *present* or *future*; under the former, may be classed *warranties*, that a horse is sound, &c.: the latter are to do or omit some act, or to procure it to be done or omitted by another.(d) Contracts must be stated in the declaration as they were really made, either in terms, or according to their legal effect;(e) and if there be a variance, it will be fatal,(f) unless it be rectified, by amending

(a) 3 Bac. Abr. 296.

(b) Bayley, on Bills, 27, 41, 2; 57.

(c) *Ante*, 2.

(d) See further, as to *contracts in assumpsit*, 1 Chit. Pl. 4 Ed. 265, &c. Lawes, on Pleading, Chap. IV.

(e) 1 Marsh. 217, *per Gibbs*, Ch. J.

(f) For modern cases, in which *variances* between the declaration and evidence, have been holden to be *fatal*, see 1 New Rep. C. P. 351. 5 Esp. Rep. 239, S. C. 2 East, 2. 4 Maule & Sel. 505. 2 Chit. Rep. 333. 3 Moore, 79. Gow. 21, S. C. 2 Barn. & Ald. 301. 1 Chit. Rep. 28, S. C. *Id.* 60, (a). 5 Barn. & Ald. 42. 1 Barn. & Cres. 16. 3 Stark. Ni. Pri. 156, S. C. 2 Dowl. & Ryl. 15, S. C. 2 Barn. & Cres. 20. 3 Dowl. & Ryl. 211, S. C. 3 Barn. & Cres. 462. 5 Dowl. & Ryl. 319, S. C. 4 Barn. & Cres. 108. 6 Dowl. & Ryl. 200, S. C. 5 Barn. & Cres. 909. 8 Dowl. & Ryl. 643, S. C. 3 Bing. 472, in *assumpsit*; 4 Maule & Sel. 470. 6 Maule & Sel. 115. 1 Moore, 89. 2 Barn. & Ald. 765. 1 Chit. Rep. 518, S. C. 5 Moore, 164. 2 Brod. & Bing. 395, S. C. 3 Dowl. & Ryl. 145. 1 Moody & M. 6. 6 Barn. & Cres. 430, in *covenant*; *Ante*, 225, 6, in *debt* on bail bond; Ry. & Mo. 153. 1 Car. & P. 534, S. C. in *debt* for usury; 4 Barn. & Cres. 403. 6 Dowl. & Ryl. 483, S. C. 5 Barn. & Cres. 339. 8 Dowl. & Ryl. 98, S. C. in *case*, against sheriff, for escape or false return; Doug. 665. 4 Barn. & Cres. 657. 7 Dowl. & Ryl. 123. Ry. & Moore, 266, S. C. in *case*, against sheriff, on stat. 8 Anne, c. 14, § 1; 2 Barn. & Ald. 756. 1 Chit. Rep. 507, S. C. for malicious prosecution; 4 Moore, 266. 1 Brod. & Bing. 538, S. C. against agent, for misconduct; 5 Barn. & Ald. 615. 1 Dowl. & Ryl. 230, S. C. for libel; 2 Barn. & Cres. 486. 3 Dowl. & Ryl. 728, S. C. for slander of title; 5 Moore, 475, in *replevin*; and 1 Car. & P. 472, on an indictment for a conspiracy. And for cases in which *variances* have been deemed *immaterial*, see 8 East, 8. 13 East, 410. 6 Taunt. 108. *Id.* 581. 2 Marsh. 287, S. C. 8 Taunt. 197. 2 Moore, 114, S. C. 1 Chit. Rep. 60, (a). 1 Brod. & Bing. 523. 4 Moore, 515. 2 Brod. & Bing. 89, S. C. 5 Moore, 74. 2 Brod. & Bing. 359, S. C. 4 Barn. & Ald. 435. 5 Barn. & Ald. 964, S. C. 11 Price, 19. 3 Stark. Ni. Pri. 156. 1 Barn. & Cres. 18. 7 Moore, 283. 1 Bing. 34, S. C. 8 Moore, 372. 1 Bing. 355, S. C. 4 Barn. & Cres. 445. 6 Dowl. & Ryl. 533, S. C. 7 Dowl. & Ryl. 140. 3 Bing. 633. 1 Moore & P. 239. 7 Barn. Cres. 423, in *assumpsit*; 1 Stark. Ni. Pri. 294. 1 Chit. Rep. 518, (a). 4 Moore, 66. 1 Brod. & Bing. 443, S. C. 9 Price, 642. 6 Moore, 483. 3 Brod. & Bing. 186, S. C. 1 Barn. & Cres. 358. 2 Dowl. & Ryl. 662, S. C. 1 Car. & P. 80, 610. Ry. & Mo. 195. 1 Car. & P. 586, S. C. 1 Younge & J. 2, in *covenant*; *Ante*, 225, in *debt* on bail bond; 7 Moore, 231. 1 Bing. 6, S. C. in *debt* on replevin bond; 1 Durnf. & East, 235. 1 Chit. Rep. 60, in *debt* for penalties; 6 Barn. & Cres. 251, in *debt* for rent; 4 Barn. & Cres. 380. 6 Dowl. & Ryl. 500, S. C. in *debt*, against marshal, for escape; 7 Moore, 345, for diverting a watercourse; 1 Chit. Rep. 104. 4 Barn. & Cres. 161. 6 Dowl. & Ryl. 291, S. C. for disturbance of common; 1 Barn. & Cres. 77. 2 Dowl. & Ryl. 184, S. C. 7 Moore, 304. 1 Bing. 45, S. C. in *trover*; 3 Durnf. & East, 643, in *case*, on stat. 11 Geo. II. c. 19, § 3; 4 Durnf. & East, 558. Dowl. & Ryl. Ni. Pri. 35. 7 Barn. & Cres. 301; for negligence; 3 Barn. & Cres. 541. 5 Dowl. & Ryl. 292, S. C. for deceit; 2 Barn. & Cres. 2. 3 Dowl. & Ryl. 226, S. C. against the sheriff, for not taking sufficient pledges in *replevin*; 10 Price, 154; Ry. & Mo. 291. 4 Bing. 278, against the sheriff, for an escape; 3 Dowl. & Ryl. 483. 3 Barn. & Cres. 2. 4 Dowl. & Ryl. 624, S. C. against the sheriff, for a false return; 4 Bing. 261, in an action for words. 9 East, 157. 6 Maule & Sel. 29, for malicious prosecution; 1 Chit. Rep. 480. 2 Barn. & Cres. 678. 4 Dowl. & Ryl. 230, S. C. 3 Barn. & Cres. 24. 4 Dowl. & Ryl. 695, S. C. 3 Barn. & Cres. 113. 4 Dowl. & Ryl. 670, S. C. 3 Barn. & Cres. 138, 9, (b). 4 Dowl. & Ryl. 810, S. C. for libel; 10 Moore, 264. 6 Barn. & Cres. 34. 9 Dowl. & Ryl. 20, S. C. in *replevin*; 4 Dowl. & Ryl. 202. 9 Moore, 556. 2 Bing. 271, S. C. in *trespass*; Ry. & Mo. 252. 4 Barn. & Cres. 850. 7 Dowl. & Ryl. 324, S. C. 6 Barn. & Cres. 102. 9 Dowl. & Ryl. 97, S. C. 1 Moody & M. 118, on an indictment for perjury. And see further, as to *variance*, 1 Chit. Pl. 4 Ed. 271, &c., 334, &c. 3 Stark. Evid. 1526, &c.

[*435] the record at the trial, pursuant to the statute 9 Geo. IV. c. 15. *In *assumpsit* for use and occupation, it is not necessary to state in what *parish* the premises are situated: (a) and where a parish is known as well by one name as another, it is sufficient to call it by either. (b) But where the situation of the premises is alleged in the declaration, a variance in the name of the parish is fatal. (c)

When the contract is by deed, it is not necessary to set forth the *consideration* upon which it is founded: as the law in that case *implies* a consideration where none is stated: (d) And a consideration is also implied, upon bills of exchange, and promissory notes: But in all other cases, the consideration, not being implied, must be stated in the declaration. *Considerations* are commonly said to be *executed* or *executory*; or in other words, the contract is founded upon something already done, or to be done: But there is a third species of considerations, partaking of the nature of both the others, as in the case of *mutual promises*; (e) where the plaintiff's promise is executed, but the thing which he has engaged to perform is executory. When the consideration is executed, the defendant cannot traverse the consideration by itself, because it is incorporated and coupled with the promise, and if it were not then in fact executed, it is *nudum pactum*: But if it be executory, the plaintiff cannot bring his action till the consideration be performed; and if in truth the promise were made, and the consideration not performed, the defendant must traverse the performance, and not the promise, because they are distinct things. (f)

It is also commonly supposed, that to make a good consideration, there must be either an immediate benefit to the party promising, or a loss to the person to whom the promise was made. But this rule seems to be too narrow; for it is said, that wherever a man is under a *moral* obligation,

which no court of law or equity can enforce, and promises, the [*436] honesty and *rectitude* of the thing is a consideration; as if a man promise to pay a just debt, the recovery of which is barred by the statute of limitations; or if a man, after he comes of age, promise to pay a meritorious debt contracted during his minority, but not for necessities; or if a bankrupt in affluent circumstances, after his certificate, promise to pay the whole of his debts; or if a man promise to perform a secret trust, or a trust void for want of writing by the statute of frauds: In these and many other instances, though the promise give a compulsory remedy, when there was none before, either in law or equity; yet as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright mind are said to be a sufficient consideration. (aa)

When the promise and consideration explain themselves without refer-

(a) 6 East, 348. 1 Taunt. 570.

(b) 1 Taunt. 570; and see 1 Bos. & Pul. 225. 2 Campb. 3. 13 East, 9. 3 Taunt. 127. 5 Maule & Sel. 326. 4 Barn. & Ald. 616, 619. 3 Bing. 449. 1 Younge & J. 492. 1 Chit. Pl. 4 Ed. 251, 2; but see 2 Campb. 274.

(c) 3 Campb. 235; and see 4 Taunt. 700. 1 Moore, 161. Holt Ni. Pri. 523, S. C. 2 Moore, 587. 8 Taunt. 539, S. C. 1 Younge & J. 492.

(d) 7 Durnf. & East, 475; and see 3 Bur. 1639.

(e) 1 Salk. 171. 1 Ld. Raym. 665, S. C.

(f) Bul. Ni. Pri. 146; and see 7 Barn. & Cres. 423.

(aa) *Per* Lord Mansfield, Cowp. 290; and see 5 Taunt. 36, *accord.*; but see 3 Bos. & Pul. 249, (a), *semb. contra.* And see further, as to the *consideration* in *assumpsit*, 1 Chit. Pl. 262, &c. Lawes, on Pleading, Chap. III. 4 Barn. & Cres. 8. 6 Dowl. & Ryl. 42, S. C. 2 Bing. 464. 1 McClel. & Y. 205, S. C.; but see 4 Barn. & Cres. 345. 6 Dowl. & Ryl. 438, S. C. 7 Dowl. & Ryl. 14. 1 Moore & P. 227. 4 Bing. 459, S. C.

ence to any collateral matter, they are stated in the declaration without any *inducement*: But when that is not the case, the declaration begins by stating the circumstances under which the contract was made, or to which the consideration refers; as in an action of *assumpsit* to pay money, in consideration of forbearance, or of staying proceedings, the declaration begins by stating the debt forborne, or the proceedings that were stayed. The inducement is in nature of a preamble, and leads on to the principal matter of the declaration; and as its office is explanatory, it does not require exact certainty. (b)

When the consideration is *executed*, and the promise to pay a sum certain, or to do or omit some specific act, the declaration proceeds at once from the contract to the breach, without any intermediate *averments*; [A] as in the case of *indebitatus assumpsit*, to pay a precedent debt, &c. But when the consideration is *executory*, or the performance of the defendant's covenant or agreement is made to depend on the performance of a condition precedent, on the part of the plaintiff, the declaration ought to *aver* that the consideration has been executed, or the condition performed: for it is a rule, that in all cases where the estate or interest commences

(b) Com. Dig. tit. *Pleader*, C. 31. And see further, as to the *inducement* in *assumpsit*, 1 Chit. Pl. 4 Ed. 260, &c. Lawes, on Pleading, Chap. II.

[A] A declaration should aver facts, and not set forth the evidence by which the facts might be proved. *Ralston v. Strong*, 1 Chip. 293. *Glover v. Tuck*, 24 Wend. 153. And averments by way of inducement, in the first count of a declaration, will aid a subsequent count, which would otherwise be defective, when it clearly refers to the first count which is good. *Crookshank v. Gray*, 20 Johns. 344. Where any acts are to be done by the plaintiff, by way of a condition precedent, he must show, in pleading, precisely what he has done by way of performing them, with such circumstances as are material, in point of law, to raise the corresponding obligation. *Glover v. Tuck*, 24 Wend. 153. And this upon the general principle, that where any allegation is necessary in a declaration to maintain an action, its omission in the declaration cannot be supplied by the proof. *Pollard v. Thomason*, 5 Humph. 56. *Kinney v. Hosen*, 3 Harring. 456. And generally, every material averment in a declaration must be proved, although averments foreign to the issue may be rejected as surplusage and need not be proved. *Bell v. Lakin*, 1 McMullan, 364. *Ferguson v. Tucker*, 2 Harr. & Gill. 182. But no immaterial averment, made by way of inducement merely, need be proved, although descriptive of a written instrument. *Ward v. The Little Red*, 7 Miss. 582. Where the matter alleged in the pleadings is to be considered as lying more properly in the knowledge of the plaintiff than the defendant, then the declaration ought to state that the defendant had notice thereof. But where the matter does not lie more properly in the knowledge of the plaintiff, notice need not be averred. *Carlisle v. Cahawba and Marion Railroad Co.*, 4 Ala. 70. And where a *videlicet* is followed by that which is necessary to be alleged, and is material, it is considered as a direct and positive affirmation, or averment, which is traversable, unless contrary to the preceding matter. It is as necessary to prove it, when material, as if it had been averred without a *videlicet*. *Ladue v. Ladue*, 16 Verm. 189. So, too, matter in excuse of performance must be expressly averred. Excuse of performance is not admissible under mere averment of performance. *Brace v. Astor, Anthon*, 133. A subsequent count in a declaration may, by a distinct reference to a preceding one, adopt an averment contained in such preceding count, without repetition of such averment. *Freeland v. McCullough*, 1 Denio, 414. *Mardis v. Shackelford*, 6 Ala. 433. Useless averments in a declaration do not affect those which are well alleged. *Olmstead v. Doty*, 2 Root, 184. But any averment is unnecessary, where the words are so connected with the subject matter as to make their meaning obvious. *M-Lellan v. Morris*, Kirby, 145. Although the omission of a material averment in a declaration, or the cause of action defectively set out, cannot be supplied with evidence at the trial. *Waldsmith v. Waldsmith*, 2 Ham. 156. In declaring on a contract which is not sufficiently explicit in itself, and where its validity depends upon extrinsic matter, either referred to or necessarily arising out of the terms of the contract, the deficiency must be supplied by proper averments in the declaration. *Riley Vanhouton*, 4 How. Mis. 425. Averments contrary to the record are inadmissible. *Wight v. Mott*, Kirby, 152. *Bush v. Byvanks*, 2 Root, 248. Nor can a defect in a record be supplied by averment. *Wood v. Commonwealth*, 4 Rand. 329.

on a condition precedent, be the condition or act in the affirmative or negative, and to be performed by the plaintiff or defendant, or any other, the plaintiff ought in his count to aver performance; (c) as if a man grant an annuity to another, *when* he is promoted to such a benefice, &c. the plaintiff in *annuity* ought to aver that he is promoted, (d) &c. But when any estate or interest passes or vests immediately, and is to be defeated by a condition *subsequent*, or matter *ex post facto*, be it in the affirmative or negative, or to be performed by the plaintiff or defendant, or by any other performance of that matter need not be averred: (e) as if a [*437] grant be of an annuity *to A. *till* he be advanced to a benefice, A. in *annuity* need not say that he is not yet advanced. (aa)

Covenants or agreement are of three kinds; first, such as are called mutual and independent, where either party may recover damages from the other, for the injury he may have received by a breach of the covenants in his favour, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff: Secondly, there are covenants which are conditions and dependent, in which, the performance of one depends on the prior performance of another; and therefore till, this prior condition be performed, the other party is not liable to an action on his covenant: Thirdly, there is also a sort of covenants, which are mutual conditions, to be performed at the same time; and in these, if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered, has fulfilled his engagement, and may maintain an action for the default of the other, though it be not certain that either is obliged to do the first act. (b)

The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties; and however transposed they may be in the deed, their precedency must depend on the order of time, in which the intent of the transaction requires their performance. (c) The words by which conditions precedent are commonly created, are *for*, (d) *in consideration of*, *ita quod*, (e) *proinde*, (f) &c. In general, if the agreement be that one party shall do an act, and that for the doing thereof the other shall pay a sum of money, the doing of the act is a condition precedent to the payment, and the party who is to pay shall not be compelled to part with his money, till the thing be performed. (g) And however improbable the thing may be, it must be complied with, or the right which was to attach on its being performed does not vest: as if the condition be, that A. shall enfeoff B. and A. do all in his power to perform the condition, and B. will not receive livery of seisin, it was never

(c) 7 Co. 10, a.

(d) Pl. Com. 25, b.

(e) 7 Co. 10, a.

(aa) 7 Co. 10, a. Pl. Com. 25, b. 30, a. 32, b; and see 1 Durnf. & East, 645. 2 H. Blac. 579. For the cases in which it is, or is not necessary to aver the existence of a life, and how it may be averred, see 1 Wms. Saund. 5 Ed. 235, a, (8).

(b) Per Lord Mansfield, in the case of *Kingston v. Preston*, cited in Doug. 690, 91. And see the several modern cases on this subject, collected and arranged in Willes, 157, (a). 1 Wms. Saund. 5 Ed. 320, (4). 2 Wms. Saund. 5 Ed. 108, a, (3). Sel. Ni. Pri. 6 Ed. 108, &c., 510, &c. 1 Chit. Pl. 278, &c. Lawes, on Pleading, Chap. V.

(c) Doug. 690; and see 6 Durnf. & East, 570, 668. 7 Durnf. & East, 130.

(d) 1 Vent. 177, 214. 2 Wms. Saund. 5 Ed. 350, S. C.

(e) 2 Ld. Raym. 766.

(f) Doug. 688.

(g) 1 Salk. 171. 1 Ld. Raym. 665, S. C.; and see 1 Ld. Raym. 440, 686. 2 Salk. 623. Com. Rep. 117. 12 Mod. 529, S. C. 1 Str. 535, 615. 2 Str. 712. 1 Wils. 88. 2 Bur. 899. 2 Blac. Rep. 1312. Doug. 27, 272, 620, 684. 1 Durnf. & East, 639. 1 H. Blac. 270. 4 Durnf. & East, 761. 2 H. Blac. 123, 389, 574. 5 Durnf. & East, 409. 6 Durnf. & East, 570, 665, 710. 7 Durnf. & East, 125. 8 Durnf. & East, 366. 1 East, 203. 2 Bos. & Pul. 447.

doubted, but that the right which was to depend on the performance of the condition did not arise. *(h)* If a person undertake for the act of a *stranger*, the cases are uniform to *show that such act [*438] must be performed. *(a)* And where there are *mutual* promises yet if one thing be the consideration for the other, there a performance is in general necessary. *(bb)*

If a day be appointed for the payment of money, and the day is to happen before the thing can be performed, an action may be brought for the money, before the thing is done: for it appears that the party relied upon his remedy, and intended not to make the performance a condition precedent: *(cc)* But where a certain day of payment is appointed, and that day is to happen subsequently to the performance of the thing to be done by the contract, in such case the performance is a condition precedent, and must be averred in an action for the money. *(ce)* So if two men agree, one that the other shall have his horse, and the other that he will pay 10*l.* for him, no action lies for the money, till the horse be delivered. *(ce)* Another distinction to be attended to is, that where mutual covenants go to the *whole* of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where they go only to a *part*, and a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. *(d)* And it is said, that where the participle *doing, performing, &c.*, is prefixed to a covenant by another person, it is a mutual covenant, and not a condition precedent. *(e)*

An *averment* may be by any words which show the matter to be as stated; as that the plaintiff *avers*, or *in fact saith*, or *although*, or *because*, or *with this that*, &c. *(f)* And where there is a condition *precedent*, it is necessary to state in the declaration, that it has been performed, or a lawful excuse for its non-performance. *(g)* But there are some cases in the books, respecting conditions precedent, where the thing agreed to be done having been in effect performed, though not in the exact manner, nor with all the circumstances mentioned, it was deemed a substantial performance; *(h)* as where the condition was to enfeoff, a conveyance by lease and release has been deemed sufficient: *(i)* So, if the condition be for one to deliver the will of the testator, and he deliver letters testamentary. *(k)* And wherever a man, by doing a *previous* act, would acquire a right to any debt or duty, by a tender to do the previous act, if the other party refuse to permit him to do it, he acquires the right as completely, as if it had been actually done; and if the tender be defective, owing to the conduct of the other party, such incomplete tender will be sufficient: because it is a general principle, that he who prevents a thing from being done, shall not avail himself of the *non-performance [*439]

(h) 6 Durnf. & East, 719.

(a) 6 Durnf. & East, 722.

(bb) 1 Salk. 171. 1 Ld. Raym. 665, S. C. 6 Durnf. & East, 570. 7 Durnf. & East, 125.

(cc) 1 Salk. 171, 2. 1 Ld. Raym. 665, 6, S. C.; and see 2 H. Blac. 392.

(d) 1 H. Blac. 273, *(a)*; and see 6 Durnf. & East, 572, 3. 8 Durnf. & East, 373. 4 East, 483, 4. 10 East, 295. 1 Moore & P. 66. 4 Bing. 409, S. C. 1 Chit. Pl. 4 Ed. 281. Sel. Ni. Pri. 6 Ed. 517, &c.

(e) 2 Blac. Rep. 1313; and see Willes, 146, 496.

(f) Com. Dig. tit. *Pleader*, C. 77. Willes, 134, 427. 1 Wms. Saund. 5 Ed. 117, *a*, (4), 235, *a*, *b*. 2 Wms. Saund. 5 Ed. 61, *g*, (9).

(g) 4 Durnf. & East, 761. 6 Durnf. & East, 570.

(i) Co. Lit. 207, *a*.

(h) 6 Durnf. & East, 722.

(k) 1 Rol. Abr. 426, pl. 2, 4.

which he has occasioned.(a) The performance of a condition precedent is also excused by the *absence* of the plaintiff, in those cases where his *presence* is necessary for the performance of the condition; by his *obstructing* or preventing the performance; or by his *neglecting* to do the first act, if it be incumbent on him to perform it : (b) It is also excused in some cases, by his not giving notice to the defendant. (c) When the conditions are *mutual*, and to be performed at the same time, the plaintiff must aver that he was ready, and offered to perform his part, but the defendant refused to perform his. (dd) And when the sum to be paid is not ascertained by the contract, the plaintiff must aver the facts necessary to ascertain it : as, upon a *quantum meruit* or *valebant*, that the plaintiff *deserved* to have, or that the goods were reasonably *worth*, a certain sum, &c. (ee)

When the contract is to pay a collateral sum upon request, there the *request*, being parcel of the contract, and as it were a condition precedent, ought to be specially alleged, with the time and place of making it : (ff) but when the contract is founded upon a precedent debt or duty, as in the case of a bond, or for money lent, (gg) &c., or is for the payment of a collateral sum on a day certain, (h) or otherwise than upon request : (i) or the debt or duty arises immediately upon the performance of the consideration, (k) there it is not necessary to urge a special request, but *licet sæpius requisitus* is sufficient ; which is only a form of pleading, and if it be omitted, does not vitiate the declaration. (l)

When the matter alleged lies more properly in the knowledge of the plaintiff than of the defendant, there the declaration ought to show that *notice* was given to the latter ; (m) as where the defendant promises to give the plaintiff so much for a commodity as it is worth, or as any other had given him for the like, or to give so much for every cloth the plaintiff should buy, or to pay the plaintiff what damages he had sustained by a battery, or to pay the plaintiff's costs of suit : (n) And when notice is necessary, it ought to appear that it was given in due time, and to a proper person. (n) But when the matter does not lie more properly in the knowledge of the plaintiff than of the defendant, no notice is [*440] requisite ; (o) as in **debt* upon an obligation, conditioned to perform an award, notice of the award need not be alleged, because the defendant may take notice of it, as well as the plaintiff. So if, upon a treaty of marriage, a promise be made to the father of the daughter,

(a) Doug. 686 ; and see 1 Durnf. & East, 638.

(b) 1 Rol. Abr. 457, 8.

(c) *Id.* 463, 467, 8 ; and see Co. Lit. 207, a.

(dd) 7 Durnf. & East, 130 ; and see 7 Taunt. 314. 1 Moore, 56, S. C.

(ee) And see further, as to the *avertment* of performance, or excuse of performance, in *assumpsit*, Sel. Ni. Pri. 6 Ed. 108, &c. 1 Chit. Pl. 4 Ed. 277, &c. Lawes, on Pleading, Chap. V. VI. ; and as to the *form of averment*, and the consequences of a mistake, 1 Chit. Pl. 282, &c. (ff) Com. Dig. tit. *Pleader*, C. 69. 1 Wms. Saund. 33, a, (2) ; and see 2 H. Blac. 131. 5 Durnf. & East, 409. But the time and place of the request, being merely matter of form, the omission of them cannot be taken advantage of in arrest of judgment, since the statute 4 Ann. c. 16. 10 East, 359.

(gg) 1 Wms. Saund. 5 Ed. 32.

(h) Owen, 109.

(i) 1 Lutw. 231.

(k) 1 Str. 88.

(l) Pl. Com. 128, b. Hardr. 38, 72. 1 Bos. & Pul. 59, 60. And see further, as to a *request*, 2 Wms. Saund. 5 Ed. 118, (3), 123, (4). 1 Chit. Pl. 4 Ed. 287, &c. Lawes, on Pleading, Chap. VIII.

(m) Hardr. 42 ; and see 16 Vin. Abr. tit. *Notice*. 5 Durnf. & East, 621.

(n) Com. Dig. tit. *Pleader*, C. 74.

(o) Hardr. 42 ; and see 1 Wms. Saund. 5 Ed. 117, a, (2).

by the father of the son, to pay the daughter 100*l.* after the death of the son, if she survive, and the son die, an action may be brought upon this promise; and notice need not be given to the defendant of the death of the son.(a) So, on a promise to pay so much money at the full age of an infant, notice of his attaining that age need not be given, because it is as notorious to the one as to the other.(a) And in an action on a promissory note, by the indorsee against the drawer, notice of the indorsement need not be averred.(b)

The *breach*, in a declaration upon contract, is either *negative*, that the defendant has not done something which he contracted to do, or procured it to be done by another, or that he has not done it, or procured it to be done, in a careful and proper manner; or it is *affirmative*, that he has done something which he contracted not to do, or suffered it to be done by another, or that he has *deceived* the plaintiff, on a warranty, &c. The breach must be assigned in the words of the contract, or in words tantamount, which comprehend the substance and effect of it. Where a party, however, has disabled himself from making an estate he has stipulated to make at a future day, by making an inconsistent conveyance of that estate, he is considered as guilty of a breach of his stipulation, and he is liable to be sued before the day arrives.(c) And in assigning the breach of a covenant for quiet enjoyment, it is sufficient to allege, that at the time of the demise to the plaintiff, A. B. had lawful right and title to the premises, and having such right and title, entered and evicted the plaintiff, without showing what title A. B. had, or that he evicted the plaintiff by legal process.(d) When the *damages* sustained by the plaintiff are naturally connected with the breach of contract, it is not usual to state them specially in the declaration; otherwise they should be stated, in order to prevent a surprise upon the defendant.(e)

In actions for *wrongs*, the declaration should state the *injury* complained of; and in actions on the case, it should set forth, by way of *inducement* the circumstances under which the injury was committed, and the consequential *damages* resulting therefrom to the plaintiff.[A] The injury com-

(a) Hardr. 42; and see 1 Wms. Saund. 5 Ed. 117, a, (2).

(b) 1 Bos. & Pul. 625. And see further, as to *notice*, 1 Chit. Pl. 4 Ed. 285, &c. Lawes, on Pleading, Chap. VII.

(c) 6 Barn. & Cres. 325.

(d) 4 Durnf. & East, 617. And see further, as to the *breach* in *assumpsit*, 1 Chit. Pl. 4 Ed. 290, &c. Lawes, on Pleading, Chap. IX.

(e) See further, as to the *damages* in *assumpsit*, 1 Chit. Pl. 4 Ed. 296, 7. And as to the mode of declaring in general in *assumpsit*, see *id.* 259, &c. Lawes, on Pleading, Chap. 1. to XV. inclusive; in *debt*, 1 Chit. Pl. 309, &c.; and in *covenant*, *id.* 325, &c.

[A] "Whenever a sum of money is sought by an action at law, this sum is, in our legal English, called damages. No more distinct sense than this can be given to the term damages, which has wholly lost, in its legal use, both its popular sense of hurt and its etymological sense of subtraction of right; while, on the other hand, it has come to signify a multitude of pecuniary obligations, which have nothing in common but this one result—a money payment by judgment of law." Law Rev. for Feb. 1850, p. 247.

"Damages—*damna* in the common law," says Lord Coke, Co. Litt. 257, a, "hath a special signification for the recompense that is given by the jury to the plaintiff, for the wrong the defendant hath done unto him."

"It is a general and very sound rule of law," said Sedgwick, J., delivering the opinion of the Supreme Court of Massachusetts, *Rockwood v. Allen*, 7 Mass. p. 254, "that where an injury has been sustained, for which the law gives a remedy, that remedy shall be commensurate to the injury sustained."

"It is a natural and legal principle," said Shippen, Chief Justice of the Supreme Court of

plained of is *immediate* or *consequential*. When it is *immediate*, and included in the act complained of, there it is sufficient to state that act

Pennsylvania, *Bussy v. Donaldson*, 4 Dallas, 206, "that the compensation should be equivalent to the injury."

"The general rule of law," said *Story*, J., to the jury on the Rhode Island circuit, *Dexter v. Spear*, 4 Mason, 115, "is this: whoever does an injury to another, is liable in damages to the extent of that injury. It matters not whether the injury is to the property, or the person, or the rights or the reputation of another."

And this compensation is awarded according to certain rules of law which the jury are not at liberty to disregard, and which equally control the conduct of the court.

"In cases," said *Washington*, J., on the Pennsylvania circuit, *Walker v. Smith*, 1 Wash. C. C. R., 152, "where a rule can be discovered, the jury are bound to adopt it. That rule is, that the plaintiff should recover so much as will repair the injury sustained by the misconduct of the defendant." In regard to the rate of damages on a foreign bill of exchange, the New York Court of Errors said: "In this, as in other cases of contract, the rule by which the amount or extent of redress should be ascertained, is a question of law." *Graves v. Dash*, 12 John. R. 17." *Sedgwick on Dam.* 29.

Wherever the breach of an agreement or the invasion of a right is established, the English law infers some damage to the plaintiff; and if no evidence is given for any particular amount of loss, it declares the right by awarding what it terms nominal damages, being some very small sum, as a farthing, a penny, or sixpence—*ubi jus, ibi remedium*.

"Every injury," said Lord *Holt*, "imports a damage." *Ashby v. White*, 1 Salk. 19. So again, in the same case, as elsewhere reported, his lordship said: "My brother *Powell*, indeed, thinks that an action upon the case is not maintainable, because there is no hurt or damage to the plaintiff; but surely every injury imports a damage, though it does not cost the party one farthing; and it is impossible to prove the contrary, for a damage is not merely pecuniary, but an injury imports a damage, where a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no, not so much as a little *diachylon*, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage, for it is an invasion of his property, and the other has no right to come there." 2 Lord Raym. 955.

"Wherever," says Mr. Sergeant *Williams*, "any act injures another's right, and would be evidence in future in favour of the wrong-doer, an action may be maintained for an invasion of the right, without proof of any specific injury." 1 Saunders, 346, a.

"It has been said that the effect of our law is to give in damages what it calls compensation. When, however, we come to analyze this phrase, we shall find its juridical interpretation a very restricted one. Injury resulting from the acts or omissions of others, free from any taint of fraud, malice, or wilful wrong, consists:—

First. Of the actual pecuniary loss directly sustained; as the amount of the note unpaid; the value of the property paid for, but not delivered.

Second. Of the indirect pecuniary loss sustained in consequence of the primary loss; the profits that might have been made if the contract had been performed; the derangement and disturbance produced by the failure of others to comply with their engagements, and the consequent inability of those who depend on them to adhere to their own; loss of credit; loss of business; insolvency.

Third. Of the mental suffering produced by the act or omission in question; vexation; anxiety.

Fourth. The value of the time consumed in establishing the contested right by process of law, if suit become necessary.

Fifth. The actual expenses incurred to obtain the same end, costs and counsel fees.

To these one further element is to be added in those cases where the aggressor is animated by a fraudulent, a malicious, or an oppressive intention, and that is:

Sixth. The sense of wrong, or insult, in the sufferer's breast, resulting from an act dictated by a spirit of wilful injustice, or by a deliberate intention to vex, degrade, or insult. This constitutes the difference, and the only difference, between the injury produced by inability, and that produced by design. All the other constituents are the same. The pecuniary loss, direct and indirect; the anxiety, the time and expense are the same, whether a wrong be done through the honest inability, the wilful fraud, or the deliberate malice of the offending party. But in the two latter cases, the last element is superadded; a sense of wrong or insult which does not exist in the former.

All these items must, therefore, be taken into the account in any effort to make complete compensation, in the ordinary acceptance of the word. But we shall find that the legal meaning of the term is very different. We shall find that in cases of contract, as a general rule, the law takes no notice whatever of the motives of the defaulting party; that whether

alone in the declaration, as in trespass *vi et armis*. The charge in such case ought to be direct and positive, and not merely by way of recital: Therefore, a declaration by *bill*, stating that *whereas*, or *wherefore* the defendant *did the act complained of, is bad on special [*441] demurrer; and was formerly holden to be so, in arrest of judgment; (a) But now it may be amended at any time before or after judgment, by a right bill; the time of filing whereof the court will not inquire into: (b) And by *original*, the court part being helped by the recital of the writ, this fault is not fatal, even on a special demurrer. (c)

When the *damages* in *trespass* are such as naturally arise from the act complained of, or cannot with decency be stated, they may be given in evidence under the *alia enormia*; but otherwise they must be stated in the declaration: (d) And many things may be laid and proved in aggravation of damages, for which alone *trespass* would not lie: as *trespass* may be brought for entering the plaintiff's house, and beating his wife, (e) child, or servant, (f) and the *beating* may be given in evidence, to aggravate the damages: but in such case, the plaintiff cannot recover damages for losing the *service* of his child or servant, because he may have a proper action for that injury. (g) So, *trespass* will lie for breaking and entering the plaintiff's house, under a false and unfounded charge and assertion that the plaintiff had stolen property therein, *per quod* he was injured in his credit, &c.; and the jury may give damages for the trespass, as it is aggravated by such false charge. (h) So, in *trespass quare domum fregit*, he may give in evidence that the defendant came into his house, and debauched his daughter; (i) or that his wife was so terrified by the con-

(a) 2 Salk. 636. 1 Str. 621.

(b) 2 Str. 1151, 1162.

(c) 1 Wils. 99. Barnes, 452, S. C. 2 Wils. 203. And see further, as to the statement of the *injury*, in actions for wrongs, 1 Chit. Pl. 4 Ed. 336, &c.

(d) Peake's Cas. Ni. Pri. 3 Ed. 64, 87; and see 1 Sid. 225.

(e) 1 Str. 61; and see Cro. Jac. 501. 1 Stark. Ni. Pri. 98.

(f) 2 Salk. 642. Holt, 699, S. C. 2 Ld. Raym. 1032. 6 Mod. 127. Holt, 699, S. C.

(g) 2 Salk. 642. Holt, 699, S. C. Bul. Ni. Pri. 89; but see Cro. Jac. 501.

(h) 2 Maule & Sel. 77; and see 5 Taunt. 442. 1 Marsh. 139, S. C.

(i) 1 Sid. 225. 2 Ld. Raym. 1032. 6 Mod. 127. Holt, 699, S. C. 3 Bur. 1878. 2 Durnf. & East, 166. Bul. Ni. Pri. 89.

the engagement be broken through inability or design, the amount of remuneration is the same; and that in these cases, as well as in those of torts or breach of duty of any kind, where there is no complaint of fraud, malice, nor wilful negligence, of all the heads of loss above enumerated, only the first and fifth are taken into consideration, and the latter but imperfectly.

In all cases growing out of contracts, and in those of infringement of rights, or non-performance of duties, created or imposed by the law, in which there is no element of fraud, wilful negligence, or malice, the compensation recovered in damages, consists solely of the direct pecuniary loss, which includes, in mere money demands, interest for the detention of the amount claimed, and the costs of the suit brought for the recovery of the demand. No indirect loss is accounted for. No allowance is made for the mental suffering of the party who complains of the non-performance of his contract, or the infringement of his rights, which, indeed, it may be said the law possesses no scale to measure. This, however, is not the reason; for as little does it take into consideration the time actually consumed, and the fees actually paid to counsel for the establishment of the demand in controversy. In this class of cases, the direct pecuniary loss, and the costs of the suit, are all that the law means when it speaks of compensation. In fact, unless the word is used in a technical sense, it is altogether inaccurate to speak of damages as resulting in compensation; and whatever restricted meaning this term may be supposed to have technically acquired, it is, at all events, entirely incorrect to say, in the language which has been used by various eminent judges, that "the remedy is commensurate to the injury." This language attributes to legal relief a degree of perfection which it is very far from possessing." Sedgwick on Dam. 35.

duct of the defendant, that she was immediately taken ill, and soon afterwards died.(k) But, in *trespass quare clausum fregit*, the plaintiff would not be permitted to give evidence of the defendant's taking away a horse,(l) &c. ; and in other cases, the evidence is allowed to be given, not as a substantive ground of action, but merely to show the evidence of the defendant's conduct.(k)

Consequential injuries, we have seen,(m) arise from *mal-feazance*, *non-feazance*, or *mis-feazance*. In actions for *mal-feazance*, three things are to be attended to in the declaration ; first, the *motive*, if any, which urged the defendant to the commission of the act complained of ; secondly, the *end* which he had in view ; and thirdly, the *means* which he took of accomplishing it. Thus, in an action for *defamation*, the *motive* is malice, the *end* proposed is to injure the plaintiff in his good name, &c. and the *means* are the words spoken by the defendant for that purpose. In actions for *mal-feazance*, the motive is either *malice*, which generally speaking [*442] *leads to the commission of injuries to the person, or the gratification of self-interest at the expense of another ; and accordingly, the *end* which the defendant has in view, is either to injure the plaintiff, or to benefit himself : and the *means* he takes of accomplishing his intention, are either direct and open, or under colour of legal process, or by *deceit*, which is either where there is a privity between the parties, as upon a sale of goods, &c. or where there is no such privity. In actions for *non-feazance*, or *mis-feazance*, the injury frequently proceeds from a mere neglect, without any bad motive imputable to the defendant.[A]

The circumstances attending the several injuries before mentioned, and which should be stated by way of *inducement*, are various, according to the nature and grounds of the action. In general, they disclose some *right* or

(k) 1 Stark. Ni. Pri. 93 ; but see Peake's Cas. Ni. Pri. 3 Ed. 87 ; and see 2 Phil. Evid. 134, 5

(l) 1 Sid. 225. Bul. Ni. Pri. 89.

(m) *Ante*, 4.

[A] "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case ; and of this advantage it would be very unjust to deprive them." *Per Alderson, B.*, in *Hadley v. Baxendale*, 9 Exc. R. 354. And in a very late case, *Fletcher v. Taylor*, 17 C. B. 21, *Crowder, J.*, referring to *Hadley v. Baxendale*, directed the jury in regard to the proper measure of damages in these terms, that "where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive, in respect to such breach of contract, should be such as may fairly and reasonably be considered either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." See also *Taylor v. Maguire*, 12 Missouri, 313. *Freeman v. Clute*, 3 Barb. S. C. 324. *Green v. Manning*, 11 Ill. 613. *Ferlong v. Polleys*, 30 Maine, 491. *Johnson v. Small*, 2 Cushing, 40. *Myers v. Perry*, 1 Ann. Rep. Louis, 373. *Sugden v. Jenkins*, 2 Sandf. S. C. 614. *Bosworth v. Brand*, 1 Dana, 377. *Harrison v. Berkeley*, 1 Strobbart, 525.

title in the plaintiff, or some *duty* to be performed by the defendant. In actions for wrongs, affecting the *absolute* rights of persons, the right to personal security, being implied, need not be stated in the declaration; as in actions of *assault* and *battery*, &c. But when the wrongs complained of affect the *relative* rights of persons, the relation should be stated, in respect of which the plaintiff is injured; as in actions for *criminal conversation*, &c.: And when an action is brought for *defamation*, it is usual to state in the declaration, by way of inducement, that the plaintiff is a person of good name, &c., and has not been guilty of the crime imputed to him.(a)

In actions for wrongs to *real* or *personal* property, the plaintiff's right or title must be set forth in the declaration, either *generally* or *specially*. When a *special* title is necessary to maintain the action, it must be stated with certainty:(b) If a man allege in himself a title to the inheritance of freehold of lands in possession, he ought regularly to say that he was *seised*:(c) or, if he allege possession of a term for years, or other chattel real, that he was *possessed*:(c) So, if he allege *seisin* of things manurable, as of lands, tenements, rents, &c. he should say that he was *seised in his demesne as of fee*:(d) if of things not manurable, as of an *advowson*, that he was *seised as of fee and right*, omitting *in his demesne*:(d) And it is a rule, that when title is necessary to be shown, if the plaintiff derive a particular estate from another, he ought to show that the other had such an [*443] *interest as would enable him to make the estate.(aa) The reason why the commencement of particular estates must be shown in pleading is, because they are created by agreement out of the primitive estate: and the court must judge, whether the primitive estate and agreement be sufficient to produce the particular estate claimed: And this is a fundamental rule, which ought not to be broken upon fancied inconveniences.(bb) It is also a rule, that if the plaintiff claim under one who has only a particular estate, as for life, he must aver the continuance of that estate.(cc)

In setting forth a title to *incorporeal* hereditaments, the plaintiff must show that it was by grant, custom, or prescription. A *grant* ought regularly to be pleaded, with a *profert in curiâ* of the deed containing it; but where the deed is lost or destroyed, by accident or length of time, it may be pleaded without a *profert*.(dd) *Custom* is properly a *local* usage, and

(a) Com. Dig. tit. *Action upon the Case for Defamation*, G. 1. And as to the inducement in a declaration for a *libel*, see 1 Younge & J. 480. 7 Barn. & Cres. 459. 1 Moore & P. 402. 4 Bing. 489, S. C.

(b) As to the mode of stating or setting forth, in a declaration or other pleading, the *seisin of the king*, see 1 Wms. Saund. 5 Ed. 187, (1), *seisin of a corporation*, sole or aggregate, *id. ibid.*, *seisin of a husband, jure uxoris id.* 253, (4). 2 Wms. Saund. 5 Ed. 283, (1), *lease and re-lease, id.* 10, (15), 11, (16), *bargain and sale inrolled*, 1 Wms. Saund. 5 Ed. 251, (2), 251, a, (3). 2 Wms. Saund. 5 Ed. 11, (18), 12, a. (20). *feoffment*, 2 Wms. Saund. 5 Ed. 9, c. *fine and proclamations*, 1 Wms. Saund. 5 Ed. 258, a. (8). 2 Wms. Saund. 5 Ed. 175, f. g. (1, 2, 4), *devise*. 1 Wms. Saund. 5 Ed. 276, c. (2), *lease or demise, id.* 276, (1), *lease of tithes*. 2 Wms. Saund. 5 Ed. 297, (1), *entry under lease, &c.* 1 Wms. Saund. 5 Ed. 147, (2), 202, a. (1), *interesse termini, id.* 251, (1), *assignment of term, or reversion, id.* 234, (3), 238, (2), *attornment, id.* 234, b. (4), or a *copyhold* title, *id.* 348, (8, 9). As to the mode of setting forth the title in declarations in *covenant*, see 2 Chit. Pl. 4 Ed. 209, &c. And see further, as to the showing of title in declarations and other pleadings, Steph. Pl. 321, &c.

(c) Co. Lit. 17, a.

(d) Lit. § 10; and see Com. Dig. tit. *Pleader*, C. 35. 2 Bos. & Pul. 574.

(aa) Com. Dig. tit. *Pleader*, C. 36; and see Steph. Pl. 328, &c.

(bb) 2 Salk. 562; and see 3 Wills. 72.

(cc) Com. Dig. tit. *Pleader*, C. 66.

(dd) 3 Durnf. & East, 151. And for the cases in which a *profert in curiâ* is necessary, or

not annexed to any particular *person*; such as a custom within a manor, that land shall descend to the youngest son, or that copyholders shall have a right of common, &c. *Prescription* is altogether a *personal* usage; and is either in a *que estate*, or in a man and his *ancestors*: the former is where the right claimed is annexed to, and passes with the land, in which case the plaintiff states that he, and all those whose estate he hath therein, have immemorially had such right; the latter is where the right is not annexed to the land, but lies in grant, in which case the plaintiff must aver that he, and his ancestors, have immemorially enjoyed it.(e)

But in *personal* actions, it is seldom necessary to state a title specially in the declaration; for damages are the gist of these actions, and the title only matter of inducement:(f) And it is a general rule therein, that *possession is sufficient evidence of title, against a wrong-doer*:(g) as in trespass *quare clausum fregit*:(h) &c. So, in an action on the case for a *nuisance* to the plaintiff's house, &c. it is sufficient for the plaintiff in his declaration, to state generally that he was lawfully possessed of the house, or other property affected by the injury complained of:(i) and if the declaration be for stopping up *lights*, it goes on to state, that by reason of his possession he had, and of right ought to have, the lights that have been obstructed.(k) In like manner, the plaintiff, in an action for [*444] diverting a *water-course* from his mill, need only state, that he was possessed of the mill, and that the water had been accustomed, and of right ought to flow thereto, without stating that it was an *ancient* mill, or disclosing the grounds upon which the right to the water is claimed.(aa)

In an action upon the case for the *disturbance* of rights of *common*:(b) &c., there is said to be this distinction: When the action is brought against a *wrong-doer*, it is sufficient for the plaintiff to state in his declaration, that he was *possessed* of a house or land, &c., and by reason of his possession thereof, was entitled to the right, in the exercise of which he has been disturbed. But when the plaintiff would lay any charge or servitude on the land or property of another, he must set forth his title *specially* in the declaration.(c) Thus, in an action on the case against a

may be dispensed with, and as to the demand and giving of *oyer*, and the manner of setting out deeds, &c., thereon, see 1 Wms. Saund. 5 Ed. 9, (1), 9, b. (1), 289, (2), 317, (2). 2 Wms. Saund. 5 Ed. 9, b. c. (12, 13), 46, b. (7), 366, (1), 405, (1), 409, (2). Steph. Pl. 439, &c.

(e) And see further, as to *customs* and *prescriptions*, what may or may not be claimed by them, 1 Wms. Saund. 5 Ed. 341, (3), 348, (10), how the claim should be made by a *corporation*, *id.* 340, (2), 341, (3), as to a *custom* for a *corporation* to exclude *foreigners* from buying and selling, *id.* 312, c. d. (3), or a *prescription* for tenants to have the *sole and several pasture*, &c., in exclusion of the *lord*, or owner of the soil, *id.* 353, (2), and as to a *custom* or *prescription* for *common*, &c., by *copyholders*, *id.* 341, (3), 349, (11, 12).

(f) 10 Co. 59, b.

(g) Steph. Pl. 323, &c.

(h) 2 Bulst. 288.

(i) Rol. Rep. 393.

(k) Cro. Car. 325. 1 Show. 18.

(aa) 1 Leon. 247. Palm. 290. Cro. Car. 499, 575. 3 Mod. 48. 3 Lev. 133, S. C.

(b) 1 Vent. 319. 4 Mod. 418. And for the manner of declaring for the *disturbance of rights of way*, see 1 Vent. 274. 2 Lev. 148. 3 Keb. 528. 3 Lev. 266. 1 Lutw. 120. 2 Ld. Raym. 751, 1090. 3 Ld. Raym. 85; of *offices*, 10 Co. 59, b. Cro. Eliz. 335; of *franchises*, 4 Mod. 423. 1 Show. 18; of *tolls*, Owen, 109. Cro. Jac. 43, 122, 3. 3 Lev. 190. 2 Lutw. 1517; of *ferries*, Willes, 508; and of *seats* in churches, 1 Lev. 71. 1 Sid. 203, S. C. 2 Lev. 193. 3 Lev. 73. 1 Wils. 326. 1 Durnf. & East, 428. See also 1 Wms. Saund. 5 Ed. 346, (2). 2 Wms. Saund. 5 Ed. 113, (1), 172, (1), 175, (2). 2 Chit. Pl. 4 Ed. 807, &c.

(c) 4 Mod. 421. 1 Str. 5. Willes, 619. 1 Bur. 440. 4 Durnf. & East, 718. *Sed quære* as to this distinction? and see 3 Durnf. & East, 768. 2 Wms. Saund. 5 Ed. 113, (1). 1 Chit. Pl. 4 Ed. 330.

stranger and wrong-doer, for disturbing the plaintiff in the use of a *seat* in a church, no title or consideration is necessary to be shown: But when the plaintiff claims against the ordinary himself, who hath *primâ facie* the disposal of all the seats in the church, he ought to show some cause or consideration, as building, repairing,(d) &c. And though, in the other case, the plaintiff is allowed to declare upon his possession, yet he must prove his title at the trial: And possession for above *sixty* years of a pew in a church, is not a sufficient title to maintain an action on the case, for disturbance in the enjoyment of it; but the plaintiff must prove a prescriptive right, or a faculty, and should claim it in his declaration, as appurtenant to a messuage in the parish.(e) In declaring for wrongs to *personal* property, the plaintiff must state his right; as, in *trespass* for taking goods, that they were his own goods;(f) or in *trover*, that he was possessed of them, &c.: And, in a declaration in *replevin*, for taking goods, the description number and value of them must be stated with certainty.(g)

In actions upon the *case* for a breach of duty, the declaration should state the nature of the duty to be performed by the defendant: which is founded on the general obligation of law, the defendant's particular situation, or some contract or agreement between the parties. When the defendant is liable of common right, as to repair a wall, for preventing damage to his neighbour, it is not necessary for the plaintiff to show a title in his declaration, or the special ground of the defendant's liability:(h) But when a charge is imposed on another *against* common right, as owner of the soil *or *tertenant*, it was formerly holden, that [*445] a title must be shown; as in an action for not repairing fences,(a) &c. So, where a special action on the case was brought against the defendant, for not keeping a bull and a boar, the declaration was holden bad on demurrer, for not setting forth that the defendant was obliged to keep them, either by custom, prescription, or otherwise.(bb) But in a late case, where an action was brought for not repairing a private road, leading through the defendant's close, it was holden to be sufficient to allege, that the defendant, as *occupier* of the close, was bound to repair it:(cc) And, *per Buller* Justice, "the distinction is, between cases where the plaintiff lays a charge upon the right of the defendant, and where the defendant himself prescribes in right of his own estate: In the former case, the plaintiff is presumed to be ignorant of the defendant's estate, and cannot therefore plead it; but in the latter, the defendant, knowing his own estate, in right of which he claims a privilege, must set it forth.(d) In actions against sheriffs or other officers, or against carriers, &c., for *mis-feazance*, the declaration must state the nature of the plaintiff's right, and ground of the defendant's duty.(e)

In actions upon the *case* for consequential injuries, the *damages* which the plaintiff has sustained, being the gist of the complaint, must be stated

(d) 3 Lev. 73.

(e) 1 Durnf. & East, 428.

(f) Cro. Jac. 46. 2 Salk. 640. 1 Ld. Raym. 239. 2 Ld. Raym. 890. 2 Str. 1023.

(g) 1 Moore, 386. 7 Taunt. 642, S. C.

(h) 1 Salk. 22, 360. 6 Mod. 311, S. C.

(a) Salk. 335, 6.

(bb) 4 Mod. 241.

(cc) 3 Durnf. & East, 766.

(d) *Id.* 768. *Tamen quere?*

(e) See further, as to the statement of the plaintiff's *right* or *interest*, and the defendant's *obligation* or *duty*, with the consequences of a mistake in setting them out, in actions for wrongs, 1 Chit. Pl. 4 Ed. 328, &c.

in the declaration; which damages must appear to depend on the injury complained of, and not be too *remote*, or happen from the intervention of another cause: (f) [A] And they are either *general* or *special*. *General* damages are such as naturally arise out of, or are connected with the injury complained of: [B] And, in actions for *mal-feazance*, they in general correspond with the end or design which the defendant had in view, and which has been previously stated in the declaration; as, in an action for *defamation*, the declaration states that the defendant, intending to injure the plaintiff in his good name, &c., spoke the words complained of; whereby the plaintiff was injured in his good name, &c. *Special* damages are either such as are superadded to general damages, arising from an act injurious in itself; or such as arise from an act indifferent in itself, but injurious in its consequences: and, in either case, they must be specially laid in the declaration, or the plaintiff will not be allowed to give them in evidence at the trial. Thus, in an action for *defamation*, though the words be in themselves actionable, yet the plaintiff is not at liberty to give evidence of any loss or injury he has sustained by the speaking of them, unless it be specially laid in the declaration. (g) If an action be brought for words that are not in themselves actionable, and the plaintiff do not prove the special damage laid in the declaration, he must be nonsuited; because the special damage is the gist of the action: but [*446] where the words are of themselves actionable, if the words be proved, the jury must find for the plaintiff, though no special damage be proved. (a)

The declaration in general concludes, "to the *damage* of the plaintiff of a certain sum of money, and therefore he brings his suit, &c." But in a *penal* action, brought by a common informer, where the plaintiff's right to the penalty accrues upon bringing the action, it is not necessary to conclude in this way; as the plaintiff cannot have sustained any damage by a previous detention of the penalty. (b) In actions against *attorneys* and officers of the court, it is usual, though not necessary, (c) for the plaintiff instead of bringing *suit*, to *pray relief*, &c. And where the action is brought by *bill* against a *member* of the house of commons, the bill concludes with a prayer of process to be made to the plaintiff, according to the statute, &c. (dd) It was anciently necessary to find *pledges* to prosecute, and add their names to the declaration by *bill*; (e) but they are now holden to be mere matter of form, and may be found at any time before judgment. (f)

The general requisites, or *qualities* of a declaration are, first, that it correspond with the process; secondly, that it contain all the circum-

(f) 5 Taunt. 534; and see 2 Chit. Rep. 198.

(g) Bul. Ni. Pri. 7.

(a) Bul. Ni. Pri. 6. And see further, as to the statement of the damages, in actions for wrongs, 1 Chit. Pl. 4 Ed. 349, &c. Steph. Pl. 426, 7.

(b) 4 Bur. 2021, 2490.

(c) Andr. 247.

(dd) See further, as to the mode of concluding declarations, 1 Chit. Pl. 4 Ed. 356, &c. Steph. Pl. 427, 8.

(e) 9 Ed. IV. 27. Bro. Abr. tit. *Bill*, 15, tit. *Pledges*, 11. Dyer, 288.

(f) 18 Edw. IV. 9. 2 Hen. VII. 1, 17. Palm. 518. Stat. 4 & 5 Ann. c. 16, § 1. Fort. 330. Cas. temp. Hardw. 315. Barnes, 163. 1 Wils. 226. 2 Wils. 142. *Butler v. Bailey*, E. 25 Geo. III. K. B. 3 Durnf. & East, 157. 1 Chit. Pl. 4 Ed. 358, 9. Steph. Pl. 428, 9.

[A] See Sedgw. on Dam. ch. 3, p. 57.

[B] See *ante*, note [A], pp. 440-441.

stances necessary to maintain the action, and no more; thirdly, that these circumstances be set forth with certainty and truth.(g)

The correspondence of the declaration with the process may be considered, as it respects the *parties* to the action, their *christian* and *surnames*, the description of the *character* in which they sue or are sued, and the nature of the *cause of action*. In the Common Pleas, when the process is not bailable, the plaintiff, we have seen,(h) is allowed to join four defendants, for separate causes of action, in one writ, and to declare against them severally:(i) and accordingly, in that court, on a common *capias quare clausum fregit* against two, a declaration against one has been deemed regular.(k) But when the cause of action is bailable, the plaintiff cannot declare against one defendant separately, upon joint process, and affidavit to hold to bail against two;(l) though they were sued upon a joint and several promissory note,(m) or though the other defendants are out of the jurisdiction of the court and cannot therefore be served with process:(n) And where a defendant is held to bail, on a writ issued against himself and *another, and the plaintiff declares against [*447] one only, the court will set aside the declaration and subsequent proceedings for irregularity.(a) So, where a husband and wife being arrested, the latter was discharged out of custody on filing common bail, and the plaintiff declared against the husband alone, the court held the proceeding to be irregular.(b) In the Common Pleas, however the affidavit of debt and clause of *ac etiam* in bailable process, point out the person against whom the action is to proceed: Therefore, where the affidavit of debt was against A., the *capias* against A. and B., and the declaration against A. only, by whom bail was put in, that court held it to be regular:(c) So, upon a bailable *capias* against two defendants, with a clause of *ac etiam* and affidavit of debt against one, the plaintiff, in that court, may regularly declare against the latter defendant only.(d) And where the plaintiff first sued out bailable process against W. in which *he* only was named, and on which he was arrested and put in and perfected bail, and the plaintiff then sued out serviceable process against *four* other defendants, in which W. was not named, and afterwards a declaration was delivered against W. with the other four defendants, the court held the declaration to be regular.(ee)

The declaration should regularly correspond with the process, in the *christian* and *surnames* of the parties. If a person enter into a bond by a wrong *christian* name, and be sued thereon, he should be sued by that name; it having been determined, that a declaration against him by his right name, stating that he executed the bond by a wrong one, is bad.(f) And, as a man cannot have two *christian* names, it has been holden, on a

(g) Co. Lit. 303, a. Pl. Com. 84, 122. And see further, as to these *qualities*, 1 Chit. Pl. 4 Ed. 222, &c.

(h) *Ante*, 148, 420.

(i) 2 New Rep. C. P. 98.

(k) 1 Bos. & Pul. 19, 49; but see R. E. 8 Geo. IV. K. B.

(l) *Ante*, 420.

(m) 4 East, 589.

(n) 1 Maule & Sel. 55.

(a) 5 Durnf. & East, 722. 4 East, 589. 1 Maule & Sel. 55 K. B. 1 Bos. & Pul. 49. 2 New Rep. C. P. 82. 1 Marsh. 274, C. P. Forrest, 31. Excheq.; but see 3 Barn. & Cres. 734. 5 Dowl. & Ryl. 622, S. C. *Ante*, 420.

(b) 3 Dowl. & Ryl. 247.

(c) 2 New Rep. C. P. 98.

(d) 7 Taunt. 458. 1 Moore, 147, S. C.

(ee) 1 Bing. 48. 7 Moore, 301, S. C.; and see Steph. Pl. 319, &c.

(f) 3 Taunt. 504.

plea in abatement, that the plaintiff cannot declare against the defendant in his right name, with an *alias* of the name he is sued by.^(g) Yet, where the defendant was sued by the name of *Jonathan otherwise John Soans*, this was holden to be no cause of demurrer to the declaration; for *non constat* that it was not all one christian name.^(h) If the defendant has been arrested by a wrong name, the sheriff and his officers are liable to an action of trespass and false imprisonment,⁽ⁱ⁾ and the arrest being illegal, the court instead of putting the defendant to plead the *misnomer* in abatement, will set aside the proceedings,^(k) and discharge him if in custody;^(l) or if he has given a bail-bond, will order it to be delivered up to be cancelled.^(m) But in cases of non-bailable process, if the [*448] defendant's name be **misstated* in the writ, the court will not set aside the writ and proceedings on motion, but will leave the defendant to his plea in abatement.^(a) And if the defendant be called and known as well by one name as the other, or there be only an inaccuracy in the spelling, so that the name is *idem sonans*, the court will not interfere.^(b) So, where A. having two *christian* names, has omitted one of them in his dealings with B., he cannot in an action brought against him by B., make the omission a ground for setting aside the proceedings.^(c) And where the defendants had signed a regular bail-bond, they were holden to have thereby waived the irregularity of the omission of their christian names in a *capias ad respondendum*, directing the sheriff to take Messrs. L. and B.^(d) The application for setting aside the proceedings, which is founded on an affidavit of the misnomer,^(e) should it seems be made before the expiration of the time allowed for pleading in abatement;^(ff) and the court will only relieve the defendant, upon the terms of his filing common bail, and undertaking not to bring any action.^(gg) If the plaintiff declare against the defendant by a wrong name, he may, if not estopped, plead the misnomer in abatement; and it is said that his entering into a bail-bond to the sheriff in the wrong name, should not estop him from pleading in abatement in the original action; though perhaps it might, in an action on the bail bond.^(hh) The safer way, however, is for the defendant, when arrested by a wrong name, to enter into the bail bond by his right name, stating that he was arrested by the name in the writ; for if his entering into it by a wrong name would not operate as an estoppel, it might be evidence, by his own admission, of his being called as well by one name as the other:⁽ⁱⁱ⁾ And it is clear, that if

(g) Willes 554.

(h) 3 East, 111; and see 2 Chit. Rep. 335. Steph. Pl. 319, &c.

(i) 6 Durnf. & East, 234. 8 East, 328. 2 Campb. 270. 2 Taunt. 399. 1 Marsh. 75. 2 Chit. Rep. 357. 5 Taunt. 623. 1 Barn. & Ald. 647. *Ante*, 110; but see 3 Campb. 108. 8 Moore, 297. 1 Bing. 314, S. C.

(k) 1 Marsh. 477. 4 Maule & Sel. 360. 1 Chit. Rep. 282; but see 4 Barn. & Cres. 970. 7 Dowl. & Ryl. 458, S. C. 3 Bing. 296.

(l) 2 Taunt. 399. 4 Maule & Sel. 360; but see 1 Price, 277, 391. 2 Price, 328.

(m) 1 Chit. Rep. 282. 2 Chit. Rep. 357. 1 Bing. 424; but see 3 Durnf. & East, 572. 2 Bos. & Pul. 109, *contra*. *Ante*, 301.

(a) 7 Dowl. & Ryl. 258. *Waterlow & another v. Galiegne*, E. 7 Geo. IV. K. B. *accord*.

(b) 2 Taunt. 401; and see 16 East, 110, 11. 1 Price, 277, 391.

(c) 6 Taunt. 530. 2 Marsh. 230, S. C.

(d) 1 Brod. & Bing. 529. 4 Moore, 317, S. C.; but see 6 Moore, 264. 3 Bing. 296. *Ante*, 148.

(e) 1 Chit. Rep. 282.

(ff) 15 East, 159; and see 6 Taunt. 115. 1 Marsh. 474, S. C.

(gg) 1 Chit. Rep. 282; and see 4 Maule & Sel. 360. 2 Taunt. 399.

(hh) Willes, 461. Barnes, 94, S. C.; and see 1 Salk. 7.

(ii) 3 Taunt. 505; but see 8 Moore, 526. 1 Bing. 424, S. C.

the defendant, after being arrested, were to put in bail above in a wrong name, it would estop him from pleading the misnomer in abatement; *(k)* even though he were himself no party to the recognizance. *(l)* The bail above therefore, in such case, should be put in, and entered on the recognizance roll, by the defendant in his right name, as having been arrested by the name in the writ. *(m)*

When process is taken out against a defendant by a wrong name, the misnomer may be cured by amending the writ, if there be anything to amend by, and then declaring against the defendant by his right name; *(n)* [A] but in doing this, the court will take care that it shall not operate to the *prejudice of the sheriff. *(a)* Or, if the defendant appear by [*449] his right name, the plaintiff may declare against him by the name in which he appears, stating that he was arrested, or served with process, by the other; for by appearing, the defendant admits himself to be the person sued, and so the variance is immaterial. *(b)* On process not bailable, if the defendant be sued by a wrong name, and do not appear, the plaintiff, we have seen, *(c)* cannot rectify the mistake, by appearing for him in his *right* name, according to the statute: *(d)* nor can he appear for him in the name by which he is sued, and afterwards declare against him in his right name. *(e)* But if a defendant be arrested or served with process by a *wrong* christian name, and afterwards put in bail or appear by his *right* name, and the plaintiff declare against him by his right name, without stating that he was arrested or served with process by the other, the court will not interpose in a summary way, and set aside the proceedings for irregularity; *(f)* nor will they, on that ground, order an *exoneretur* to be entered on the bail-piece: *(g)* And it seems, that a misnomer, in process may be cured, by an attorney's undertaking to appear. *(h)* So, if a defendant be served with a process by a *wrong* christian name, and afterwards the plaintiff enter an appearance for him, and serve him with notice of declaration, by his *right* name, and proceed to judgment and execution, the court will not set aside the proceedings for irregularity, merely on the ground that the defendant never appeared: because he ought to have pleaded the misnomer in abatement; *(ii)* And the course is now said to be, when there has been a misnomer in the writ, for the plaintiff, on the return of it, to file a declaration in the proper form; and the declaration so filed has been holden to cure the objection to the writ. *(kk)* It has also been determined, that if the plaintiff declare by a

(k) Willes, 461. Barnes, 94, S. C.; and see 1 Salk. 8. 3 Durnf. & East, 611.

(l) 2 New Rep. C. P. 453.

(m) *Ante*, 252, 3.

(n) 2 Bos. & Pul. 109; and see 3 Wils. 49. *Ante*, 242.

(a) Bos. & Pul. 109; and see 3 Wils. 49. *Ante*, 242.

(b) 2 Wils. 393. *Green & Robinson*, II. 23 Geo. III. K. B. *Boyne v. Mills*, M. 25 Geo. III. K. B. 3 Durnf. & East, 611. 1 Bos. & Pul. 105, 645.

(c) *Ante*, 242.

(d) 3 Durnf. & East, 611. 2 New Rep. C. P. 132. 11 East, 225, *accord*. 1 Bos. & Pul. 105, *contra*.

(e) 10 East, 328. 11 East, 225; and see 3 Maule & Sel. 450.

(f) 2 Wils. 393.

(g) 13 East, 273.

(h) 2 Chit. Rep. 240.

(ii) 3 East, 167.

(kk) 2 Chit. Rep. 8; and see 3 Maule & Sel. 450. *Sed quare*, if the objection to the writ can be cured, by any form of declaring, when the defendant has not appeared? For the plaintiff in that case cannot, it seems, regularly appear for him, according to the statute, in a

[A] The misnomer of a corporation, in a grant or obligation, will not prevent a recovery upon it in the true name, provided the corporation, designed and intended by the parties to the instrument, be shown by proper and apt averments and proof. *Upper Alloways Creek v. String*, 5 Halst. 323.

wrong christian name, this is no ground of nonsuit at the trial, if it can be shown that the defendant knew that the action was brought by the person who actually sues; ^(l) nor is it any objection to the plaintiff's recovery, in an action on a promissory note, that one of the defendants is misnamed, if it be proved that he was the real person sued, and served [*450] with process. ^(m) And if the defendant be sued by a *wrong* *christian name, and omit to plead the misnomer, the plaintiff may proceed to judgment and execution against him, in the name by which he is sued. ^(a)

Upon *general* process, the plaintiff may declare *qui tam*, ^(b) or as *executor* or *administrator*, &c.; or the defendant may be declared against in his representative character. ^(c) But this rule will not hold *è converso*; for where the process was to answer the plaintiff *qui tam*, &c. and the declaration was in his own name only, omitting the *qui tam* part, the court held the variance to be fatal, and set aside the proceedings. ^(d) In a subsequent case, the proceedings were set aside, where the process was to answer the plaintiffs as *assignees* of a bankrupt, and the declaration was in their own right; for the plaintiff cannot declare against the defendant generally, on process sued out in a special character. ^(e) So, where a writ was sued out by the plaintiffs as *executors*, and the declaration was by them *in their own right*, it was deemed a sufficient variance for discharging the defendant out of custody on filing common bail. ^(f)

The plaintiff may declare in *chief*, upon common process by *bill* in the King's Bench, or on a common *capias quare clausum fregit* in the Common Pleas, ^(g) for any cause of action whatever. ^(h) And where the process was in *trespass* and *assault*, and the declaration in *trover*, the variance was deemed immaterial. ⁽ⁱ⁾ But, in *bailable* cases, the declaration should regularly correspond with the *ac etiam* in the writ, as to the nature of the cause of action: Therefore, where the plaintiffs having held the defendant to bail on an affidavit in *assumpsit*, delivered a declaration in *trover*, the court of King's Bench ordered an *exoneretur* to be entered on the bail-piece. ^(k) But they will not permit a defendant to take advantage of a variance in the amount of the debt, between the *ac etiam* part of the *latitat* and the declaration. ^(ll) And though, where there is a material variance between the *ac etiam* in the writ and the declaration, the plaintiff will lose his bail, ^(mm) yet the court will not on that ground set aside the proceedings for irregularity. ⁽ⁿ⁾

different name from that in the process; and after having appeared for him in the latter name, a declaration in a different one would be irregular. *Ante*, 242, 449.

^(l) 3 Campb. 29; and see 6 Moore, 141. 3 Brod. & Bing. 54, S. C. 7 Moore, 522. 1 Bing. 143, S. C. *Ante*, 9.

^(m) 16 East, 110; and see 1 Chit. Rep. 507, 8, ^(a), 512, 13, ^(a).

^(a) 2 Str. 1218. 6 Taunt. 115. 1 Marsh. 474, S. C. 7 Barn. & Cres. 486. 1 Man. & Ryl. 265, S. C.; but see 1 Moore, 105.

^(b) 2 Str. 1232. 2 Blac. Rep. 722. 3 Wils. 141, S. C.

^(c) 6 Moore, 66. 3 Brod. & Bing. 4, S. C.

^(d) 4 Bur. 2417. 6 Durnf. & East, 158.

^(e) *Meggs & another, assignees of Cochran, v. Ford*, E. 25 Geo. III. K. B.

^(f) 8 Durnf. & East, 416; and see 3 Wils. 61. 1 Bos. & Pul. 383.

^(g) Pr. Reg. 137. Cas. Pr. C. P. 58, S. C.

^(h) R. E. 15 Geo. II. reg. 1, K. B. Cowp. 455. *Ante*, 352.

⁽ⁱ⁾ 2 Chit. Rep. 166.

^(k) 7 Durnf. & East, 80; and see 8 Durnf. & East, 27.

^(ll) 5 Durnf. & East, 402.

^(mm) *Ante*, 294.

⁽ⁿ⁾ *Per Cur. M.* 43 Geo. III. K. B. 2 Moore, 89. 8 Taunt. 189, S. C.; and see 2 Moore, 301. 8 Taunt. 304, S. C. C. P.

It should also be remembered, that in the Common Pleas, a variance between the writ and count, the *ac etiam* being in *case on promises*, but the declaration in *debt*, is not a ground for entering an *exoneretur* on the bail-piece, where the sum sworn to is under 40*l.*(*o*) By *original*, the plaintiff must declare in chief, for the same cause of action as is expressed in the writ: (*p*) and if there be a variance between the *original [*451] writ and declaration, the court will discharge the defendant, on entering a common appearance: (*a*) But they will not on this ground set aside the proceedings; for that would be permitting the defendant to do indirectly, what the practice of the court will not allow him to do directly, by craving *oyer* of the original writ, and pleading the variance in abatement. (*b*)

The rules of pleading, upon which the statement of the cause of action depends, are founded in good sense; their objects are precision and brevity: nothing is more desirable for the court than precision, nor for the parties than brevity. (*c*) Precision or *certainity* is of three kinds; first, to a common intent; secondly, to a certain intent in general; thirdly, to a certain intent in every particular: (*d*) The second, or that which is to a certain intent in general, is all that is required in a declaration; and it ought to be such that the defendant may answer it, a good issue be joined thereon, and the court be enabled to give judgment. (*e*) This certainty should pervade the whole declaration; and is particularly required in setting forth the time, place, and other circumstances necessary to maintain the action. (*f*) [A] But that which is alleged by way of conveyance

(*o*) 1 H. Blac. 310. *Ante*, 294.

(*p*) R. H. 8 Car. 1. K. B. 5 Durnf. & East, 402.

(*a*) 6 Durnf. & East, 363; but see 2 Moore, 301. 8 Taunt. 304, S. C.

(*b*) *Id.* 2 Wils. 393. *Durant v. Scroocold*, E. 24 Geo. III. K. B.; but see 5 Durnf. & East, 722. 4 East, 589. 2 New Rep. C. P. 82. 5 Taunt. 649. 1 Marsh. 274.

(*c*) *Ioung*. 666, 7.

(*d*) Co. Lit. 303, a.; and see Cowp. 682. Dong. 158, 9.

(*e*) Co. Lit. 303, a. Pl. Com. 84.

(*f*) Com. Dig. tit. *Pleader*, C. 18, &c. And see further, as to *certainity* in general, 1 Chit. Pl. 4 Ed. 212, &c.; and as to the certainty required in *declarations*, *id.* 229, &c.; in *pleas*, *id.* 457, &c.; and in *replications*, *id.* 561; and as to *time* and *place*, see 5 Durnf. & East, 607. 1 Chit. Pl. 4 Ed. 231, &c.

[x] The declaration, in every case, must set out a good and sufficient cause of action. *Mackull v. Jones*, 5 Gill, & Johns. 65. *U. States Bank v. Smith*, 11 Wheat. 172. And every material fact, which constitutes the ground of the plaintiff's action, should be alleged. *Drowne v. Stimpson*, 2 Mass. 441, 444. *Tracy v. Dakin*, 7 Johns. 75. If a declaration contain a substantial cause of action, duplicity, or irrelevant and superfluous matter, does not vitiate it. *Callison v. Simmons*, 2 Port. 145. *Evans v. Watrouse*, *ib.* 205. It is not, however, necessary to state a promise according to the words of it, but it is sufficient to state it according to its effect. *Andrews v. Williams*, 11 Conn. 326. The whole of the consideration of a contract must be stated; and if any part of an entire consideration, or of a consideration consisting of several things, be omitted, the plaintiff will fail on the ground of variance. *Brooks v. Lorie*, 1 N. & M. 342. In declaring on contracts not under seal, which do not contain within themselves the acknowledgment of a consideration, or that from which a consideration can be implied by law, it is incumbent on the plaintiff to set out and prove a consideration. *Treadway v. Nicks*, 3 M'Cord, 195. And a contract in the alternative must be stated, in the declaration, according to the terms of it. *Stone v. Knowlton*, 3 Wend. 374.

Whatever the plaintiff is under the necessity of newly assigning, in order to avoid the effect of a plea, whether of time, place, or circumstance, must be stated with as much precision as in the declaration itself. *Price v. Perry*, 1 Miss. 542. So where an action on the case is brought, and the damages actually sustained do not necessarily arise from the act complained of, and are not therefore implied by law, the plaintiff must state, in his declaration, the particular damage which he has sustained, or he cannot give evidence of it upon the trial. *Squier v. Gould*, 14 Wend. 159. Or where, by the terms of a contract, an act is

or inducement to the substance of the matter, need not be so certainly alleged, as that which is the substance itself: *(g)* and *surplusage* will not vitiate, except where it defeats the action. *(h)*

If the declaration be defective in any of the above particulars, the defendant may demur: But if he do not, the defect may in some cases be aided by the defendant's *plea*, or by a *verdict* for the plaintiff. If the declaration want time, place, or other circumstances, it may be aided by the defendant's *plea*; but not if it be defective in substance: *(i)* And a verdict will aid the omission of that which was necessary to be proved at the trial, and without which the jury could not have found for the plaintiff. *(k)* Defects in the declaration are also frequently cured by the statutes of *jeofails*. *(l)*

The declaration itself was formerly *delivered*, in the King's Bench, to the defendant's attorney, who made a *copy* of it, and then delivered it back: *(m)* But the copy is now made in that court, as well as in the Common Pleas, by the plaintiff's attorney; *(n)* and, except where the defendant is in custody, should either be *delivered* to the defendant's attorney, or *filed* *with the clerk of the declarations in the King's Bench, or prothonotaries in the Common Pleas. When the defendant has appeared, and filed common bail, or special bail has been put in and perfected, a copy of the declaration should be *delivered* to his attorney, *(aa)* if his place of abode be known; the delivery of a copy to the defendant himself, after he has appeared or filed bail, not being deemed sufficient. *(b)* And, on the delivery of a copy of the declaration, the defendant's attorney must formerly have paid for the same, after the rate of *four pence per sheet*, computing *seventy-two words* to a sheet, together with the stamps or king's duty, *(c)* and *four pence* for the warrant

(g) Co. Lit. 303, a.

(h) Com. Dig. tit. *Pleader*, C. 28, 9. Steph. Pl. 417, &c.

(i) 8 Co. 120, b.

(k) Com. Dig. tit. *Pleader*, C. 87; and see Doug. 680. 7 Durnf. & East, 518, 583. 1 Chit. Pl. 4 Ed. 359, 60.

(l) 32 Hen. VIII. c. 30. 18 Eliz. c. 14. 21 Jac. I. c. 13. 16 & 17 Car. II. c. 8.

(m) R. T. 12 W. III. K. B.

(aa) R. T. 2 Geo. II. K. B.; but see 8 Mod. 379. 2 Ld. Raym. 1407, by which this rule appears to have been made in T. 11 Geo. I. before the statute 12 Geo. I. c. 29, and the rule upon that statute, of T. 1 Geo. II. K. B.

(b) Lofft, 332.

(c) R. T. 12 W. III. K. B.; and note *(a)* R. T. 2 Geo. II. K. B.

to be done in a reasonable time, an allegation that it was done in a reasonable time, to wit, on or about such a day, is sufficient. *Nichols v. Blakeslee*, 2 Day, 218. Or in declaring upon a special contract, it must be set out in its very terms, or according to its legal effect. *Keyes v. Dearborn*, 12 N. Hamp. 52. *Pye v. Rutter*, 7 Mis. 548. *Dickerson v. Morrison*, 5 Pike, 316. *White v. Guest*, 6 Black. 228. *Moore v. Platte County*, 8 Mis. 467. *Maxfield v. Scott*, 17 Verm. 634. *Berthe v. Biggs*, 1 How. Miss. 195. A declaration should contain all that it is necessary for the plaintiff to prove under a plea of the general issue, in order to entitle himself to recover. *Beardsley v. Southmayd*, 2 Green, 534. Writings always may, and often should, be declared on according to their legal effect, and not set forth in their precise words. *Churchill v. Merchants' Bank*, 19 Pick. 532. *Doar v. Fenno*, 12 Ib. 521. *Lent v. Puddleford*, 10 Mass. 230. *Hopkins v. Young*, 11 Ib. 302, 307. *Johnson v. Carter*, 16 Ib. 443. And it is not necessary to state a promise according to the words of it, but according to its effect. Thus, in an action on a written agreement to pay a certain sum for a certain number of staves, subject to a deduction at a certain rate for any number not taken, it is necessary to allege in the declaration the number of staves actually taken. *Martin v. Woodall*, 1 Stew. & Port. 244. And a writing declared on, but not spread upon the record by *oyer*, or otherwise, must be taken as set out in the declaration. *Pollard v. McClain*, 3 A. K. Marsh. 24.

of attorney.(d) But now, it is not necessary for the defendant's attorney to pay for a copy of the declaration, when delivered;(e) the stamps or king's duty on copies of declarations are repealed, by the statute 5 Geo. IV. c. 41; and the plaintiff, we have seen,(f) cannot sign judgment, for the defendant's refusing to pay *four* pence for the warrant of attorney, when a copy of the declaration is delivered to him.

If the abode of the defendant's attorney be unknown to the plaintiff's attorney, the copy should be *filed*, with the clerk of the declarations in the King's Bench, or prothonotaries in the Common Pleas, and *notice* thereof given to the defendant.(g) And a copy of the declaration should be *filed* in like manner, where the plaintiff has entered an appearance, or filed common bail for the defendant, according to the statute, and *notice* thereof delivered to, or left at the last or most usual place of abode of the defendant; in which notice should be expressed the nature of the action, at whose suit it is prosecuted, and the time limited by the rules of the court for pleading; and that in case the defendant do not plead by such limited time, judgment will be entered against him by default.(h) The statute 48 Geo. III. c. 149,(i) requiring copies of declarations to be written in the usual and accustomed manner, and it not having been the practice to write such copies on both sides of the paper, the court of King's Bench held, that a copy so written, and delivered to a prisoner, was irregular, and entitled him to be discharged out of custody.(k) But the court of Common Pleas refused to set aside a declaration, on the ground that the common counts were partly printed, and partly written.(l)

*The declaration, in the foregoing cases, must be delivered or filed *absolutely*. But it cannot be so delivered or filed, *before* [*453] appearance or bail; as the defendant till then is not in court.(a) Still, however, for the sake of expediting the cause, by making the times for appearance and pleading concurrent, it is a rule in the King's Bench, that "upon all process, returnable before the *last* return of any term, where no affidavit is made or filed of the cause of action, the plaintiff *may*(bb) file or deliver the declaration *de bene esse*, or *conditionally*, at the return of such process, with notice to plead in *eight* days after the filing or delivery thereof: And that upon all such process as aforesaid, where an affidavit is made and filed of the cause of action, the declaration may be filed or delivered *de bene esse*, at the return of such process, with notice to plead in *four* days after such filing or delivery, if the action be laid in *London* or *Middlesex*, and the defendant live within *twenty* miles of *London*; and in *eight* days, if the action be laid in any other county, or the defendant live above *twenty* miles from *London*: Provided the declaration in either case be filed or delivered, and notice thereof given, *four* days ex-

(d) R. M. 5 Ann. reg. 2, K. B. In the Common Pleas, *four* pence was paid for the warrant of attorney in *debt*, *trespass* and *detinue*, and *eight* pence in other actions. Imp. C. P. 4 Ed. 228.

(e) 4 Durnf. & East, 370. Imp. K. P. 10 Ed. 179, (a). Imp. C. P. 7 Ed. 183, (a).

(f) *Ante*, 95.

(g) R. T. 2 Geo. II. K. B. R. M. 1654, § 15, C. P.

(h) R. T. 1 Geo. II. K. B. R. M. 1 Geo. II. reg. 1, C. P.; and see Append. Chap. XVII, § 22, 23.

(i) *Sched.* Part II.; and see stat. 55 Geo. III. c. 184. *Sched.* Part. II. *principio*.

(k) 12 East, 294; and see 1 Maule & Sel. 709. 1 Dowl. & Ry. 562.

(l) 2 Moore, 654. 8 Taunt. 591, S. C.

(a) Lofft, 333. 2 Durnf. & East, 719; and see Forrest, 33. 2 Chit. Rep. 165. *Ante*, 419, 20.

(bb) But he is not bound to do so, *Carmichael v. Chandler*, T. 24 Geo. III. K. B. Imp. K. B. 10 Ed. 119; and see 2 East, 442. *Ante*, 299, 305.

clusive before the end of the term, and a rule to plead be duly entered.”(c) It was formerly doubted, whether a declaration could be filed or delivered *de bene esse*, in the King’s Bench, on process returnable the *last* return of the term.(d) But it is now settled, that it cannot be so filed or delivered:(e) the practice of declaring *de bene esse* being founded on a rule of court,(c) by which the right of declaring in that mode is limited to process returnable *before* the last *general*(f) return: and the privilege was only intended to apply, when the plaintiff is entitled to a plea of the term.(e)

In the Common Pleas, the practice of declaring *de bene esse* seems to have been first allowed on *special* writs,(g) and was afterwards extended to *common* ones.(h) At present, the declaration in that court may be filed or delivered *de bene esse*, upon process returnable the *first*, *second*, or *third* return of any term,(i) or on the *fourth* return of *Easter* term:(k) And, by a late rule,(k) it may be so filed or delivered, upon process returnable the *last* return of any term; provided it be filed or delivered, on the day of such return, or on the day next after such return, in case the same shall not happen on a *Sunday*, in which case the plaintiff shall have the whole of

the *Monday* following, to file or deliver his declaration *de bene*
[*454] *esse*: *And this rule applies equally to *Easter* term, as to any

other.(a) It was not formerly necessary, in the Common Pleas, to give notice of a declaration being filed conditionally, in bailable actions:(b) But now, by a late rule of court,(cc) “in every action in which special bail shall be required, and where the declaration shall be filed conditionally, notice in writing of such declaration being so filed, shall be given to the defendant, his attorney or agent; and no declaration shall be considered as filed, until such notice shall be so given.”

In the Exchequer of Pleas, it was formerly the practice, to file the original draft of declaration in the office; and engrossments on paper, of declarations and other pleadings, were not usually required to be made by the party declaring or pleading: But now, by a late rule of court,(dd) it is ordered, that “engrossments on paper, of all declarations and other pleadings, shall be duly made on stamp,(ee) and filed or delivered by the parties respectively declaring or pleading, within the times prescribed by the rules of the court for filing and delivering declarations or other pleadings respectively; and that a book be kept in the office of pleas, wherein entries shall be made of declarations so filed.”

(c) R. T. 22 Geo. III. K. B.; and see R. M. 10 Geo. II. *reg.* 2, K. B. R. M. 3 Geo. II. *reg.* 2, C. P. *Pr. Reg.* 148.

(d) 1 *Scl. Pr.* 2 Ed. 226; and see the *eighth* edition of this work, p. 456, (c).

(e) 1 *Barn. & Cres.* 653. 3 *Dowl. & Ryl.* 28, S. C.; and see 2 *Chit. Rep.* 237. 5 *Barn. & Cres.* 455. 8 *Dowl. & Ryl.* 135, S. C. *accord.*; but see 1 *H. Blac.* 533, 4, *contra*, in C. P.

(f) 5 *Barn. & Cres.* 455. 8 *Dowl. & Ryl.* 135, S. C.

(g) *Cas. Pr. C. P.* 16. *Pr. Reg.* 145, 6.

(h) *Pr. Reg.* 146, 7. *Cas. Pr. C. P.* 55, 6, S. C.

(i) R. T. 8 Geo. III. C. P.; and see R. M. 8 Geo. II. *reg.* 2, C. P. *R. Reg.* 148.

(k) R. H. 35 Geo. III. C. P. 2 *H. Blac. oct. ed.* 551. 7 *Taunt.* 71, (a). 2 *Marsh.* 337, (a). 2 *Chit. Rep.* 381. Same rule.

(a) 7 *Taunt.* 70. 2 *Marsh.* 337, S. C.

(b) *Pr. Reg.* 149. *Barnes*, 302, S. C. 2 *Blac. Rep.* 725. 3 *Wils.* 147, S. C. 2 *Bos. & Pul.* 42.

(cc) R. E. 49 Geo. III. C. P. 1 *Taunt.* 616.

(dd) R. H. 60 Geo. III. & 1 Geo. IV. *in Seac.* 8 *Price*, 85; and see 2 *Price*, 114. And for the time and manner of declaring in that court, after the defendant’s appearance, see R. T. 26 & 27 Geo. II. § 9. R. M. 5 Geo. III. § 2, & R. T. 26 Geo. III. *in Seac.* *Man. Ex. Append.* 213, 218, 221, 2.

(ee) The stamp duty on copies of declarations has been since repealed, by the statute 5 Geo. IV. c. 41.

With regard to declarations *de bene esse*, it is a rule in the Exchequer, (f) that “upon all process of *quo minus ad respondendum* and *capias*, to be issued out of that court, returnable before the *last* return of any term, where an affidavit shall be made and filed of the cause of action, pursuant to the act of parliament for preventing frivolous and vexatious arrests, a declaration may be filed or delivered *de bene esse*, at the return of such process, (g) with notice to plead in *four* days after such filing or delivery; if the action be laid in *London* or *Middlesex*, and the defendant live within *twenty* miles of *London*, and in *eight* days, if the action be laid in any other county, or the defendant live above *twenty* miles from *London*; and if the defendant put in bail, and do not plead within such times as are respectively before mentioned, judgment may be signed; provided such declaration be delivered or filed, and notice thereof given, *four* days exclusively before the end of the term, and a rule to plead duly entered.” It is also a rule in that court, (h) that “upon all process to be issued out of that court, returnable as aforesaid, where the defendant shall be personally served with a copy thereof, pursuant to the said act of parliament, or to the statute 51 Geo. III. c. 124, (i) the plaintiff may file or deliver a declaration *de bene esse*, at the return of *such process with notice to [*455] plead in *eight* days after the filing or delivery thereof: (a) and if the defendant do not enter an appearance and plead within the said *eight* days, the plaintiff, having entered an appearance for him according to the said acts, may sign judgment for want of a plea; provided such declaration be delivered or filed, and notice thereof given, *four* days exclusively before the end of the term, and a rule to plead duly entered: And that upon all writs of *distringas*, whereupon notice shall be given pursuant to the said last-mentioned act, the plaintiff may file or deliver a declaration *de bene esse*, at the return of such writ, with notice to plead in *eight* days after the filing or delivery thereof; and if the defendant do not enter an appearance and plead within the said *eight* days, the plaintiff, having entered an appearance according to the same act, may sign judgment for want of a plea, a rule to plead having been duly entered.” And by a late rule, (b) it is ordered, that “in all cases wherein the plaintiff, by the present practice of the court, would be entitled to sign judgment for want of a plea, where the declaration had been delivered or filed, and notice thereof given, *four* days exclusively before the end of the term in which the process is returnable, the plaintiff shall be at liberty to sign such judgment; provided the declaration be delivered or filed, and notice thereof given, *two* days exclusively before the end of the term within which the process is returnable, a rule to plead having been duly entered.” This rule does not extend to filing declarations *de bene esse*, so as to entitle the plaintiff to a plea of the term, on writs returnable *two* days exclusively before the end of the term. (c)

In the King’s Bench, the declaration may be filed, and notice thereof given, on the return day of the writ, or *quarto die post* by *original*; and

(f) R. T. 26 Geo. III. in *Scac. Man. Ex. Append.* 221; and see R. T. 26 & 27 Geo. II. § 10, and R. M. 5 Geo. III. in *Scac. Man. Ex. Append.* 214, 219.

(g) 13 Price, 178. McClel. 65, S. C.

(h) R. M. 53 Geo. III. in *Scac. Man. Ex. Append.* 226, 7. 8 Price, 508, 9.

(i) And see stat. 7 & 8 Geo. IV. c. 71, § 5.

(a) Append. Chap. XVII. § 24.

(b) R. H. 60 Geo. III. & 1 Geo. IV. in *Scac.* 8 Price, 84.

(c) McClel. 659.

the writ of *latitat*, we have seen, (d) may be sued out and served on the return day: but it cannot be served, and notice of declaration given, at the same time; for the notice of declaration presupposes the declaration to be filed, and it cannot regularly be filed till after the writ is served: There must be some interval therefore, however short, between the service of the writ and notice of declaration. (e) But where the defendant had omitted to take advantage of the objection, until after judgment was signed and a whole term had elapsed, the court would not set aside the judgment with costs. (f) In the Common Pleas, the declaration may be filed *de bene esse*, on the *essoïn* or return day of the writ, or any day after; though a rule to plead cannot be given till the first day of term. (g) And notice of the declaration being so filed may be given, in that court, on the return day of the writ, at the time of serving it: (h) But notice cannot be given on that day, of a declaration being filed *in chief*. (i) And service of a notice of declaration on a *Sunday* is bad, though the defendant accept it, knowing it to be *irregular. (a) The declaration, however, cannot be filed before the *essoïn*, or return day of the writ: therefore a notice of declaration given the day before the *essoïn* day of the term, being *Sunday*, until which day the plaintiff could not file his declaration, has been deemed a nullity. (b) And, in that court, the declaration cannot be filed or delivered *de bene esse*, so as to charge the defendant with the costs of it, till the *appearance* day of the return of the writ. (cc) So, if one of three defendants, in a joint action, appear to a *quare clausum fregit*, and the two others, being arrested on bailable process, have till the ensuing term to justify bail, it is irregular for the plaintiff, previous to that time, to deliver a declaration against all three, indorsed "*conditionally, until special bail is perfected*." (dd) And the declaration cannot, in either court, be filed or delivered *de bene esse*, after the defendant has appeared, or filed bail: (ee) or the time limited for his appearance, or putting in bail, is expired; (ff) whether the process be bailable or not bailable. (gg) On bailable process therefore, when the defendant has neglected to put in or perfect *special* bail, the plaintiff must proceed against the sheriff, or his bail, upon the bail-bond: and when he has not appeared or filed *common* bail in due time, the plaintiff must enter an appearance, or file common bail for him, according to the statute; and then deliver or file his declaration *absolutely*. (hh) In the Exchequer of Pleas, it has been the usual course of the court, when the process is served on the return day, to give notice of the declaration

(d) *Ante*, 153, 168.

(e) 3 Smith, R. 531. 12 East, 116. 2 Chit. Rep. 164, 5. 7 Dowl. & Ry. 233.

(f) 2 Chit. Rep. 164.

(g) Cas. Pr. C. P. 68; and see Pr. Reg. 148.

(h) 3 Taunt. 404. 8 Taunt. 127. 1 Moore, 573, S. C.

(i) 4 Taunt. 818. 8 Taunt. 127. 1 Moore, 573, S. C.

(a) 1 H. Blac. 628.

(b) 2 New Rep. C. P. 75.

(cc) 2 Blac. Rep. 749; and see 1 Esp. Rep. 345. 2 Bos. & Pul. 515. 2 New Rep. C. P. 398.

(dd) 2 New Rep. C. P. 231. *Quare*, whether, if the declaration had been indorsed conditionally, until bail should be perfected by the two latter defendants, it would have been irregular? *Id. ibid.*

(ee) R. M. 10 Geo. II. *reg.* 2. R. T. 22 Geo. III. K. B. R. M. 3 Geo. II. *reg.* 2. R. T. 8 Geo. III. R. H. 35 Geo. III. C. P. 2 H. Blac. *oct. ed.* 551.

(ff) 1 Bur. 56. 2 Durnf. & East, 720. 6 Durnf. & East, 548. 8 Durnf. & East, 77, K. B. Pr. Reg. 145, 6. Barnes, 342. 2 New Rep. C. P. 232.

(gg) 2 New Rep. C. P. 433.

(hh) Pr. Reg. 145, 6.

being filed conditionally, on the same day : (i) And, in that court, service of notice of declaration on the return day, by a person going away, and returning a few minutes after service of the writ, was holden not to be irregular. (k)

If the declaration be *filed*, and notice thereof given to the defendant or his attorney, it is deemed to be a good declaration, from the time of such notice only ; (l) and therefore a rule to plead in such case, given before notice of declaration, is irregular. (m) Yet where the declaration, in the King's Bench, was filed on the last day of the second term, after the return of the writ, but the notice was not given till a little before the essoin day of the following term, this was holden to be well enough ; the master certifying it to be the practice. (n) The defendant must formerly have received and paid for a copy of the declaration, whether it were delivered or left in the *office, before he could have been [*457] admitted to plead ; (a) and if he neglected to do so, the plaintiff's attorney might have refused to accept his plea, and signed judgment : (b) But now, though a copy of the declaration must be paid for, on taking it out of the office, when *filed*, yet the defendant's attorney, we have seen, (c) is not bound to pay for it, when *delivered* to him. (d)

The *notice* of declaration being filed in the office, must be properly entitled ; and express the nature of the action, as whether it be in *debt* or *case*, &c. : (e) but, in the Common Pleas, it need not state the amount of the damages ; (f) and, in the King's Bench, it seems that no date to the notice of declaration is necessary. (g) When the defendant's place of residence is known to the plaintiff's attorney, the notice of declaration should be delivered to the defendant, or left for him at the last or most usual place of his abode ; it being irregular in such case for the plaintiff's attorney to stick up a notice of declaration in the office : (h) And the court of Common Pleas would not allow the affixing of a notice of declaration in the prothonotaries office, to be good service ; although it was sworn, that the defendant had no fixed place of residence, and that the plaintiff did not know where to find him. (i) If the defendant's place of abode be unknown, application must be made to the court, that affixing the declaration in the office may be deemed good service : (kk) and it is not so considered, unless by express permission of the court, though the defendant's place of abode be unknown to the plaintiff. (ll) But where the defendant and his attorney had been informed that a notice of declaration was stuck up in the office, the latter court refused to set aside a judgment, for want of service of the notice at the defendant's last place of abode. (mm) And where a defendant kept out of the way, to avoid

(i) 9 Price, 153.

(k) M'Clel. 659.

(l) R. T. 1 Geo. II. R. T. 2 Geo. II. K. B. 8 Mod. 379. 2 Ld. Raym. 1407. 7 Durnf. & East, 298. R. M. 1 Geo. II. *reg.* 1, C. P.

(m) Pr. Reg. 131. Cas. Pr. C. P. 111. Barnes, 248, S. C.

(n) 3 Bur. 1452. 2 Durnf. & East, 112.

(a) R. M. 10 Geo. II. *reg.* 3, K. B. ; and see R. T. 12 W. III. R. T. 2 Geo. II. K. B.

(b) 1 Wils. 173.

(c) *Ante*, 452.

(d) Imp. K. B. 10 Ed. 179, (a). Imp. C. P. 7 Ed. 183, (a).

(e) Pr. Reg. 131. Cas. Pr. C. P. 63, S. C. *Id.* 68, 122. 2 Wils. 84.

(f) 6 Taunt. 331.

(g) 2 Chit. Rep. 238.

(h) 7 Durnf. & East, 26. 1 Bos. & Pul. 214.

(i) 8 Moore, 273.

(kk) 1 Taunt. 433.

(ll) 5 Taunt. 777 ; and see 7 Taunt. 145. 1 Chit. Rep. 675, (a).

(mm) 1 New Rep. C. P. 279.

being served with notice of declaration, and it was sent to him in a letter by the post, which was returned opened and marked "refused," this was deemed good service; it appearing that the defendant knew the handwriting of the plaintiff's attorney.⁽ⁿ⁾ So, in the Exchequer, service of notice of declaration is good, by affixing it on the door of the house where the defendant last lived, if the plaintiff or his attorney do not know the place to which he is removed, and knowledge of such service can be brought home to him.^(o) When the declaration is filed or delivered *de bene esse* or conditionally, it is necessary to make an indorsement thereon, that it is so filed or delivered:^(p) and, in the King's Bench, where the declaration filed in the office, before the defendant's appearance, was indorsed *"*filed conditionally*," and judgment afterwards signed for want of a plea, the court held the proceeding regular; though the notice served on the defendant was of a declaration *generally*.^(a)

If the plaintiff do not declare in due time, he is liable to be *nonprossed*, or have judgment signed against him for not prosecuting his suit.^(b) It is called a judgment of *nonpros*, from the words *non prosequitur*, &c., formerly used in entering it up. And this seems to be the proper appellation of the judgment, in actions by *bill*: but in actions by *original*, where the language of the judgment was *non prosequitur breve, vel seetam*, it is more commonly called a judgment of *nonsuit*.^(c) The judgment of *nonpros* is founded on the statute 13 Car. II. stat. 2, c. 2, § 3, by which it is enacted, that "upon an appearance entered for the defendant by *attorney*, in the term wherein the process is returnable, unless the plaintiff shall put into the court from whence the process issued, his bill or declaration, against the defendant, in some personal action or ejectment of farm, before the end of the term next following after appearance, a nonsuit for want of a declaration may be entered against him; and the defendant shall have judgment to recover costs against the plaintiff, to be taxed and levied in like manner as upon the 23 Hen. VIII."^(d) The provisions of this statute are confined in terms, to cases where the defendant has been arrested; but it has been holden, that if a defendant appear at the day of the return of the process, and put in bail, though he never were arrested, nor the process returned, yet if the plaintiff do not declare within *two* terms, a *nonpros* may be entered against him:^(e) And the statute is not confined to cases where the writ is defective, but has always been construed to extend to cases in general.^(f) Hence it is a rule, in the King's Bench, that "on *all* process issuing out of this court, returnable at a day certain, if the defendant appear by his attorney, and file bail of the term wherein the process is returnable, and the plaintiff do not declare before the end of the term next following, a *nonpros* may be signed, without entering any rule to declare, or calling for a declaration."^(g) So, where the proceedings are by *original* in the King's Bench, it is not necessary to give a rule to declare, or demand a declaration.^(h) But, in the Common

(n) 5 Taunt. 186. 1 Marsh. 8, S. C.

(o) 6 Price, 15.

(p) R. M. 10 Geo. II. *reg.* 2, K. B. R. E. 3 Geo. II. C. P. Barnes, 257, 302. 2 New Rep. C. P. 223.

(a) 8 Durnf. & East, 77. 2 Moore, 719. 8 Taunt. 644, S. C.

(b) Append. Chap. XVII. § 25, &c.

(c) *Ante*, 421, 2.

(d) c. 15. (e) 2 Salk. 455. 7 Mod. 32, S. C.

(f) 7 Durnf. & East, 27.

(g) R. M. 10 Geo. II. *reg.* 2, (b), K. B. Gilb. K. B. 345.

(h) Imp. K. B. 10 Ed. 493, 531; but see R. M. 10 Geo. II. *reg.* 2, (b), K. B. *contra*.

Pleas, the defendant must, before the end of the second term, or within *four* days after, enter a rule for the plaintiff to declare, *(i)* which he obtains on a *proceipe* from the secondaries, and demand a declaration; *(k)* and if the plaintiff do not declare before the rule is out, the defendant may, at any time before the *essoin* day of the next term, sign a *nonpros*, but not afterwards; *(l)* and the plaintiff, we have seen, *(m)* is not allowed any longer time to declare. *without leave than the time limited [*459] by the defendant's rule. The demand of declaration must be in writing; *(a)* and, in country causes, it must be made on the agent in town. *(b)*

The defendant cannot sign a judgment of *nonpros*, before an appearance is entered: and it cannot in general be signed, unless bail be filed, or an appearance entered, of the term wherein the process is returnable; *(c)* and therefore it cannot be signed, where a prisoner is superseded for not declaring, &c., on filing common bail. *(d)* But when special bail is required, the appearance is not complete, until they are perfected: *(e)* and therefore, where the defendant was arrested on a bill of *Middlesex*, on the 22d *November*, and special bail was put in in *Michaelmas* term, and perfected in *Hilary* term, and judgment of *nonpros* was signed in *Hilary* vacation, the court of King's Bench set aside the judgment for irregularity; the plaintiff having been guilty of no laches, in not declaring in *Michaelmas* term, as the defendant was not then fully in court. *(f)* And the statute contemplates an available appearance only, or such an appearance as will entitle the plaintiff to declare: Therefore, where a *latitat* having issued against three defendants, returnable on the last day of *Trinity* term, but only one of the defendants being served, an *alias* issued, returnable on the last day of *Michaelmas* term, of which one other of the defendants was served with a copy, and in *Hilary* term following a *pluries latitat* issued, returnable on the last day of *Hilary* term, but which was not served on the third defendant, and another *pluries* issued, returnable on the 19th *May* in *Easter* term, of which he was served with a copy, and an appearance was entered for all the defendants, in *Easter* term; and the plaintiff not having declared in *Trinity* term, the defendant signed judgment of *nonpros*; the court held, that such judgment was regular, though an appearance was not entered of the term the process was returnable. *(g)* The judgment of *nonpros*, however, must be signed, in the King's Bench, within a year after the return of the writ. *(h)*

In a joint action, it is said, the plaintiff cannot be *nonprossed* by one or more of the defendants, without the others. *(ii)* And this is universally true in actions by *original*, where the plaintiff cannot proceed against the defendants severally, upon a joint writ. But upon common process for a supposed trespass, in the King's Bench or Common Pleas, if the plaintiff declare,

(i) Imp. C. P. 7 Ed. 194, 5. Append. Chap. XVII. § 3.

(k) *Id.* § 4.

(l) R. H. 9 Ann. reg. 3, C. P. *Ante*, 422.

(m) *Ante*, 422.

(a) N. M. 1 Geo. II. C. P.

(b) Barnes, 311. Pr. Reg. C. P. 124, S. C.

(c) *Holmes v. White*, E. 11 Geo. III. K. B. 6 East, 314. 2 Chit. Rep. 37. 3 Barn. & Cres. 555. 5 Dowl. & Ry. 352, S. C. *Ante*, 242.

(d) Imp. K. B. 10 Ed. 494. Imp. C. P. 7 Ed. 535. 1 Crompt. 5 Ed. 123. 5 Durnf. & East, 35.

(e) 2 Chit. Rep. 37.

(f) 3 Barn. & Ald. 514.

(g) 3 Barn. & Cres. 553.

(h) 3 Barn. & Ald. 271. 1 Chit. Rep. 669, S. C.

(ii) Doug. 169. *Philpot v. Muller & another*, T. 23 Geo. III. K. B.

serve a notice of declaration, or even take out a rule for further time to declare, against one or more of several defendants, and do not proceed against the others, the latter may sign a judgment of *nonpros*.^(k) [*460] In *such case, however, there ought to be but one judgment of *nonpros* for all the defendants, unless the plaintiff have indicated his intention of proceeding against them severally; for the trespass is joint, and though the plaintiff, in the Common Pleas, may declare severally, yet it remains joint, till it be severed by the declaration.^(a)

The judgment of *nonpros*, or *nonsuit*, for want of a declaration, is a final judgment, and signed with the clerk of the judgments in the King's Bench, or prothonotaries in the Common Pleas; an *incipitur* being first made on a roll, and also on a sheet of paper, called a judgment paper: And in the Common Pleas, the defendant's warrant of attorney must be filed with the clerk of the warrants, who will mark the judgment paper.^(b) Whenever the defendant obtains a judgment of *nonpros*, he is, as a necessary consequence, entitled to costs;^(c) for which he may either take out execution, or bring an action of *debt* upon the judgment. It has even been holden, that an *executor* is liable to pay costs, upon a judgment of *nonpros*.^(d) And the court in two cases, have ordered the costs to be paid by the plaintiff's attorney; in one of them, at the instance of the *defendant*, upon an affidavit that the plaintiff could not be found;^(e) and in the other, at the instance of the *plaintiff* himself, where his attorney refused to proceed, without being furnished with money.^(f)

If the judgment of *nonpros* be *regular*, the courts will not set it aside, as a matter of course; and, in a *qui tam* action, they have refused to do so.^(g) But it may be set aside on motion, if *irregular*, with all the proceedings that have been had upon it, provided the application be made in time: And if an action be brought on the judgment, the whole proceedings may be set aside, by one rule.^(h) But where the plaintiff did not apply till after judgment was signed, in an action brought on the judgment of *nonpros*, the court of Common Pleas refused to set aside the latter judgment, on the ground of laches.⁽ⁱ⁾ A judgment of *nonpros* cannot regularly be signed, pending an injunction:^(kk) nor where the proceedings are stayed, by a judge's order for the delivery of the particulars of the plaintiff's demand, 7 Dowl. & Ryl. 125, 7 Barn. & Cres. 485, *Post*, 598. And where it was signed after the debt and costs had been paid, the court set it aside, although the defendant swore that the money was not paid with his privy.^(l) But where it was signed for not adjourning an *essoin*, cast upon a special *capias*, and the plaintiff took no notice of it, but delivered his declaration, and after the rule to plead was out, and a plea called for, signed judgment; the court, considering it as a trick, declared that as there was no colour for the *essoin*, or to expect the plaintiff to search after a *nonpros*, and there was no notice given of it, the plaintiff had a right to go on; and therefore they refused to set aside his judgment.^(m)

(k) 2 Durnf. & East, 257; and see 5 Barn. & Cres. 178. 7 Dowl. & Ryl. 619, S. C. 5 Barn. & Cres. 768. 8 Dowl. & Ryl. 592, S. C.

(a) 2 Salk. 455. Com. Rep. 74, S. C. 4 Bur. 2418. Vin. Abr. tit. *Costs*, 6 V. 341, *contra*.

(b) Imp. C. P. 7 Ed. 534.

(c) Stat. 23 Hen. VIII. c. 15. 8 Eliz. c. 2, § 1, 2. 4 Jac. I. c. 3. 13 Car. II. stat. 2, c. 2, § 3. 1 Durnf. & East, 373.

(d) 3 Bur. 1584.

(f) Say. Rep. 172. *Ante*, 86.

(h) 4 Durnf. & East, 688.

(kk) *Bowser v. Price*, E. 20 Geo. III. K. B.

(e) 1 Str. 402.

(g) 1 Bur. 401. 2 Ken. 82, S. C.

(i) Cas. Pr. C. P. 75. Pr. Reg. 138, S. C.

(l) 1 Chit. Rep. 142. (m) 2 Str. 1194.

*It may not be improper in this place, to state the operation and effect of an *injunction*, which, we have just seen, will prevent the plaintiff from signing a judgment of *nonpross*, and how far it affects the different proceedings in the course of the suit. The general effect of an injunction in *Chancery*, when obtained for want of an answer before action commenced, or after action and before the defendant in equity is in a condition to demand a plea, (a) that is, before the plaintiff in equity has appeared and the defendant has declared against him, is to stay all proceedings at law, from the time of its being served; but when it is not obtained until after the defendant in equity is in a condition to demand a plea, he is permitted to demand it, and proceed to trial and judgment, being only restrained from taking out execution: (b) And even then, under particular circumstances, the injunction may be extended to stay trial, on an affidavit that the plaintiff in equity is advised and believes that the answer will afford a discovery material to his defence. (c)

In the Exchequer, the effect of an injunction for want of an answer, in a *town* cause, is to stay all proceedings at law, from the time it is served, until answer and further order: (d) And it is of equal force in a *country* cause, when the bill is filed in *Michaelmas* or *Easter Term*; (e) but in *Hilary* and *Trinity*, which are *issuable* terms, there is a clause in the injunction, that if issue is or can be joined in the action, the plaintiff at law may proceed to trial thereof; but is not to enter up judgment, or sue out execution thereon: (f) and therefore, in these terms, if the plaintiff at law has so far proceeded in his action, as that he can join issue therein by his own act, as by adding a *similiter*, (g) in that case he is permitted to go to trial at the following assizes, and the injunction only stays judgment and execution. But though this be the ordinary practice of the court, yet cases do occasionally occur, especially in matters of title and discovery, where the court will restrain the trial at law till after answer. (h) An injunction upon the *merits*, in both courts, operates as a stay of all further proceedings in the cause, from the time it is granted. Taking money out of a court of law, which has been paid in by rule of court, is a breach of a common injunction, against proceeding at law: (i) but showing cause against a rule for a new trial, is not a proceeding which amounts to the breach of an injunction. (k)

(a) 16 Ves. jun. 141.

(b) *Id. ibid.*

(c) *Id.* 220, 223; and see 1 Madd. Chan. 132, 3.

(d) Fowl. Pr. Excheq. 1 V. 250, 51, 259.

(e) *Id.* 260.

(f) *Id.* 249.

(g) 1 Younge & J. 404.

(h) Fowl. P. Excheq. 1 V. 260; and see 1 Campb. 561, (a), and the cases there cited.

(i) 13 Price, 289. McClel. 193, S. C.

(k) 3 Price, 242. And see further, as to the nature and effect of an injunction, Com. Dig. tit. *Chancery*, D. 8, &c. 1 Madd. Chan. 130, &c. And for the cases in which the court of Exchequer will, or will not, grant an injunction after trial, for want of an answer by one of several defendants, see 3 Price, 164, 241. See also 4 Price, 346, McClel. 89.

*CHAPTER XVIII.

Of IMPARLANCE, and TIME for PLEADING; and of the NOTICE and RULE to plead, and DEMAND of PLEA, &c.

THE plaintiff having declared, the defendant is allowed a certain time to prepare for his defence; and that either with or without an imparlance.

Imparlance is said to be, when the court gives a party leave to answer at another time, without the assent of the other party; (*aa*) and in this sense, it signifies time to reply, rejoin, surrejoin, &c. But the more common signification of imparlance is time to plead: (*b*) and it is either *general*, (*c*) without saving any exception to the defendant, which is always to another term; (*d*) or *special*, which is sometimes to another day in the same term, (*e*) with a saving of all exceptions to the writ, bill, or count; (*f*) or of all exceptions whatsoever: which latter is called a *general special* imparlance. (*g*) The *general* imparlance is of course, when the defendant is not bound to plead the same term; but a *special* imparlance is not allowed without leave of the court, in the King's Bench: (*h*) and the court will not grant a *special* imparlance, except to prevent injustice. (*i*) In the Common Pleas, *general* imparlances are entered of course by the *attorneys*; and it is a rule, that "all attorneys and clerks do duly enter, or cause to be entered, imparlances or *incipiturs* in all causes, according to the ancient usage and custom of this court; and that the want of entering an imparlance or *incipitur*, in every cause wherein imparlances ought to be entered, shall be a sufficient cause for the defendant to have a further imparlance of course." (*k*) A *special* imparlance, in that court, may be granted by the *prothonotaries*, so as to enable the defendant to plead in abatement, within the first *four* days of the next term after the delivery, or [*463] filing and notice *of declaration. (*a*) But a *special* imparlance, saving all exceptions to the jurisdiction, cannot be entered without leave of the court. (*bb*)

After a *general* imparlance, the defendant can only plead in *bar* of the action; (*cc*) and cannot regularly plead to the *jurisdiction* of the court, (*cc*) in *abatement*, (*dd*) or a *tender* and *touts temps prist*. It is then also too late to claim *conusance*, (*dd*) or demand *oyer* of a deed, (*ee*) &c. After a *special* imparlance, the defendant may plead in abatement, (*ff*) though not to the jurisdiction of the court. (*gg*) And where the defendant pleaded a

(*aa*) Com. Dig. tit. *Pleader*, D. 1.

(*b*) 2 Mod. 62. 2 Show. 310. Barnes, 346. 2 Wms. Saund. 5 Ed. 1, *e*, (2).

(*c*) Hardr. 365. 1 Lutw. 46. 12 Mod. 529, S. C. Gilb. C. P. 183, 211. 4 Bac. Abr. 27, 8. 3 Blac. Com. 301.

(*d*) 6 Mod. 28.

(*e*) *Id.* 8. 10 Mod. 127. Com. Dig. tit. *Pleader*, D. 1.

(*f*) Append. Chap. XVIII. § 1.

(*g*) For an account of the different kinds of *imparlances*, when and how granted, and what may or may not be done after each of them, see 2 Wms. Saund. 5 Ed. 1, (2.) 1 Chit. *Pl.* 4 Ed. 375, &c. 2 Blac. Rep. 1094.

(*h*) R. E. 5 Ann. K. B.

(*i*) 2 Chit. Rep. 214.

(*k*) R. T. 21 *Cur. II. reg.* 2, C. P.; and see R. M. 1654, § 14, C. P.

(*a*) Pr. Reg. 1. Cas. Pr. C. P. 78. Barnes, 224, S. C. *Id.* 334. And for the note for an imparlance, in C. P. see Append. Chap. XVIII. § 2.

(*bb*) 2 Blac. Rep. 1094.

(*cc*) 4 Bac. Abr. 29. Gilb. C. P. 184. Steph. *Pl.* 436.

(*dd*) *Post*, Chap. XXVI.

(*ee*) *Post*, Chap. XXIII.

(*ff*) 1 Lutw. 6.

(*gg*) 2 Wms. Saund. 5 Ed. 1, *e*, (2).

misnomer in abatement, after an imparlance, thus: "And A. B. who was arrested by the name of A. C. comes, &c.," the court in one case held this to be tantamount to a special imparlance: *(hh)* This case, however, has since been overruled, by a subsequent determination. *(ii)* And where a bill was filed in vacation against an attorney, as of the preceding term, with a special *memorandum* of a subsequent day in vacation, stating the cause of action to have accrued after the last day of term, and the defendant pleaded a plea in abatement, entitled of the following term, without a special imparlance; the court of King's Bench held that this was regular, and set aside a judgment signed as for want of a plea. *(kk)* After a *general special* imparlance, the defendant may not only plead in abatement of the writ, bill or count, but also *privilege*, *(l)* which is a plea to the *person* of the defendant, affecting the *jurisdiction* of the court. *(m)* The defendant was not formerly allowed to plead a *tender* and *touts temps prist*, after any kind of imparlance; *(n)* and the reason assigned was, that by craving time, he admitted he was not ready, and so falsified his plea. But it is now settled, that a plea of tender, being an issuable plea, may be pleaded *after* imparlance, *(o)* as well as before; though, for avoiding the inconsistency above stated, it must always be entitled of the same term with the declaration: *(p)* and where it is pleaded after an imparlance, a judge's order must be obtained in the King's Bench, or treasury rule in the Common Pleas, *(q)* for leave to plead it as of the preceding term.

If the defendant plead in abatement after a *general* imparlance, or to the jurisdiction of the court after a *special* imparlance, the plaintiff may sign judgment, *(r)* or apply to the court by motion to set aside the plea; *(s)* *or he may demur thereto, *(a)* or allege the impar- [*464] lance in his replication, by way of *estoppel*: *(b)* but if the plaintiff, instead of taking any of these advantages, reply to the special matter of the plea, the fault is cured. *(c)*

In the King's Bench, the defendant was formerly allowed to imparl to the term next after the return of the process, unless the proceedings were by *original*, *(d)* upon a *habeas corpus*, for or against *attorneys* or other privileged persons, or against *prisoners* in custody of the marshal. *(e)* On proceedings by *original*, if the action were laid in *London* or *Middlesex*, and the defendant appeared before the *last* return of the term; or if the

(hh) 1 Blac. Rep. 51. 1 Wils. 261, S. C. *(ii)* 4 Durnf. & East, 520.

(kk) 3 Barn. & Ald. 259. 1 Chit. Rep. 704, S. C.

(l) 1 Lev. 54. Hardr. 365. 1 Lutw. 46. 12 Mod. 529, S. C. Gilb. C. P. 185, 211.

(m) 5 Mod. 335.

(n) 4 Bac. Abr. 28. Gilb. C. P. 184. Sty. P. R. 465. 2 Lil. P. R. 37. 1 Sid. 365. 2 Mod. 62. 2 Salk. 622. 1 Ld. Raym. 254. Carth. 413, 14, S. C. 1 Lutw. 238, 9. R. E. 5 Ann. *(a)*. R. T. 5 & 6 Geo. II. *(b)*, K. B.

(o) Dyer. 300. Freem. 134. 1 Wms. Saund. 5 Ed. 33, (2). 2 Wms. Saund. 5 Ed. 2, (2).

(p) 1 Bur. 59.

(q) Barnes, 343, 351, 355, 357, 359, 361; and see 1 H. Blac. 369.

(r) 4 Durnf. & East, 520; and see 7 Durnf. & East, 298, 447, *(d)*; but see 3 Barn. & Ald. 259. 1 Chit. Rep. 704, S. C.

(s) 6 Durnf. & East, 373.

(a) Sty. P. R. 465. 3 Inst. Cler. 40. Barnes, 334. 1 Wils. 261. 1 Blac. Rep. 51, S. C. *Per Cur. E.* 22 Geo. III. K. B. *Green v. Simmester*, H. 27 Geo. III. K. B. 6 Durnf. & East, 369. 2 Bos. & Pul. 384. 2 Maule & Sel. 484.

(b) 1 Lutw. 23. 3 Inst. Cler. 39.

(c) 1 Vent. 236; and see 2 Wms. Saund. 5 Ed. 1, c. (2).

(d) Skin. 2; but see 8 Mod. 228.

(e) R. M. 5 Ann. reg. III. *(a)*, K. B. Gilb. K. B. 310. Gilb. C. P. 43, 182. 4 Bac. Abr. 27.

action were laid in any other county, and the defendant appeared the *first* return of *Hilary* or *Trinity* term, or before the *third* return of *Michaelmas* or *Easter* term, no imparlance was allowed, without consent or special rule. *(f)* So, upon a *habeas corpus*, returnable in *Michaelmas* or *Easter* term, if the declaration were delivered before the *third* return, the defendant was not entitled to an imparlance. *(g)* And where the proceedings were for or against *attorneys* or other privileged persons, *(h)* or against *prisoners* in custody of the marshal, *(i)* the defendant was bound to plead, without any imparlance, the same term the declaration was delivered, if delivered *four* days exclusive before the end of the term. Afterwards, the time was narrowed for pleading upon a *latitat*, &c.; and it became a rule, that where the cause of action was specially expressed in the process, the defendant should not have liberty of imparling, without leave of the court; but should plead within the time allowed, by the course of the court, to defendants sued by original writ. *(k)* And at length it was determined, that even upon a special *capias* by original, the defendant should not be obliged to plead sooner than upon a common *latitat*. *(l)*

The former distinctions upon this subject being thus gradually abolished, it is now settled, in the King's Bench, *(m)* that "in all cases when the defendant has appeared and filed common bail, or put in and perfected special bail, or the plaintiff has appeared and filed common bail for him according to the statute, and the declaration is delivered, or filed and notice thereof given, four days *exclusive* before the end of the term in which the writ was returnable, if the venue be laid in *London* or *Middlesex*, and the defendant live within *twenty* miles of *London*, the declaration should be delivered or filed *absolutely*, with notice to plead within [*465] *four* days; *or in case the action be laid in any other county, *(a)* or the defendant live above twenty miles from *London*, within *eight* days *exclusive* *(b)* after the delivery or filing thereof; and the defendant must plead accordingly, without any imparlance: or in default thereof, the plaintiff may sign judgment." If the declaration be delivered or filed, with notice to plead within the *first* four days of term, the defendant has all the morning of the *fifth* day to plead; and judgment cannot be signed for want of a plea; till the opening of the office in the afternoon of that day: *(c)* but in any other part of the term, if the defendant do not plead within the *four* days, the plaintiff may sign judgment in the morning of the *fifth* day. *(c)*

When the defendant has not appeared, or filed bail, the rule in the King's Bench, we have seen, *(d)* is that "upon all process returnable before the *last* return of any term, where no affidavit is made and filed of the cause of action, the plaintiff may file or deliver the declaration *de bene esse*, at the return of such process, with notice to plead in *eight* days *exclusive* *(e)* after

(f) R. M. 1654, § 15, K. B.

(g) 1 Mod. 1. 2 Salk. 515. 1 Wils. 154; and see 6 Durnf. & East, 752.

(h) 2 Salk. 517. 6 Mod. 175, R. E. 5 W. & M. reg. III. § 3, *(a)*, K. B.; and see R. M. 5 Ann. reg. 3, *(a)*, K. B.

(i) R. II. 2 Geo. II. reg. 1, K. B.; and see 1 Dowl. & Ryl. 186.

(k) R. M. 5 Ann. reg. 3, K. B.

(l) 1 Str. 684.

(m) R. T. 5 & 6 Geo. II. K. B.

(a) 1 Maule & Sel. 566.

(b) R. T. 5 & 6 Geo. II. *(a)*, K. B.

(c) *Shephard v. Mackreth*, E. 35 Geo. III. K. B. *Lingard v. Peto*, M. 48 Geo. III. K. B. 4 Dowl. & Ryl. 392, *(b)*. 2 Barn. & Cres. 798. 4 Dowl. & Ryl. 391, S. C.

(d) *Ante*, 453.

(e) The days in this case are both *exclusive*: therefore, if notice of declaration be served on the 11th, judgment cannot be signed till the 20th. *Per Cur. M.* 46 Geo. III. K. B.

the filing or delivery thereof;" being the same time as is allowed for the defendant to appear and file common bail:(*f*) and "if the defendant do not file common bail, and plead within the said *eight* days, the plaintiff, having filed common bail for him, may sign judgment for want of a plea."(*g*) But if the declaration be not filed until *after* the return of the process, the defendant has *eight* days to plead from the time of filing it, whenever it may be.(*h*) And "upon all such process, where an affidavit is made and filed of the cause of action, the declaration may be filed or delivered *de bene esse*, at the return of such process, with notice to plead in *four* days after the filing or delivery, if the action be laid in *London* or *Middlesex*, and the defendant live within *twenty* miles of *London*, and in *eight* days, if the action be laid in any other county, or the defendant live above *twenty* miles from *London*;"(*g*) being the same time as is allowed for pleading, when the declaration is delivered or filed *absolutely*:(*i*) and "if the defendant put in bail, and do not plead within such times as are respectively before-mentioned, judgment may be signed."(*g*) But in all the foregoing cases, the declaration should be delivered, or filed and notice thereof given, *four* days *exclusive* before the end of the term, a rule to plead duly entered, and a plea demanded, when necessary.(*k*) In bailable actions, however, the defendant cannot regularly plead in bar, until the bail are perfected; and if he plead before, his plea may be considered as a nullity, although the *bail afterwards justify.(*a*) And where the plaintiff declared *de bene esse*, and the defendant pleaded in abatement before he had put in special bail, and the plaintiff, treating his plea as a nullity, signed interlocutory judgment, the court held it to be regular.(*b*)

In the Common Pleas, it is a rule, that "upon all process returnable the *first*, *second* or *third* return of any term, (since extended to process returnable the *fourth* return of *Easter* term,(*c*) if the plaintiff declare in *London* or *Middlesex*, and the defendant live within *twenty* miles of *London*, the defendant shall plead within *four* days after such declaration delivered, with notice to plead accordingly, without any imparlance, provided the declaration be delivered *four* days before the end of the term; and in case the plaintiff declare in any other county, or the defendant live above *twenty* miles from *London*, the defendant shall plead within *eight* days after the declaration delivered, with notice to plead accordingly, without any imparlance.(*d*) This rule applies to declarations filed or delivered *de bene esse*,(*d*) as well as to such as are delivered absolutely; and was extended, by a subsequent rule,(*e*) to process returnable the *last* return of any term; provided the declaration be filed or delivered on the day of such return, or on the day next after such return, in case the same shall not happen on a *Sunday*, in which case the plaintiff shall have the whole of the day follow-

(*f*) *Ante*, 240.

(*g*) R. T. 22 Geo. III. K. B.; and see former rule of M. 10 Geo. II. *reg.* 2 K. B. *Ante*, 453.

(*h*) 1 Bur. 56. *Delatre & Mango*, M. 20 Geo. III. K. B.

(*i*) *Ante*, 464, 5.

(*g*) R. T. 22 Geo. III. K. B.; and see former rule of M. 10 Geo. II. *reg.* 2, K. B. *Ante*, 453.

(*k*) R. T. 5 & 6 Geo. II. (*b*). R. M. 10 Geo. II. *reg.* 2. R. T. 22 Geo. III. K. B.

(*a*) 4 Durnf. & East, 578. 2 Dowl. & Ryl. 252; but see 2 East, 406. 11 East, 411.

(*b*) 2 Dowl. & Ryl. 252.

(*c*) R. II. 35 Geo. III. C. P. 2 H. Blac. *oct. ed.* 551. 7 Taunt. 71, (*a*). 2 Marsh. 337, (*a*). 2 Chit. Rep. 381. *Ante*, 453.

(*d*) R. T. 8 Geo. III. C. P. 2 Wils. 381. 1 Sel. Pr. 2 Ed. 292, 3; and see former rules of H. 9 Ann. *reg.* 2, M. & E. 3 Geo. II. C. P. *Ante*, 453.

ing, to file or deliver such declaration as aforesaid. If the declaration be filed *de bene esse*, on the *essoin* day of the return of the writ, the defendant is entitled, in the Common Pleas, to *eight* days time to plead; and the defendant must plead in that time, although by the rules of the office, no person is allowed to search for a declaration, till the first day in full term.(e) But if the declaration be filed after the *essoin* day, and on or before the appearance day, the defendant is entitled only to *four* days, to be computed from the appearance day; or if it be filed after the appearance day, then to four days from the time of delivery:(f) And the days are reckoned *inclusively* in that court; so that if a declaration be filed or delivered on the *first*, with notice to plead in *four* days, the plaintiff is entitled to sign judgment for want of a plea, on the opening of the office in the afternoon of the *fifth* day.

When the process, in the King's Bench, is returnable the *last* return of the term;(gg) or, in the Common Pleas, when it is returnable on that return, and the declaration is not filed or delivered on the return day, or on the day following;(e) or where the process, in either court, is returnable before, but the declaration is not delivered, or filed and notice thereof given, *four* days *exclusive* before the end of the term,(h) the defendant, if completely in court, is entitled to an imparlance; and must plead [*467] within *the first four days* of the next term; provided the declaration be delivered, or filed and notice thereof given, before the *essoin* day of that term: otherwise the defendant will be allowed to imparl to the subsequent term.(a) But if the declaration be delivered before such *essoin* day, though without a notice to plead, and the defendant appear and accept the declaration, he shall not have an imparlance to the subsequent term; the notice to plead not being necessary in such case, as it would be, where a declaration is filed *de bene esse*.(b) And if a writ be returnable the *last* day of one term, and the defendant do not justify bail until the *fourth* day of the next, he is not entitled to an imparlance to the *third* term; the foundation of which is, that no laches can be imputed to the plaintiff, for not declaring until the defendant is perfectly in court:(cc) And, for the like reason, if a writ be taken out against two defendants, and one of them is arrested, or served with a copy of it, in the term in which is returnable, but the other cannot be met with, so that it becomes necessary to take out another writ against him, returnable in the next term; as the plaintiff cannot declare till both defendants are in court,(d) they are neither of them entitled to an imparlance, on account of the plaintiff's not declaring until the term in which the latter defendant is arrested, or served with process,(d) or until he is outlawed.(ee) So, the defendant is not entitled to an imparlance, where the delay in declaring is occasioned by himself; as by his unnecessarily obtaining an order for particulars, with a stay of proceed-

(e) 1 Taunt. 22.

(f) 2 Blac. Rep. 1243.

(gg) R. T. 5 & 6 Geo. II. (b). R. M. 10 Geo. II. *reg.* 2. R. T. 22 Geo. III. K. B.

(c) R. H. 35 Geo. III. C. P. 2 H. Blac. *oct. ed.* 551. 7 Taunt. 71, (a). 2 Marsh. 337, (a). 2 Chit. Rep. 381. *Ante*, 453.

(h) R. T. 5 & 6 Geo. II. (b), K. B.

(a) Vidian's *Introd.* II. 2 Wms. Saund. 5 Ed. 1, c. (2).

(b) *Per Cur.* M. 21 Geo. III. K. B. *Post*, 473.

(cc) 5 Durnf. & East, 372. 2 Bos. & Pul. 126. 6 Taunt. 261. 1 Marsh. 587, S. C.; and see 9 Dowl. & Ryf. 18.

(d) *Ante*, 420, 446, 7; and see 1 Chit. Rep. 359, (a).

(ee) *Slack v. Hurd*, T. 31 Geo. III. K. B.

ings until they have been delivered.(f) So, when a defendant removes the cause by *habeas corpus* from an inferior court, and the plaintiff does not declare until the next term, the defendant is not entitled to an imparlance; for such removals being in general considered as dilatory, it would only be adding to the delay, if an imparlance were granted.(g) And it is not usual for the court, or a judge, in any case to grant a rule for an imparlance; but when the defendant is entitled thereto, he takes it as a matter of course.(hh)

In the Exchequer it is a rule,(i) that "upon all process to be issued out of that court, returnable the *first* or *second* return, or on any day before the second return of any term, (or, according to the present practice, if returnable on any day before the *four* last days of the term,)(k) where the defendant shall, at the return thereof, enter an appearance or file special bail, (as the case may require,) if the plaintiff declare in *London* or *Middlesex*, and the defendant live within *twenty* miles of *London*, he shall *plead to the said declaration within *four* days [*468] after the delivery thereof, without any imparlance; and in case the plaintiff declare in any other county, or the defendant live above *twenty* miles from *London*, then he shall plead within *eight* days after the delivery thereof, without any imparlance; or in default thereof, the plaintiff may sign judgment, a rule to plead being duly given, unless the court, or one of the barons, shall think proper, on the special circumstances of the case, to grant an imparlance: but no defendant shall be compelled to plead, by virtue of this rule, unless the declaration be delivered *four* days before the end of the term in which the writ is returnable, with notice thereon indorsed of the time wherein such defendant is to plead." The time for pleading, on a declaration filed or delivered *de bene esse*, before the defendant's appearance, has been already stated:(n) And it is a rule,(b) that "where any declaration shall be delivered to the defendant's attorney or clerk in court, or notice of a declaration shall be delivered to any defendant according to the statute, before the *essoins* day of any term, and the defendant shall imparl until the next term, he shall plead to the said declaration, within the first *four* days of such next term, a rule to plead being duly given; and in default thereof, the plaintiff shall be at liberty to sign judgment."

If *four* terms have elapsed since the delivery of the declaration, the defendant shall have a whole term's notice of the rule to plead,(c) before judgment can be entered against him,(d) unless the cause have been stayed by *injunction*,(e) or privilege; which notice must be given before the *essoins* day of the term:(ff) And where a general notice is given, of the plaintiff's intention to proceed in the cause, it does not extend beyond the term; therefore a rule to plead may be entered, and judgment signed, in the vacation.(gg) This rule was established, for the purpose of preventing

(f) 2 Barn. & Ald. 390. 1 Chit. Rep. 230, S. C.

(g) 6 Durnf. & East, 752; but see 2 Bos. & Pul. 137. *Ante*, 413.

(hh) *Phillips v. Hardinge*, T. 24 Geo. III. K. B. *Boyd v. Gordon*, H. 30 Geo. III. K. B.

(i) R. M. 5 Geo. III. in *Scac. Man. Ex. Append.* 218; and see R. T. 26 & 27 Geo. II. § 6, 9, and R. T. 26 Geo. III. in *Scac. Id.* 212, 13; 221, 2.

(k) *Man. Ex. Pr.* 200, (l).

(n) *Ante*, 454.

(b) R. II. 16 Geo. III. in *Scac. Man. Ex. Append.* 220; and see former rule of T. 26 & 27 Geo. II. § 8, in *Scac. Id.* 213.

(c) *Append. Chap. XVIII.* § 7.

(d) R. T. 5 & 6 Geo. II. (b), K. B.

(e) *Id. ibid.* 2 Bur. 660. *Dong.* 71. 2 Blac. Rep. 781.

(ff) 2 Str. 1164. 1 Str. 211, *contra*.

(gg) 2 Durnf. & East, 40.

any surprise on the defendant, after the plaintiff has lain by four terms, without proceeding in his action; and therefore it does not apply, where the proceedings have been delayed at the defendant's request.^(h)

It remains to be observed, within what time the defendant must plead after changing the *venue*, demanding *oyer*, giving a bill of *particulars*, or *amending* the declaration. After changing the *venue*, the defendant must plead to the new action, as he should have done in the other, without delay.⁽ⁱ⁾ After the delivery of *oyer*, the defendant shall have the same time in term to plead, or as many pleading days, as he had when he demanded it:^(k) And formerly, if *oyer* had been demanded in the Common Pleas, after the rule to plead was out, the plaintiff was not bound to give it; though

if he did, he could not have signed judgment for want of a plea, [*469] *till the next forenoon:^(aa) but now, as will be seen hereafter, the demand of *oyer* may be made in that court, as well as in the King's Bench, at any period before the time for pleading is expired.^(bb) In the latter court, a defendant has the same time to plead, after the delivery of a bill of *particulars*, as he had when the summons for it was returnable:^(c) And where a summons for better particulars of the plaintiff's demand was obtained by the defendant, *four* days before the time for pleading expired, but the plaintiff's attorney did not attend till the third summons, and the order being then refused, and the time originally allowed for pleading having expired, signed judgment for want of a plea: the court held, that as the delay was occasioned by the plaintiff's attorney, the judgment was signed too soon, and was therefore irregular.^(d) In the Common Pleas, the plaintiff cannot sign judgment for want of a plea, till the expiration of twenty-four hours after the delivery of a bill of particulars: though the time for pleading be expired, and a demand of plea given, more than twenty-four hours before that time.^(e) And in that court, after the time for pleading has expired, but before judgment signed against the defendant, if the court on his application stay proceedings, till the plaintiff give security for costs, to be approved by the prothonotary, the plaintiff, though he give security *instantly*, which is accepted by the defendant, is not at liberty to sign judgment, before the opening of the office on the next morning.^(f) In the King's Bench, if the plaintiff *amend* his declaration the same term, the defendant shall have *two* days, exclusive of the day of amendment, to alter his first plea, or plead *de novo*;^(g) but if the amendment be made in a subsequent term, the defendant is entitled to a new four day rule to plead;^(hh) though a demand of plea is unnecessary.⁽ⁱⁱ⁾ And where the plaintiff gave notice of trial for the assizes, and afterwards countermanded, and then applied for an order to amend his declaration,

(h) 3 Durnf. & East, 530; and see 2 Blac. Rep. 762.

(i) R. M. 1654, § 5, K. B. R. M. 1654, § 8, C. P.

(k) R. T. 5 & 6 Geo. II. (b), K. B. 1 Str. 705. Prac. Reg. 28, 300, 301. Barnes, 238, 254. Cas. Pr. C. P. 72, 81, 143, S. C. 8 Durnf. & East, 356, 7.

(aa) Pr. Reg. 300. Cas. Pr. C. P. 72, S. C.; and see *id.* 73, 96. Pr. Reg. 278. Barnes, 329, S. C.

(bb) Barnes, 268, 326, 7. 2 Wils. 413. 2 Bos. & Pul. 379. Post, Chap. XXIII.

(c) 13 East, 508; and see 4 Barn. & Cres. 970. 7 Dowl. & Ryl. 458, S. C.

(d) 5 Barn. & Cres. 769. 8 Dowl. & Ryl. 607, S. C.; and see 4 Barn. & Cres. 970. 7 Dowl. & Ryl. 458, S. C. Ante, 301.

(e) New Rep. C. P. 361; but see 2 Bos. & Pul. 363, *semb. contra*; and see 2 Moore, 6. 8 Taunt. 592, S. C.

(f) 3 Bos. & Pul. 319.

(g) 1 Str. 705; and see R. M. 10 Geo. II. *rrg.* 2, (b), K. B.

(hh) 8 Durnf. & East, 87.

(ii) 3 Barn. & Ald. 137.

which order was obtained on the terms of the defendant's having an imparlance until the next term, the court of King's Bench refused to rescind so much of the order as related to the imparlance.^(k) In the Common Pleas, it seems that a new four-day rule to plead is in all cases necessary to be given by the plaintiff, on amending his declaration.^(l)

If the defendant be not prepared to plead, by the expiration of the time allowed him for that purpose, his attorney or agent should take out a *summons*, and obtain an order, for time ;^(m) which may be repeated, if necessary: And in *trover* for goods, where the defence was, that they had *been sold by the plaintiff, the court of King's Bench [*470] gave the defendant time to plead, in order that he might obtain a discovery from the court of Chancery.^(a) So where the plaintiff, being indicted for felony, sued a banker for money he had paid him, which was surmised to be the produce of the felony, the court of Common Pleas, on application, gave the defendant time to plead in a month after the trial of the indictment.^(b) The summons should be regularly served on the plaintiff's attorney or agent :^(c) and when taken out, and made returnable before the expiration of the time for pleading, it is a stay of proceedings, pending the application ;^(d) but it is otherwise when taken out, or made returnable, after the expiration of the time for pleading.^(d) In the latter case, the plaintiff is at liberty to sign judgment, before the summons is returnable :^(e) but if he neglect to do so, he cannot afterwards sign judgment :^(f) it being a rule, that if the summons be returnable before judgment is signed, it prevents the plaintiff from afterwards signing it.^(g) When the object of the summons is collateral to the time for pleading,^(h) as to discharge the defendant out of custody, on filing common bail, &c., it will not in general operate as a stay of proceedings.

The plaintiff's attorney or agent, on being served with the summons, either indorses his consent to an order being made upon it, attends the judge or makes default. In the latter case, the defendant's attorney or agent, after waiting *half* an hour,⁽ⁱ⁾ should take out a *second* summons, and after that a *third*. (if necessary,) which should be respectively served and attended as the first; and if default be made upon *three* summonses, the judge, on affidavit thereof,^(kk) will make an order *ex parte*: but if any one of the summonses be attended, the judge will make an order upon, or discharge it, as he sees cause. The time allowed, in the King's Bench, is reckoned *exclusive* of the day of the date of the order.^(ll) In the Common Pleas, it is said to be *inclusive* of the date of the order, but

(k) 1 Chit. Rep. 246.

(l) 2 Blac. Rep. 785.

(m) Append. Chap. XVIII. § 12, 13.

(a) 2 Durnf. & East, 683. *Nutt, administratrix v. Wright*, baronet, E. & T. 25 Geo. III. K. B.

(b) 4 Taunt. 825.

(c) *Ante*, 72, 96, 7.

(d) Say. Rep. 165. *Per Cur.* M. 22 Geo. III. 1 Chit. Rep. 689, K. B. Barnes, 249, 252. Cas. Pr. C. P. 137. Pr. Reg. 292, S. C. Barnes, 255. Cas. Pr. C. P. 144, S. C. Barnes, 254. Cas. Pr. C. P. 142. Pr. Reg. 293, S. C. Barnes, 273. 2 Blac. Rep. 954. 2 New Rep. C. P. 169. 6 Taunt. 240.

(e) 2 Blac. Rep. 954; and see 1 Chit. Rep. 97. 2 Barn. & Ald. 356, S. C. 1 Chit. Rep. 689.

(f) 2 Barn. & Ald. 355. 1 Chit. Rep. 93, S. C.

(g) 1 Chit. Rep. 96, 7, *per Bayley*, J. 6 Taunt. 240, *accord*.

(h) *Per Cur.* M. 28 Geo. III. K. B.

(i) R. T. 35 Geo. III. K. B. 6 Durnf. & East, 402. R. E. 23 Geo. III. C. P. Imp. C. P. 7 El. 233, 676.

(kk) Append. Chap. XVIII. § 14, 15.

(ll) By the Master, (*Le Blanc*), on a reference from the court, on the last day of *Trinity* term, 1827.

exclusive of the day when it expires;(*m*) and therefore where an order for a *week* was dated the 16th of *May*, judgment signed for want of a plea on the 23d, was holden to be regular;(*n*) and, in the latter court, it seems that when the time to plead is not expired at the time of making the

order, the time allowed is to be reckoned from the expiration of [*471] the time to plead, and *not from the date of the order, or what is done under it.(*a*) If there be an order for a *month's* time to plead, it is understood to mean a *lunar*, and not a *calendar* month.(*b*) The order of a judge for time, or further time to plead, and all other orders, whether by consent or otherwise, should be regularly drawn up and served: it being a rule, in the King's Bench,(*c*) that "no summons for further time to plead, reply or rejoin, or summons for further particulars of the plaintiff's demand, defendant's set-off, or other particular, be granted in any action depending in that court, unless the last previous order for time, further time, or particulars respectively, be first drawn up, and such order produced at the time of applying for any such summons." And, in the Common Pleas, a consent indorsed on a judge's summons is not binding on either party, unless the order be drawn up and served pursuant thereto.(*dd*) In that court also, if a summons be taken out for time to plead, and the defendant's attorney do not attend, the plaintiff must get the summons discharged, before he can sign judgment;(*e*) but it is said to be otherwise in the King's Bench.(*f*)

When an order is obtained for time to plead, it is either upon, or without terms. The usual terms, when the plaintiff is in time to try his cause, are pleading *issuably*, rejoining *gratis*, and taking *short* notice of trial, or inquiry; but if he be not in time, then the terms are pleading *issuably* only: and when the defendant is an *executor* or *administrator*, he must undertake not to plead any judgment confessed by him, since his time for pleading was out(*g*) for otherwise he might confess judgments in the mean time, and plead them in bar to the plaintiff's demand. An *issuable* plea is a plea *in chief* to the merits;(*h*) upon which the plaintiff may take issue, and go to trial;(*i*) Therefore a plea in abatement is not an issuable plea;(*k*) nor a false plea of judgment recovered;(*l*) nor a plea of alien enemy,(*mm*) or other plea, which does not go to the merits.(*nn*) But a plea of tender has been deemed an issuable plea;(*o*) and also a plea of the statute of limitations,(*p*) or, in the King's Bench, that a bail bond was taken for ease and

(*m*) 2 H. Blac. 35.

(*n*) *Read v. Montgomery*, E. 26 Geo. III. C. P., cited by *Gould, J.*, in 2 H. Blac. 35.

(*a*) 2 Moore, 655. 8 Taunt. 592, S. C.

(*b*) 3 Bur. 1455. 1 Blac. Rep. 450, S. C.; and see 2 H. Blac. 35. 1 Bos. & Pul. 479.

(*c*) R. H. 59 Geo. III. K.B.; and see 7 East, 542. 1 Chit. Rep. 647, (*a*).

(*dd*) 4 Taunt. 253.

(*e*) *Barnes*, 240, 255. Cas. Pr. C. P. 144, S. C.

(*f*) Imp. C. P. 7 Ed. 233.

(*g*) 8 Mod. 308; and see 1 Bulst. 122, 3. *King v. Goodall*, E. 31 Geo. III. C. P. Imp. C. P. 233. 1 Maule & Sel. 405, 407. 5 Taunt. 333, 665, 671. 1 Marsh. 70, 280, S. C.

(*h*) 7 Durnf. & East, 530. *Barnes*, 263.

(*i*) 2 Bur. 782. 2 Ken. 483, S. C. *Barnes*, 263. 1 Chit. Pl. 4 Ed. 449, 50.

(*k*) 1 Bur. 59. *Barnes*, 263.

(*l*) 1 Blac. Rep. 376. 2 Wils. 117. 3 Wills. 33. 1 Moore, 431.

(*mm*) 8 Durnf. & East, 71.

(*nn*) *Valley v. Gardiner*, H. 24 Geo. III. K. B. *Gillet v. Ridley*, E. 29 Geo. III. C. P.

(*o*) 1 Bur. 59. *Barnes*, 263. 1 H. Blac. 369.

(*p*) 3 Durnf. & East, 124. *Drinkwater v. Claridge*, H. 27 Geo. III. C. P. Imp. C. P. 7 Ed. 253. 1 Bos. & Pul. 228; but see 1 Blac. Rep. 35. 2 Wils. 253. *Stafford v. Rowntree*, E. 24 Geo. III. K. B. *Benson v. King*, H. 25 Geo. III. K. B. 2 Durnf. & East, 390, *contra*.

favour.(g) So where the defendant, in an action on a recognizance of bail, under a judge's order to plead issuably, pleaded *nul tiel record*, and that no *ca. sa.* *was sued out against the principal, [*472] the court of Common Pleas held, that such pleas might be considered as issuable, and that the plaintiff could not sign judgment as for want of a plea.(a) As to *demurrers*, there is a distinction between a real and fair demurrer, and a demurrer without good cause:(b) The former is an issuable plea, within the meaning of a judge's order;(c) the latter is not, but only an evasion of it.(d) In the King's Bench, the defendant, when under terms of pleading issuably, cannot demur specially to the replication; and if he do, the plaintiff may sign judgment, as for want of a plea. 5 Dowl. & Ryl. 620. But, in the Common Pleas, the condition of pleading issuably applies only to the stage of the proceedings in which it is imposed, and does not affect subsequent proceedings: Therefore, where a defendant, being under terms of pleading issuably, put in an issuable plea, to which the plaintiff replied, and gave notice of trial, and the defendant demurred specially to the replication, whereupon the plaintiff signed judgment; the court of Common Pleas held that the judgment was irregular, 4 Bing. 267. And a defendant, when under terms of pleading issuably, cannot assign special causes of demurrer, even though the causes assigned be matter of substance.(e) But where the plaintiff declared in *trespass* for breaking and entering his close, &c. and seizing and taking his goods and chattels, to wit, 100 articles of furniture, and 100 articles of wearing apparel, without describing their nature or quality; and the defendant, being under a judge's order to plead issuably, demurred generally to the whole declaration, and the plaintiff signed judgment as for want of a plea; the court of Common Pleas ordered it to be set aside with costs, as the demurrer went to the substance of the declaration, the goods taken having been insufficiently described therein.(f) And where the defendant was advised that he had substantial ground of demurrer, the court of King's Bench set aside the judgment, signed as for want of a plea, upon terms.(g) By rejoining *gratis* is meant, rejoining without the common four-day rule to rejoin:(h) And, in the Common Pleas, the plaintiff having tendered an issue to a plea, and demanded a rejoinder, when the defendant was under terms to rejoin *gratis*, and for want of a rejoinder signed judgment, the court held the judgment regular; but set it aside without costs, because the plaintiff might have added the *similiter* himself.(i) Short notice of a trial in *country* causes must, in the King's Bench, be given at least *four* days before the commission day, one day exclusive, and the other inclusive:(k) But, in the Common Pleas, *two* days' notice seems to be sufficient in *country* causes;(l) as it is also in town causes, in both courts; though it is usual to give as much more as the time will admit of. The defendant

(g) 1 Bur. 605.

(a) 1 Moore, 430.

(b) 3 Bur. 1738, 9. 1 Chit. Rep. 711.

(c) 2 Str. 1185. Barnes, 168. 2 Blac. Rep. 923. 3 Wils. 530, S. C. 1 Chit. Rep. 711. 7 Price, 670.

(d) Say. Rep. 80. 7 Durnf. & East, 530. 1 East, 411. Barnes, 271. 2 Blac. Rep. 923. 2 Bos. & Pul. 446. *White v. Benson*, II. 55 Geo. III. K. B. 1 Chit. Rep. 711, 12, (a).(e) 1 Bing. 379. 8 Moore, 427, S. C. 5 Dowl. & Ryl. 620, *accord*.

(f) 8 Moore, 379.

(g) 7 Durnf. & East, 530. 1 East, 414, (a), S. C.

(h) Barnes, 271.

(i) 3 Bos. & Pul. 443.

(k) R. E. 30 Geo. III. K. B. 3 Durnf. & East, 660.

(l) Pr. Reg. 390. Barnes, 301.

however is not precluded by these terms, from demurring to the replication, if there be good cause.(m)

When the defendant is under a judge's order for time to plead, on the terms of pleading issuably, and pleads a false plea of judgment recovered,(n) or other plea which is not issuable, the plaintiff may consider it as a mere nullity, and sign judgment:(o) and where several pleas [*473] are pleaded, one *of which is not issuable, it will vitiate all others.(a) So, where a defendant, when under an order to plead issuably, puts in a sham demurrer to some of the counts in the declaration, and pleads issuably to the rest, the plaintiff may consider the whole as a nullity, and sign judgment as for want of a plea.(b) But where it is doubtful whether the plea be issuable, the better way, in term time, is to move the court to set it aside.(c)

Before the plaintiff, however, can sign judgment, the defendant must have notice to plead; and, unless he be bound by rule of court, or order of a judge, to plead by a time therein limited, a rule to plead must be entered in all cases, whether the defendant have appeared or not; and when he has appeared, there must also in general be a demand of plea.

When the declaration is delivered absolutely, after appearance, a notice to plead must be given;(d) which is usually indorsed on the declaration, otherwise the defendant need not plead thereto, within the regular time; but if the defendant take an imparlance, for want of such notice, then he must plead at the time allowed him by such imparlance.(e) And if the declaration be delivered before the essoin day of the term next after the return of the writ, though without a notice to plead, the defendant, we have seen,(f) if he appear and accept the declaration, shall not have an imparlance to the subsequent term. A notice to plead seems also to be necessary, when the declaration is filed or delivered *de bene esse*, or conditionally,(g) though this was formerly doubted in the Common Pleas.(h) But it is not necessary that the notice to plead should be indorsed on, or given at the time of delivering the declaration: Therefore, where the declaration in the King's Bench was filed on the last day of the second term after the return of the writ, but the notice to plead was only given a little before the essoin day of the following term, the court held it to be well enough, the master certifying it to be the practice.(i) And where the plaintiff having declared in his own right, afterwards declared as executor, without indorsing the declaration "*by the bye*" when delivered, but the defendant's attorney was told it was *by the bye*, the court of King's Bench, we have seen,(k) on the opinion of the master, held it to be regular. In the Common Pleas, where a declaration was delivered without a notice to plead, and some time afterwards a notice in writing was given to the defendant, who lived above forty miles from London, to plead in

(m) R. T. 5 & 6 Geo. II. (b), K. B. 2 Str. 1185.

(n) 1 Blac. Rep. 376. 2 Wils. 117. 3 Wils. 33. 1 Moore, 431; and see 2 Chit. Rep. 292.

(o) 1 Bur. 59. *Valley v. Gardiner*, H. 24 Geo. III. K. B. Barnes, 263. 3 Bos. & Pul. 395, C. P.

(a) 3 Durnf. & East, 305. (b) 1 East, 411; and see Barnes, 314.

(c) 1 Bur. 59. 2 Blac. Rep. 724. 2 Durnf. & East, 390. 7 Durnf. & East, 530. 1 Bos. & Pul. 447. 3 Bos. & Pul. 395. 7 East, 383. 4 Taunt. 668. 1 Chit. Rep. 355, (a).

(d) R. T. 5 & 6 Geo. II. K. B. R. E. 3 Geo. II. C. P.; and see Append. Chap. XVIII. § 3.

(e) *Per Cur. E.* 24 Geo. III. K. B. (f) *Ante*, 467.

(g) R. M. 10 Geo. II. reg. 2, K. B. R. E. 3 Geo. II. C. P. Barnes, 257, 302. 2 New Rep. C. P. 223. Append. Chap. XVIII. § 5, 6.

(h) Barnes, 226, 7, 310. 1 Sel. Pr. 2 Ed. 230.

(i) 3 Bur. 1452.

(k) *Ante*, 425.

eight days, this was held to be a good declaration and notice, although the notice was not given at the time of the delivery of, or written on the back of the *declaration.(a) And in the latter court [*474] it has been holden, that if a declaration be indorsed to plead in "——," it must be understood to mean within the number of days allowed by the rules of the court.(b)

The rule to plead is the order of the court;(c) and may be entered, on a *præcipe*, with the clerk of the rules in the King's Bench, or secondaries in the Common Pleas, at any time after the delivery, or filing and notice of the declaration in term time; or if the declaration be delivered, or filed and notice given, four days exclusive before the end of the term, the rule to plead may be entered at any time during the first four days after term. If the defendant obtain a judge's order for time to plead, either in the same or till the next term, the plaintiff when the time is expired, may sign judgment for want of a plea, without giving a rule to plead;(d) or, if a rule has been already given, without giving a new rule.(e) But, in the Common Pleas, a summons for further time to plead, not attended by the party taking it out, does not waive the necessity of a rule to plead.(f) The clerk of the rules, or secondaries, will accept a rule to plead on the *essoïn* day; but such rule cannot be entered until the first day of term:(g) and *Sunday* is a day within this rule, unless it be the last.(h)

Anciently there were two rules given in the King's Bench, of four days each; the first *ad respondendum*, the second *ad respondendum peremptoriè*.(i) These were afterwards converted into one eight day rule:(j) but now, four days only are allowed the defendant, in either court, from the time of giving any rule to plead:(k) which four days expire before, with, or after the time for pleading. If they expire before, the plaintiff must wait till the expiration of the time for pleading, before he can sign judgment for want of a plea: but if they expire with or after that time, the plaintiff, in the King's Bench, is at liberty to sign his judgment, the day after the rule for pleading is out: the declaration having been regularly delivered or filed, and the defendant or his agent being called upon for a plea.(l) In the Common Pleas, judgment cannot be signed for want of a plea, till the opening of the office in the afternoon of the next day after the rule to plead,(m) or day given by a judge's order for time to plead,(n) has expired. But if a rule to plead expire on a *die non juridicus*, as on the *Purification*, &c. the defendant is bound to plead on or before that day; and if he do not, judgment may be signed on the next day.(o) In the Exchequer, the *rule to [*475] plead is said to be a four day rule, *inclusive*; and judgment may be signed, for want of a plea, on the day after it expires.(aa)

(a) 2 Wils. 137.

(b) 2 Bos. & Pul. 363.

(c) Append. Chap. XVIII. § 8.

(d) R. T. 5 & 6 Geo. II. (h). K. B. *Starkie v. Wilkes*, M. 7 Geo. II. K. B. 1 Crompt. 3 Ed. 162. 4 Barn. & Cres. 386. 6 Dowl. & Ry. 390, S. C. Barnes, 243. Cas. Pr. C. P. 67, 141. Pr. Reg. 290, 91, S. C. 1 H. Blac. 88. 7 Taunt. 587. 1 Moore, 320, S. C.; and see 4 East, 571. 1 Taunt. 538. 2 Moore, 220.

(e) 7 Taunt. 587. 1 Moore, 320, S. C.

(f) 3 Bos. & Pul. 180.

(g) Cas. Pr. C. P. 68.

(h) 2 Salk. 624. 1 Str. 86. *Roberts v. Quickendon*, M. 50 Geo. III. K. B. 11 East, 272, (b).

(i) Vidian's Introd. II. 2 Salk. 517.

(k) R. T. 1 Geo. II. K. B. 2 Str. 1192.

(l) N. II. 2 Geo. II. 3, K. B.

(m) Cas. Pr. C. P. 55.

(n) *Id.* 67. Pr. Reg. 287, S. C.

(o) 2 H. Blac. 616.

(aa) 2 Price, 6.

When a rule to plead has been once entered, and the cause stands over to another term, without any further proceeding, a new rule to plead should regularly be entered for that term, to entitle the plaintiff to sign judgment, unless a judge's order has been obtained for time to plead; *(b)* for judgments ought in general to be entered the same term in which rules are given. *(c)* But when the declaration is *amended* in the King's Bench, if a rule to plead be entered the same term the amendment is made, though before such amendment, it is sufficient; *(d)* otherwise a new rule to plead must be entered: *(e)* And in the Common Pleas, we have seen, *(f)* the defendant is entitled in all cases, on amending the declaration, to a new four day rule to plead. When the plaintiff after giving a rule to plead, has been delayed by *injunction*, he may sign judgment in either court, after the injunction is dissolved, without a new rule. *(g)*

The *demand* of plea is a notice in writing from the plaintiff's attorney; *(h)* and, except when the defendant is in custody of the *sheriff*, *(ii)* and the plaintiff has declared against him as being in that custody, *(kk)* or is in custody of the *warden* of the Fleet, *(ll)* or bound down by a judge's order for time to plead, *(mm)* or the declaration has been amended, *(nn)* must be made in every case where the defendant has appeared, *(oo)* or put in bail: And, in the Common Pleas, a demand of plea is necessary, after an appearance, though the defendant has not taken the declaration out of the office. *(p)* So, where a declaration was delivered on the *essoins* day of *Hilary* term, and an imparlance was given to the defendant till *Easter* term, when a rule to plead was given, but no demand of plea made, the court of Common Pleas held, that the plaintiff, having signed judgment in *Trinity* term for want of a plea, was irregular, and set aside the proceedings. *(q)* In country causes, the demand of plea must be made, in that court, on the agent in town, *(r)* if there be one; or if not, on the attorney in the country: *(s)* And where the defendant was beyond the seas, and his attorney dead, a rule was made absolute, that a demand of plea in the office should be sufficient; upon affidavit of service of a rule to show cause on one of the defendant's bail, and that the other was not to be found. *(t)*

[*476] *In the King's Bench, a demand of plea may be made at the time of delivering the declaration, *(a)* and indorsed thereon: *(bb)* And where a rule to plead has been given, and demand of plea made, and judgment is signed of a subsequent term, there need not be a fresh demand of plea of that term, although there should be a new rule to plead. *(cc)* But,

(b) *Ante*, 474.

(c) Gilb. K. B. 318. 1 Maule & Sel. 478.

(d) 2 Salk. 517, 18, 520. R. M. 10 Geo. II. *reg.* 2, *(b)*, K. B. *Yates v. Edmonds*, T. 35 Geo. III. K. B.

(e) 2 Chit. Rep. 332.

(f) *Ante*, 469.

(g) 2 Bur. 660. Doug. 71. Barnes, 238. Pr. Reg. 26, S. C. 2 Blac. Rep. 784. *Ante*, 461.

(h) Append. Chap. XVIII. § 10; and see N. M. 1 Geo. II. C. P. Pr. Reg. 280.

(ii) 1 Durnf. & East, 591. 6 Durnf. & East, 524. *Ante*, 347.

(kk) 2 Barn. & Cres. 803.

(ll) Imp. C. P. 7 Ed. 231. *Ante*, 359.

(mm) R. T. 5 & 6 Geo. II. *(b)*, K. B. 4 East, 571. 1 Taunt. 538. 2 Moore, 220; and see 4 Barn. & Cres. 386. 6 Dowl. & Ryl. 390, S. C.

(nn) 3 Barn. & Ald. 137.

(oo) 1 Wils. 134. 1 Bos. & Pul. 341. 1 Chit. Rep. 737, *(a)*.

(p) 1 Bos. & Pul. 341; but see 1 Chit. Rep. 735. *Id.* *(a)*.

(q) 8 Taunt. 33. 1 Moore, 464, S. C.

(s) Pr. Reg. 281.

(a) 6 Durnf. & East, 689. 1 Dowl. & Ryl. 186.

(cc) *Sweet v. John*, H. 55 Geo. III. K. B. 1 Chit. Rep. 735, 6, *(a)*.

(r) Imp. C. P. 7 Ed. 231.

(t) Barnes, 307.

(bb) 5 East, 547.

in the Common Pleas, a demand of plea must be made after declaration delivered, and rule to plead given: a demand of plea indorsed on the declaration, *(d)* or made before the rule to plead is given, *(e)* being deemed insufficient: And it cannot be made, in either court, before the defendant has appeared: *(f)* and after the plaintiff has entered an appearance, or filed common bail for him according to the statute, *(g)* or when the defendant is in custody of the sheriff, *(h)* and the plaintiff has declared against him as being in that custody, *(i)* or is in custody of the warden, *(k)* or bound down by a judge's order for time to plead, *(l)* or the declaration has been amended, *(m)* a demand of plea is unnecessary. So, when the defendant pleads, without taking the declaration out of the office, *(n)* or puts in a plea which is considered as a nullity, *(o)* as a plea in *abatement* of a term subsequent to the declaration, without an imparlance, *(pp)* or the plea of *non assumpsit* in an action of *debt*, *(qq)* or *nil debet* in *assumpsit*, *(rr)* it operates in general as a waiver of the irregularity in not demanding a plea, and will enable the plaintiff to sign judgment for want of it. But where such a plea was put in without authority, by a new attorney for the defendant, without any order for changing his former attorney, the judgment which had been signed as for want of a plea, was set aside, *(ss)* In general, the demand of a plea is a waiver of the justification of bail *(tt)* [A] but where, after the time for putting in and justifying bail had expired, (one of the bail having been rejected,) time was given to add and justify another bail, without prejudice to the plaintiff, and in the interval he demanded a plea; the court of King's Bench held, that an attachment against the sheriff for not bringing the body was regular, the added bail not having justified within the time for which indulgence was given, *(u)*

*The plaintiff, in the King's Bench, cannot sign judgment for [*477] want of a plea, till the expiration of twenty-four hours after it has been demanded, whether the time for pleading be or be not expired, when such demand was made: *(a)* And, in that court, if a plea be demanded on *Saturday*, the defendant has twenty-four hours to plead, after the demand, exclusive of *Sunday*, *(b)* [B] But judgment may be signed

(d) Barnes, 276.

(e) 4 Taunt. 51.

(f) 1 Durnf. & East, 635. *Per Cur.* E. 44 Geo. III. K. B. 5 Dowl. & Ryl. 609.

(g) R. T. 1 Geo. II. K. B. 8 Durnf. & East, 465. 5 Barn. & Cres. 763. Barnes, 249. 2 Bos. & Pul. 218.

(h) 1 Durnf. & East, 591. 6 Durnf. & East, 524. *Ante*, 347; but see 2 Bos. & Pul. 367.

(i) 2 Barn. & Cres. 803.

(k) Imp. C. P. 7 Ed. 231. *Ante*, 359.

(l) 4 East, 571. *Taylor v. King*, II. 31 Geo. III. C. P. Imp. C. P. 7 Ed. 231. 1 Taunt. 538. S. P. 2 Moore, 220.

(m) 3 Barn. & Ald. 137.

(n) 1 Chit. Rep. 735. Imp. C. P. 7 Ed. 420; but see 1 Bos. & Pul. 341. 1 Chit. Rep. 735.

(a), *semb. contra*.

(o) 1 Chit. Rep. 736, *(c)*.

(pp) 4 Durnf. & East, 520. 2 Smith, R. 393; but see 3 Barn. & Ald. 259. 1 Chit. Rep. 704, S. C.

(qq) 6 East, 549. 14 East, 442. 4 Taunt. 164. 1 Chit. Rep. 716, *in notis*.

(rr) Barnes, 257.

(ss) 6 East, 549.

(tt) *Ante*, 255.

(u) 1 Dowl. & Ryl. 163; and see 4 Dowl. & Ryl. 834.

(a) 1 Blac. Rep. 50. 1 Durnf. & East, 454. 4 Durnf. & East, 118.

(b) 4 Durnf. & East, 557.

[A] A justification of bail after plea pleaded and served, does not make the plea good in a bailable action, unless the plea was served *de bene esse* and with notice; a plea otherwise made before bail is perfected is a nullity. *Adams v. Minton*, 6 Cow. 56. *Waterman v. Allen*, 1 Id. 60. *Briggs v. Rowe*, 7 Id. 508.

[B] *Accord. Cock v. Bunn*, 6 Johns. R. 325.

at any time after the twenty-four hours are expired, provided the time for pleading be then out; and therefore if the plea be demanded in the *morning*, the plaintiff is not obliged to wait until the opening of the office, in the *afternoon* of the following day.(c) In the Common Pleas, the rule is, that after a plea has been demanded, the defendant has in all cases till the opening of the office, in the afternoon of the following day, to plead; and if he do not plead within that time, the rule to plead being expired, the plaintiff may sign judgment.(d)

[*478]

*CHAPTER XIX.

Of MOTIONS and RULES in general, and AFFIDAVITS in support of them; and the PRACTICE of the COURTS thereon, and by SUMMONS and ORDER, at a JUDGE'S CHAMBERS.

As it is frequently necessary, in the course of a suit, to apply to the court where the action is depending, or a judge of that court, it may be proper, before we proceed further, to say somewhat of the manner of doing it; and of the *rules* or orders of the courts, and practice by *summons* and *order* at a judge's chambers.

The usual modes of applying to the court are by *motion*, or *petition*. A *motion* is an application to the court, by counsel in the King's Bench, or a serjeant in the Common Pleas, for a rule or order; which is either granted or refused; and if granted, is either a rule *absolute* in the first instance, or only to *show cause*, or, as it is commonly called, a rule *nisi*, that is, *unless* cause be shown to the contrary, which is afterwards, on a subsequent motion, made absolute or discharged. To use the words of an elegant writer on the law and constitution of *England*:(aa) "The application to a court by counsel is called a motion; and the order made by a court on any motion, when drawn into form by the officer, is called a rule." But, besides the rules which are moved for in court, there are others made out by the officers as a matter of course, or drawn up on a motion paper signed by a counsel or serjeant.

In the King's Bench, motions and rules are either on the *crown* side, or on the *plea* side of the court. In the Common Pleas and Exchequer, there is no *crown* side.(b) But, in any of these courts, a rule for an *attachment*, which is of a *criminal* nature, may be moved for in the following cases: First, against the *parties* to the suit, for disobedience to a rule or order of the court, by non-payment of costs, on the master's or prothonotary's *allocatur*;(cc) or of money generally, or money and costs; or for not producing deeds in his possession,(dd) &c.: Secondly, against *attorneys*, for not delivering up deeds,(e) or non-payment of costs,(e) &c.; or for not performing their undertakings,(f) or otherwise mis-

(c) 1 Durnf. & East, 454.

(d) Cas. Pr. C. P. 17, 18, 54.

(aa) Wynne, *Eunom.* Dial. II. § 26. And for a general account of the practice on motions in civil suits, see *id.* § 25, &c.

(b) 5 Taunt. 503.

(cc) *Post*, Chap. XL.(dd) *Post*, 487; and see 8 Moore, 510, 610. 1 Bing. 410, 464, S. C.(e) *Ante*, 86, 7.(f) *Ante*, 86, 227, 241.

behaving themselves: *(g)* Thirdly, against **officers* of the court, [*479] for extortion, *(a)* or neglect of duty: *(a)* Fourthly, against *inferior judges* and *officers*, for acting unjustly, oppressively, or irregularly, in the execution of their duty; *(bb)* or for disobeying the king's writs, issuing out of the superior courts, by proceeding in a cause, after it has been put a stop to, or removed by writ of prohibition, *certiorari*, *(cc)* *habeas corpus*, *(cc)* *supersedeas*, or error, *(dd)* &c.: Fifthly, against *sheriffs*, or other persons having the execution of writs, for not returning them, *(ee)* or bringing into court the body of the defendant, *(ff)* &c., on being served with a rule for that purpose: Sixthly, against *gaolers*, &c., on the Lords' act, for extortion or oppression: *(gg)* Seventhly, against *jurymen*, in collateral matters relating to the discharge of their office, such as making default when summoned; refusing to be sworn, or to give any verdict; eating or drinking, without leave of the court, and especially at the cost of either party, and other misbehaviours or irregularities of a similar kind: *(h)* but not in the mere exercise of their judicial capacities, as by giving a false or erroneous verdict: *(h)* Eighthly, against *witnesses*, for not attending on a *subpœna*; *(i)* refusing to be sworn or examined, or prevaricating in their evidence when sworn: *(k)* But, in the Common Pleas, it was not formerly usual to grant an attachment against a witness, for non-attendance upon a *subpœna*; and it cannot now be had, unless a clear case of contempt be made out against him, the party aggrieved being left to his remedy by action: *(l)* Ninthly, against *peers* of the realm, or *members* of the house of Commons, for disobeying a *subpœna*, *(m)* or other process: *(n)* but they are not liable to be attached, for non-payment of money, pursuant to an award: *(o)* Lastly, against *other* persons, for contempts committed in the face of the court, not only by an actual breach of the peace, or rude and contumelious behaviour, but also for any other heinous misdemeanour, as by a party's giving false, trifling, and contradictory answers, upon an examination in court, concerning his ability to be bail for another, in an action depending in court; *(p)* or for contempts committed out of court; as for a rescue, *(q)* or contemptuous words spoken of the court, or its process: *(r)* or for using undue means to execute process; *(s)* or not performing an award, *(t)* &c.

If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination: *(u)* but otherwise it is usual to **apply* to the court, on an *affidavit* of the circumstances, [*480] for a rule for an attachment; which is either absolute in the first

(g) *Ante*, 86, 88.

(a) *Ante*, 58, 232.

(bb) 4 Blac. Com. 284. 2 Hawk. P. C. Chap. XXII. § 25, &c.

(cc) *Ante*, 404, 415.

(dd) *Post*, Chap. XLIV.

(ee) *Ante*, 307, 8. 5 Dowl. & Ry. 614.

(ff) *Ante*, 311, 12, 314.

(gg) *Ante*, 232.

(h) 4 Blac. Com. 284. 2 Hawk. P. C. Chap. XXII. § 13, &c.

(i) *Post*, Chap. XXXV.

(k) 4 Blac. Com. 284.

(l) 1 Barnes, 33, 35, 497. Pr. Reg. 435. 1 H. Blac. 49. 5 Taunt. 260. 6 Taunt. 9. 1 Marsh.

410, S. C.

(m) *Ante*, 192.

(n) 1 Bur. 63.

(o) *Ante*, 192, *Post*, Chap. XXXVI.

(p) Cro. Car. 146. 1 Chit. Rep. 116; and see 5 Taunt. 776. *Ante*, 274.

(q) *Ante*, 236, 7.

(r) *Ante*, 163, 70.

(s) 2 Ken. 372.

(t) *Post*, Chap. XXXVI.

(u) 4 Blac. Com. 286.

instance, or only to show cause. The rule for an attachment, in the King's Bench, for non-payment of costs, pursuant to the master's *allocatur*, is absolute in the first instance, although *four* terms have elapsed since the taxation, *(a)* unless it be for non-payment of costs pursuant to an award: *(b)* But where it is for the non-payment of money generally, or of money and costs, it is only to show cause: *(c)* And, if a party obtain a rule for setting aside judgment and execution, on condition of his paying costs, the court will not grant an attachment in the first instance, for non-payment of them. *(d)* In this court, as well as in the Common Pleas, the rule for an attachment against the *sheriff*, for not returning the writ, or bringing in the body, is absolute in the first instance; and may be moved for the last day of term. *(e)* So, where contemptuous words are spoken of the *court*, the attachment issues in the first instance; but where they are spoken of its *process*, the rule is only to show cause. *(f)* In all other cases, the rule for an attachment is a rule *nisi*, in the King's Bench. And where a matter has been referred to the master, the court, on showing cause against an attachment, will not go into the accounts which were the subject of the reference; the master's *allocatur* being in the nature of a judgment, and the attachment like a writ of execution: *(g)* and besides, the party, on going before the master, enters into an undertaking to pay such sum as he shall find to be due. *(h)* An affidavit to support a rule for an attachment, for not paying money pursuant to the master's *allocatur*, must show that at the time of serving the copy, the original was shown to the defendant. *(i)* In the Common Pleas, all rules for attachments are rules *nisi*, except against the *sheriff*, for not returning the writ, or bringing in the body, or for non-payment of costs on the prothonotary's *allocatur*, *(k)* which are absolute in the first instance. In the Exchequer, as in the King's Bench, the rule for an attachment for non-payment of costs, on the master's *allocatur*, is absolute in the first instance, unless it be for non-payment of costs pursuant to an award: *(l)* And though, in other cases, there should in general be a rule to show cause, yet where an attorney had been ordered, by a former rule, to pay a sum of money to his client, with the costs of the application, the court granted a rule for an attachment against him, for non-payment of them, absolute in the first instance. *(m)*

Motions and affidavits for attachments in civil suits, in the King's Bench, are proceedings on the *plea* side of the court, until the attachments are granted, and are to be *entitled* with the names of the parties; *(n)* [*481] but as soon *as the attachments are granted, the proceedings are on the *crown* side, and from that time the king is to be named as the prosecutor: *(aa)* And motions and affidavits for attachments are entitled

(a) 1 Chit. Rep. 723.

(b) *Thomson v. Billingsley*, T. 37 Geo. III. K. B. 2 Chit. Rep. 57; and see 2 Blac. Rep. 892. 1 Price, 341.

(c) *Per Buller*, Just. M. 24 Geo. III. K. B. Append. Chap. XXXVI. § 23.

(d) 2 Chit. Rep. 158.

(e) 1 Bur. 651. 5 Bur. 2686.

(f) *Ante*, 169, 70.

(g) 1 Chit. Rep. 723.

(h) 1 Ken. 375. *Per Cur.* M. 45 Geo. III. K. B.

(i) 7 Dowl. & Ry. 612.

(k) 1 Bos. & Pul. 477. Imp. C. P. 6 Ed. 614. Append. Chap. XL. § 9; but see 2 Blac. Rep. 892.

(l) *Forrest*, 80. 1 Price, 341, 2.

(m) 1 Price, 341; and see 9 Price, 384.

(n) 3 Durnf. & East, 253. 7 Durnf. & East, 439, 528. 12 East, 165.

(aa) 1 Chit. Rep. 727, *(a)*.

in like manner, in the Common Pleas,(b) and Exchequer. A rule *nisi* for an attachment cannot be moved for the last day of term;(c) nor can it, we have seen, be served on a *Sunday*.(d)

The attachment is a *criminal* process, directed to the sheriff, commanding him to attach the party, so that he have him before the king, or his justices, at *Westminster*, on a certain day, to answer “of and concerning those things which shall there, on his majesty’s behalf, be objected against him.”(e) The party being taken on this writ, either remains in custody, or puts in bail, before the court(f) or a judge, (for it has been doubted whether he is bailable by the sheriff),(g) to answer interrogatories, and to appear from day to day, till the court shall determine concerning the matters objected against him:(h) And where the coroner had returned *cepi corpora* to writs of attachment against the sheriffs of *Middlesex*, the court of King’s Bench, on the last day of term, granted writs of *habeas corpora*, without an affidavit, to bring up the bodies of the sheriffs, before one of the judges at chambers, to answer to such matters as should be there alleged against them.(i) An attachment however, for non-payment of money, is in the nature of *mesne* process: And where the party had been taken, and permitted to go at large, and returned again into custody, and continued in custody at the return of the writ, it was holden that the sheriff was not liable to an action for an escape.(k)

When the party has been taken upon the attachment, the court, upon motion by his counsel, will make a rule, that unless his adversary exhibit interrogatories against him in *four* days, which must be in term time,(l) he shall be discharged. These interrogatories must be signed by counsel(m) or a serjeant, and filed, in the King’s Bench, with the master of the crown office, who is to examine the party thereon, in *four* days after the interrogatories are brought in;(n) but, in the Common Pleas, they are filed with one of the secondaries,(o) who examines him, and afterwards makes copies of the depositions for each party: And if the master, or prothonotaries (to whom the matter is generally referred in the Common Pleas,(p) report that he is in contempt, the court will commit him to the King’s Bench, or Fleet prison; but if the report be in his favour, they will order him to be *discharged, or his recognizance to be vacated.(a) [*482] When a plaintiff is brought in on an attachment for a *rescue*, in the King’s Bench, it is the practice of the court to put interrogatories to him, though he do not deny the charge in the affidavits, unless the prosecutor waive putting them.(bb) And, by a rule of that court,(cc) “if judgment be not given the same term, the name of the cause shall be inserted

(b) 2 Bos. & Pul. 517, (a).

(c) 3 Smith, R. 118.

(d) 8 Durnf. & East, 86. *Ante*, 218.

(e) Append. Chap. III. § 19.

(f) See Barnes, 77; where the court of Common Pleas refused to bail an attorney, who had been committed for a crime of a heinous nature, in the first instance.

(g) *Ante*, 222, 3.

(h) Imp. C. P. 7 Ed. 552.

(i) 1 Chit. Rep. 249; and see 4 Dowl. & Ry. 393. *Ante*, 314.

(k) 2 Barn. & Ald. 56.

(l) Comb. 8.

(m) R. M. 34 Geo. II. K. B. 5 Durnf. & East, 474.

(n) Lil. Pr. R. Reg. 73.

(o) 2 Blac. Rep. 1110. And for the form of interrogatories in this court, see Append. Chap. III. § 20.

(p) Imp. C. P. 7 Ed. 552, 3.

(a) 3 Bur. 1257.

(bb) *Ante*, 237. And see further, as to interrogatories exhibited in cases of contempts, Willis on *Interrogatories*, 28, 9.

(cc) R. H. 34 Geo. III. K. B. 5 Durnf. & East, 547, 723.

in the list of motions, appointed to come on *peremptorily* in the ensuing term, in order that the court may be informed what shall have been done in prosecution of the attachment."

If the party neglect to appear before the master or secondary, to be examined, or to attend the court when he is directed to come, the court will order his recognizance to be estreated: and if he confess anything material in his depositions, there is no occasion for witnesses, but the prosecutor may move on his confession: (d) If he deny part of the contempts only, and confess other part, he shall not be discharged as to those denied, but the truth of them shall be examined, and such punishment inflicted as upon the whole shall appear reasonable; and if his answer be evasive as to any material part, he shall be punished in the same manner as if he had confessed it. The report of the master of the crown office, that the defendant and his attorney are in contempt, for not performing an award, &c. is to be taken as a conviction; and on their being brought up for judgment, the court will not receive affidavits in denial of the contempt, but only in mitigation of punishment. (e) But, in the Common Pleas, the prothonotary's report is not deemed conclusive, against parties who have been put to answer interrogatories before him; but they may except to the report, on any material point: (f) And where, after making his report against the parties, the prothonotary was directed to inspect an account book belonging to one of them, which tended to support the answers given by the parties, but had been accidentally omitted in the first instance, the prosecutor was not allowed, on his own application, to produce before the prothonotary, the clerk who had made the entries in the book. (f)

Motions and rules on the *plea* side of the court of King's Bench, and in the Common Pleas, are *common* or *special*. Common rules are first, such as are given by the *master*, *filacer*, clerk of the *papers*, or clerk of the *errors*, in the King's Bench; or by the *prothonotaries*, *filacers*, or clerk of the *errors*, in the Common Pleas: Secondly, such as are *entered* with the clerk of the *rules* in the King's Bench, or *secondaries* in the Common Pleas, on a *præcipe* or note of instructions, made out by the attorneys who apply for them; and are not founded on any motion in court, either real or

supposed: Thirdly, such as were anciently moved for by the at-

[*483] torneys *at *side-bar*, in the King's Bench; or, in the Common Pleas, at *side-bar* on the *first* day of term, and in the *treasury* chamber on other days; and are thence called *side-bar* or *treasury* rules: (aa) Fourthly, such as are drawn up by the clerk of the *rules* in the King's Bench, or *secondaries* in the Common Pleas, without being moved for in court, on producing a motion paper signed by a counsel or serjeant.

In the King's Bench, rules given by the master (which are called *master's* rules,) are to declare, (b) or plead in bar, in *replevin*; and in ordinary cases, to reply, (c) rejoin, surrejoin, rebut, surrebut, or join in demurrer; (dd) to enter the issue; (ee) for the defendant to produce the record; (ff)

(d) Imp. C. P. 7 Ed. 553.

(e) 2 Chit. Rep. 57.

(f) 1 Bing. 272. 8 Moore, 214, S. C.; and see *id.* 322. And see further, as to attachments for contempts, and the proceedings thereon, 2 Hawk. P. C. Chap. 22, § 1. Bac. Abr. tit. *Attachment* 4 Blac. Com. 283, &c. Barnes, 258. Bingham on *Judgments*, &c., 277, &c.

(aa) Sty. Pr. Reg. 575, Ed. 1707.

(b) Append. Chap. XLV. § 54.

(c) *Post*, Chap. XXVIII. Append. Chap. XXVIII. § 1.

(dd) *Post*, Chap. XXIX.

(ee) *Post*, Chap. XXX. Append. Chap. XXX. § 40.

(ff) *Post*, Chap. XXXII.

for a trial by *proviso*; (*g*) or to return a writ of *certiorari* in error; (*h*) by the *filacer*, to appear to a *pone* or, *recordari*; (*i*) &c.; by the clerk of the *papers*, to return the paper book; (*k*) or, by the clerk of the *errors*, for better bail in error; (*l*) to certify the record; (*l*) or assign errors. (*l*) All master's rules in the King's Bench, are entered with the clerk of the rules, and expire in *four* days after service. In the Common Pleas, all rules are given by the *secondaries*, except rules to appear in *scire facias*, which are given by the *prothonotaries*; (*m*) rules to appear and declare in *replevin*, and to bring in the body, which are given by the *filacers*; (*n*) and rules for better bail in error, or to certify the record, which are given by the clerk of the errors. (*o*)

Common rules entered, on a *præcipe*, with the clerk of the *rules* in the King's Bench, are to plead, in ordinary cases; (*p*) or avow, in *replevin*; (*q*) or for judgment on *postcas*; (*r*) or inquisitions; (*s*) or in *scire facias*. (*t*) In the Common Pleas, the rules so entered, with the secondaries, are to declare; (*u*) (except in *replevin*,) to plead; (*x*) reply; (*y*) rejoin, surrejoin, rebut, surrebut, or join in demurrer; to avow, or plead in bar, in *replevin*: and for *attorneys* and officers of the court to appear and plead to bills filed against them. (*z*) These rules are not *served* on the opposite party; but, in the Common Pleas, a *demand* in writing must be [*484] made, before judgment can be signed for non-compliance with them.

Side-bar rules, in the King's Bench, are for the sheriff to return the writ; (*a*) or bring in the body; (*bb*) for the marshal to acknowledge the defendant in his custody; (*cc*) for time, or further time, to declare; (*dd*) to discontinue the action, upon payment of costs; (*ee*) to be present at taxing costs; (*ff*) or for a *scire facias* to revive a judgment above *seven*, and under *ten* years old. (*gg*) In the Common Pleas, *side-bar* or *treasury* rules are, in addition to those enumerated in the King's Bench, to take a bill against an attorney off the file; to bring money into court, if under *five* pounds; (*hh*) to enter the issue; (*ii*) for costs, for not proceeding to trial or inquiry, pursuant to notice; (*kk*) for leave to enter up judgment on a warrant of attorney, above *one* and under *ten* years old; (*ll*) to return a writ of false judgment; (*mm*) or assign errors thereon; (*mm*) and the common

(*g*) *Post*, Chap. XXXIII. Append. Chap. XXXIII. § 13.

(*h*) *Post*, Chap. XLIV. Append. Chap. XLIV. § 67.

(*i*) *Ante*, 416, 17.

(*k*) *Post*, Chap. XXX. Append. Chap. XXX. § 37.

(*l*) *Post*, Chap. XLIV. Append. Chap. XLIV. § 29, 39, 46.

(*m*) *Post*, Chap. XLIII.

(*n*) *Ante*, 50, 310, 416, 17. It should be remembered, however, that the rule to bring in the body, though given in the first instance by the *filacer*, who issued the process, is afterwards drawn up by the *secondaries*, and served.

(*o*) *Post*, Chap. XLIV. Append. Chap. XLIV. § 29, 39.

(*p*) *Ante*, 473, &c.

(*q*) *Ante*, 418.

(*r*) *Post*, Chap. XXXVIII.

(*s*) *Post*, Chap. XXII. XXXVIII. Append. Chap. XXII. § 70.

(*t*) *Post*, Chap. XLIII. Append. Chap. XLIII. § 128.

(*u*) *Ante*, 458.

(*x*) *Ante*, 474.

(*y*) *Post*, Chap. XXVIII.

(*z*) *Ante*, 323.

(*a*) *Ante*, 306, 7.

(*bb*) *Ante*, 303, 10.

(*cc*) *Ante*, 363, 4.

(*dd*) *Ante*, 423, 4.

(*ee*) *Post*, Chap. XXVIII. Append. Chap. XXVIII. § 7, 8.

(*ff*) *Post*, Chap. XL. Append. Chap. XL. § 5, 6.

(*gg*) *Post*, 485, (*m*), Chap. XLIII. Append. Chap. XLIII. § 59.

(*hh*) *Post*, Chap. XXV.

(*ii*) *Post*, Chap. XXX. Append. Chap. XXX. § 42.

(*kk*) *Post*, Chap. XXXIII.

(*ll*) *Post*, 485, 6, (*y*), Chap. XXI.

(*mm*) *Post*, Chap. XLIV. Append. Chap. XLIV. § 152, 155.

consent rule in *ejectment*.(n) *Side-bar* or *treasury* rules may be had as a matter of course, by applying for them at the office of the clerk of the rules in the King's Bench, or secondaries in the Common Pleas. The *last* day of term is said not to be a day for *side-bar* rules in the former court; but if the party was not entitled to such a rule before, he may take it out on the last day of term, or in vacation, dated as of the last day but one. A rule, however, calling on the sheriff to return a writ, issued in vacation, though *tested* in term time, is irregular; and an attachment grounded upon it will be set aside by the court on motion.(o)

Common rules drawn up by the clerk of the rules in the King's Bench, on producing a motion paper signed by counsel, are to declare peremptorily, after several rules for time to declare;(p) for the master, in *vacation*, to compute principal and interest on bills of exchange, or promissory notes,(q) &c.; to have a good jury on the execution of an inquiry,(q) to change the venue,(r) or bring it back to the common undertaking;(r) to bring money into court;(s) to plead several matters,(t) or make several avowries or cognizances;(t) for the defendant to abide by his plea;(u) for a [*485] **concilium* on demurrer,(a) special verdict,(b) or writ of error;(c) for costs, for not proceeding to trial or inquiry, pursuant to notice;(d) for a special jury,(e) or view;(f) rules by *consent*, as to examine witnesses upon interrogatories,(g) to refer causes to arbitration,(hh) or to enlarge the time for making an award;(ii) to make a judge's order,(kk) or order of *nisi prius*,(ll) a rule of court; or for a *scire facias* to revive a judgment, above *ten* and under *fifteen* years old.(mm) In the Common Pleas, *common* rules drawn up by the secondaries, on producing a motion paper signed by a serjeant, are for the prothonotaries, in *vacation*, to compute principal and interest on bills of exchange, or promissory notes, &c.; for bringing money into court, if it exceed *five* pounds;(nn) to plead several matters, in

(n) Append. Chap. XLVI. § 64, &c. (o) 1 Durnf. & East, 552.

(p) *Ante*, 424. (q) *Post*, Chap. XXII.

(r) *Post*, Chap. XXIV. Append. Chap. XXIV. § 2, 3, 4.

(s) *Post*, Chap. XXV. Append. Chap. XXV. § 1.

(t) *Post*, Chap. XXVII. Append. Chap. XXVII. § 11.

(u) *Id.* § 14. This rule, however, is unnecessary, in the Common Pleas. *Post*, Chap. XXVII.

(a) *Post*, Chap. XXXI. Append. Chap. XXXI. § 1.

(b) *Post*, Chap. XXXVII. (c) *Post*, Chap. XLIV.

(d) *Post*, Chap. XXXIII. Append. Chap. XXXIII. § 12.

(e) *Post*, Chap. XXXIV. Append. Chap. XXXIV. § 24.

(f) *Post*, Chap. XXXV. Append. Chap. XXXV. § 30, 31. In the King's Bench, the rule for a view in *trespass*, is drawn up on a motion paper signed by counsel: but in other actions, it is moved for in court; and in some cases is only a rule to show cause. In the Common Pleas, it is said that a rule for a view is never granted, without an affidavit, in any case, except an action of waste. Barnes, 467. And for the form of the rule, see Append. Chap. XXXIV. § 33.

(g) *Post*, Chap. XXXV. Append. Chap. XXXV. § 12. The rule for examining witnesses upon interrogatories, which can only be had by *consent*, is seldom moved for directly; but is commonly incident to, and arises out of some other motion, as to put off the trial, or for judgment as in case of a nonsuit, &c.

(hh) *Post*, Chap. XXXVI. Append. Chap. XXXVI. § 1.

(ii) *Post*, Chap. XXXVI. Append. Chap. XXXVI. § 11.

(kk) *Post*, 511.

(ll) *Post*, Chap. XXXVI.

(mm) The rule for this purpose, we have seen, is sometimes only a *side-bar* or *treasury* rule, as where the judgment is above *seven*, and under *ten* years old. *Ante*, 484. If it be above *ten* and under *fifteen* years old, the rule, as stated in the text, is absolute in the first instance, and may be drawn up on a motion paper signed by counsel; but if the judgment be above *fifteen* years old, there must be a rule to show cause. *Post*, Chap. XLIII.

(nn) *Post*, Chap. XXV. Append. Chap. XXV. § 2.

certain cases which will be mentioned in a subsequent chapter ;(o) for a *concilium* on demurrer,(p) special verdict,(q) or writ of error ;(r) or for a special jury.(s) Of these, as well as of the *side-bar* or *treasury* rules, copies should be duly served.

All rules moved in court, are denominated *special* rules ; and they are either *absolute* in the first instance,(t) or only *nisi*,(u) to show cause. These rules may be considered, as they arise, and succeed one another, in the course of the suit. In the King's Bench, special rules absolute in the first instance, are for a *certiorari*, to remove the *record* of a judgment from an inferior court,(x) or *transcript* of a record from the courts in *Wales*, or counties *palatine* ;(x) to enter up judgment in *term* time, on a warrant of attorney, above *ten* and under *twenty* years old ;(y) for the *copyhold* tenants *of a manor to inspect and take copies [*486] of court rolls ;(a) for a *mandamus*, to examine witnesses in India, on statute 13 Geo. III. c. 63, § 44,(b) or for the allowance of a writ of error *coram nobis*.(c) In the Common Pleas, they are for leave to enter up judgment on a warrant of attorney, above *ten* and under *twenty* years old ;(d) to have a good jury, on the execution of an inquiry ;(e) for judgment for the plaintiff, on *nul tiel record* ;(f) for a view ;(g) to make a judge's order,(h) or order of *nisi prius*,(i) a rule of court ; or for a *scire facias* on a judgment, above *ten* and under *twenty* years old ;(k) and, in both courts, to increase issues on writs of *distringas*, against persons having privilege of parliament ;(l) for a *distringas*, on the statute 7 & 8 Geo. IV. c. 71, § 5, where the defendant cannot be personally served with a summons or attachment, by *original* ;(m) for the allowance of bail ;(nn) for leave to compound penal actions ;(oo) for judgment on demurrer,(pp) or writ of error ;(qq) that the verdict be entered for, or *postea* delivered to the prevailing party, on a special verdict,(rr) or special case ;(rr) or for a suggestion on the *Welsh* judicature act, to entitle the defendant to a judgment of nonsuit ;(ss) And, after a rule of reference to the master or

(o) *Post*, Chap. XXVII.

(p) *Post*, Chap. XXXI.

(r) *Post*, Chap. XLIV.

(t) *Append. Chap. XIX. § 12.*

(x) *Ante*, 401, 2, 3 ; 405, 6, 7. *Post*, Chap. XLIV. *Append. Chap. XVI. § 11.*

(y) *Post*, Chap. XXI. In the King's Bench the rule is absolute in the first instance, unless the warrant of attorney be above *twenty* years old, and then it is a rule *nisi*. 1 Chit. Rep. 618, *in notis*. 2 Barn. & Cres. 555. 4 Dowl. & Ry. 5, S. C. In the Common Pleas, if the warrant of attorney be above a year old, leave to enter judgment may be given by a *side-bar* or *treasury* rule ; *ante*, 484 ; but if the warrant be above *ten* years old, the court must be moved for leave to enter judgment. If the warrant be under *twenty* years old, the rule in that court is absolute in the first instance ; but if it be above *twenty* years old, it is a rule to show cause. Barnes, 47. Cas. Pr. C. P. 146 ; and see *Append. Chap. XLIII. § 60.*

(a) *Post*, Chap. XXIII. If the rule be moved for on behalf of a *copyhold* tenant, it is absolute in the first instance, in the King's Bench ; 3 Durnf. & East, 141 ; but otherwise it is a rule *nisi*. 7 Durnf. & East, 746. In the Common Pleas, it is always a rule to show cause. 2 Blac. Rep. 1061.

(b) *Post*, Chap. XXXV. *Append. Chap. XXXV. § 26.*

(c) *Post*, Chap. XLIV. *Append. Chap. XLIV. § 22.*

(d) *Post*, Chap. XXI.

(e) *Post*, Chap. XXXII. *Append. Chap. XXXII. § 13, 14.*

(f) *Ante*, 485, (f). (h) *Post*, 511.

(k) *Post*, Chap. XLIII. *Append. Chap. XLIII. § 60.*

(l) *Ante*, 110, 11, 119.

(nn) *Ante*, 276. The *motion* is to justify bail ; but the *rule* is for the allowance of it.

(oo) *Post*, Chap. XXI.

(qq) *Post*, Chap. XLIV.

(ss) *Post*, Chap. XL. 6 Durnf. & East, 501, (b).

(q) *Post*, Chap. XXXVII.

(s) *Post*, Chap. XXXIV.

(u) *Id.* § 13, 14.

(v) *Id.* § 11.

(w) *Id.* § 12.

(x) *Id.* § 13, 14.

(y) *Id.* § 15, 16.

(z) *Id.* § 17, 18.

(aa) *Id.* § 19, 20.

(bb) *Id.* § 21, 22.

(cc) *Id.* § 23, 24.

(dd) *Id.* § 25, 26.

(ee) *Id.* § 27, 28.

(ff) *Id.* § 29, 30.

(gg) *Id.* § 31, 32.

(hh) *Id.* § 33, 34.

(ii) *Id.* § 35, 36.

(jj) *Id.* § 37, 38.

(kk) *Id.* § 39, 40.

(ll) *Id.* § 41, 42.

(mm) *Id.* § 43, 44.

(nn) *Id.* § 45, 46.

(oo) *Id.* § 47, 48.

(pp) *Id.* § 49, 50.

(qq) *Id.* § 51, 52.

(rr) *Id.* § 53, 54.

(ss) *Id.* § 55, 56.

prothonotaries, either party may move for their report thereon. In some of the preceding cases, the rule may be drawn up on a judge's order in *vacation*, on producing a motion paper signed by a counsel or serjeant; as for the master or prothonotaries to compute principal and interest on bills of exchange, or promissory notes,^(t) &c.; to bring money into court, change the venue, or plead several matters; for a special jury, or view; to have a good jury, on the execution of an inquiry; or to make a submission to arbitration a rule of court.^(u)

*Special rules *nisi*, or to show cause, are moved for, in both [*487] courts, on behalf of the *plaintiff* or *defendant*. On behalf of the *plaintiff*, they are, in the King's Bench, to discharge the rule for a special jury;^(a) or for a *scire facias*, to revive a judgment above *fifteen* years old;^(b) In the Common Pleas, for a *scire facias* to revive a judgment, above *twenty* years old;^(c) and, in both courts, for the sale of issues, on a writ of *distringas*;^(d) to amend the writ,^(e) or return; that the money deposited with the sheriff, and paid into court, under statute 43 Geo. III. c. 46, § 2, may be paid over to the plaintiff;^(f) to set aside a judgment of *nonpross*, for irregularity;^(g) for leave to enter up judgment on a warrant of attorney, above *twenty* years old;^(h) to refer it to the master or prothonotaries, in *term* time, to compute principal and interest on bills of exchange, or promissory notes,⁽ⁱ⁾ &c.; for the execution of a writ of inquiry before the chief justice,^(k) or a judge at *nisi prius*;^(l) for the defendant to produce a deed in his possession, and give a copy thereof to the plaintiff, when entitled to inspect it, in order that he may declare thereon;^(m) or to produce the same before the Commissioners of the Stamp office, to be stamped,⁽ⁿ⁾ or to the plaintiff's attorney, in order that he may ascertain the names of the witnesses, so as to *subpoena* them;^(o) to discharge the rule for changing the venue, for irregularity;^(p) for a trial at bar,^(q) or in an adjoining county;^(r) to set aside a nonsuit, verdict, or inquisition, and have a new trial,^(rr) or inquiry;^(ss) to enter judgment for the plaintiff, *non obstante veredicto*;^(tt) that the plaintiff may be allowed his costs of suit, in an action on a judgment;^(uu) to enter up judgment, and take out execution, after verdict against one of several defendants, where the rest have agreed to be bound by it;^(x) or to take out execution, pending a writ of error.^(y)

(t) *Ante*, 484.

(u) 5 Barn. & Ald. 217. And see stat. 5 Geo. IV. c. 106, § 8, for granting rules in *vacation*, in the courts of Great Sessions in *Wales*, for a particular of the plaintiff's demand and defendant's set off. &c.

(a) *Post*, Chap. XXXIV.

(b) *Ante*, 485, (m).

(c) *Post*, Chap. XLII.

(d) *Ante*, 111.

(e) *Ante*, 130, 161.

(f) *Ante*, 228, 9.

(g) *Ante*, 460.

(h) *Ante*, 485, 6, (y). *Post*, Chap. XXI.

(i) *Post*, Chap. XXII. Append. Chap. XXII. § 32.

(k) *Post*, Chap. XXII. Append. Chap. XXII. § 55.

(l) 2 Chit. Rep. 229, 231. 1 Taunt. 386; and see 4 Taunt. 666. 1 Moore, 465. 8 Taunt. 131. 2 Moore, 513, (a), S. C. 3 Moore, 671. 1 Brod. & Bing. 318, S. C.; but see 6 Taunt. 283. *Id.* 392. 1 Marsh. 610, S. C. 8 Taunt. 131. 2 Moore, 513, &c.

(m) *Cooke v. Stocks*, M. 36 Geo. III. K. B. 4 Taunt. 157. 5 Moore, 71; and see 1 Bing. 161. 3 Bing. 292.

(n) 2 Chit. Rep. 230; and see 2 Campb. 95, n.

(o) *Post*, Chap. XXIV.

(p) *Post*, Chap. XXXIII. Append. Chap. XXXIII. § 1.

(q) *Post*, Chap. XXXIII.

(rr) *Post*, Chap. XXXVIII. Append. Chap. XXXVIII. § 1.

(ss) *Post*, Chap. XXII.

(tt) *Post*, Chap. XXXVIII.

(uu) *Post*, Chap. XL; and see stat. 43 Geo. III. c. 46, § 4.

(x) *Post*, Chap. XLI.

(y) *Post*, Chap. XLIV.

On behalf of the *defendant*, rules to show cause are, in the King's Bench, to consolidate actions ;(z) in the Common Pleas, to declare **peremptorily* ;(a) when the defendant is in custody ; to change the [*488] venue ;(b) to plead several matters, except in certain cases ;(c) or for the copyhold tenants of a manor to inspect and take copies of court rolls ;(d) and, in both courts, they are to reverse an outlawry ;(e) to quash the writ ;(f) to *set aside* proceedings for irregularity in the process ;(g) or notice to appear ;(h) or in the delivery, filing, or notice of declaration ;(i) or notice of trial or inquiry ;(i) and, if the defendant be in custody, to discharge him on filing common bail, or entering a common appearance ; or, if he has given bail to the sheriff, that the bail bond may be delivered up to be cancelled ;(i) that the money deposited with the sheriff, and paid into court, under the statute 43 Geo. III. c. 46, § 2, may be repaid to the defendant, or his bail, on putting in and perfecting bail to the action ;(k) to *set aside* proceedings on the bail bond ;(l) or against the sheriff, for irregularity ;(m) or to *stay* them upon terms ;(n) for time to plead, under special circumstances ;(o) to *stay* proceedings, where the debt sued for appears to be under forty shillings ;(p) or the action is brought or conducted on bad or defective grounds ;(p) contrary to good faith ;(p) or without proper authority ;(p) or that they may be *stayed*, pending a writ of error ;(p) until security be given for payment of costs ;(p) or the costs are paid of a former action for the same cause ;(p) to set aside an interlocutory judgment, for irregularity ;(q) or, if regular, on an affidavit of merits ;(q) to strike out superfluous or unnecessary counts ;(r) to withdraw the general issue, and plead it *de novo*, with a notice of set off ;(s) or upon bringing money into court ;(s) to add or withdraw special pleas ;(t) to amend the pleadings ;(u) for judgment as in case of a nonsuit ;(xx) to put off a trial, for the absence of a material witness ;(yy) or consent to his being examined on interrogatories ;(zz) or, in the Common Pleas, commission for that purpose ;(*) to set aside a verdict or inquisition, and that there may be a new trial(†) or **inquiry*, or [*489] (after a point reserved,) that a nonsuit may be entered ;(aa) in

(z) *Post*, Chap. XXIV. Append. Chap. XXIV. § 8.

(a) *Ante*, 424.

(b) *Post*, Chap. XXIV. Append. Chap. XXIV. § 5.

(c) *Post*, Chap. XXVII. Append. Chap. XXXVII. § 12.

(d) *Ante*, 486, (a).

(e) *Ante*, 138, &c.

(f) *Ante*, 161, 167.

(g) *Ante*, 160, 61. *Post*, Chap. XX.

(h) *Ante*, 167.

(i) *Post*, Chap. XX.

(k) *Ante*, 227, 8.

(l) *Ante*, 301, 2.

(m) *Ante*, 316, 17.

(n) *Id. ibid.* And note, one motion may be made in the *original* action, to stay all the proceedings on the bail bond given in that action ; and one rule in such case seems to be sufficient. *Nicklen v. Profit*, *Same v. Taylor*, and *Same v. Birley*, 11. 37 Geo. III. K. B. 3 Bos. & Pul. 118, C. P. ; and see *ante*, 301.

(o) *Ante*, 469, 70.

(p) *Post*, Chap. XX.

(q) *Post*, Chap. XXII.

(r) *Post*, Chap. XXIV.

(s) *Post*, Chap. XXVII. In these and the two following cases, though an application may, under special circumstances, be made to the court, yet it is more usual to proceed by summons and order, before a judge.

(t) *Post*, Chap. XXVII.

(u) *Post*, Chap. XXIX. Append. Chap. XXIX. § 11, 12.

(xx) *Post*, Chap. XXXIII. Append. Chap. XXXIII. § 18.

(yy) *Post*, Chap. XXXIII.

(zz) *Ante*, 485, (g). *Post*, Chap. XXXV. Append. Chap. XXXV. § 12, 13.

(*) *Post*, Chap. XXXV. Append. Chap. XXXV. § 16.

(†) *Post*, Chap. XXXVIII. Append. Chap. XXXVIII. § 2, 3.

(aa) *Post*, Chap. XXXVIII. Append. Chap. XXXVIII. § 2, 3.

arrest of judgment,(b) for the plaintiff to bring the *postea* into court, and file the plea roll, so that the defendant may enter a suggestion, to entitle him to costs, on the court of conscience acts;(c) for a suggestion, after non-suit or verdict, to entitle him to double or treble costs,(d) &c.; that he may be allowed his costs of suit, where the plaintiff does not recover the sum for which he was arrested, and had not any reasonable cause for arresting him to that amount;(e) for the discharge of an insolvent debtor, under the statute 48 Geo. III. c. 123;(f) or to set aside an execution for irregularity, and discharge the defendant out of custody, or restore to him the money levied.(g)

The *defendant* also, as well as the plaintiff, may move for leave to inspect and take copies of books, &c. or have them produced at the trial;(h) for a trial at bar,(i) or in an adjoining county:(k) to set aside an award,(l) or judge's order:(m) for a repleader,(n) or *venire facias de novo*;(n) for the master or prothonotaries to review their taxation;(o) or to enter up judgment, *nunc pro tunc*.(p)

There are some motions and rules peculiar to the action of *ejectment*; such as, on behalf of the lessor of the plaintiff *before appearance*, for judgment against the *casual* ejector,(q) in ordinary cases; or, in the King's Bench, against the *real* ejector, on a vacant possession; or, when the tenant cannot be met with, that service of the declaration on a relation or servant may be deemed good service;(r) or, when a landlord proceeds on the statute 1 Geo. IV. c. 87, that the tenant may give such undertaking, and enter into such recognizances as are required by that statute:(s) *after appearance*, and before trial, they are to set aside a release by the nominal plaintiff, or his lessor, or a *retraxit* and *cognovit* by the tenant; or for a trial at bar: and, *after trial* for leave to take out execution against the casual ejector, when the landlord has been made defendant, and failed at the trial; for an attachment against the defendant, in the King's Bench and Common Pleas,(t) or *subpœna* in the Exchequer,(u) for non payment of costs on the consent rule, after a nonsuit, for not confessing lease entry and ouster; or for an attachment, for opposing the execution of the writ of possession, &c. On behalf of the tenant, &c. *before appearance*, they are to set aside a judgment against the casual ejector for *irregularity*, or, when *regular*, [*490] upon an **affidavit* of merits, and payment of costs; the common consent rule;(aa) for the landlord to be admitted to defend, with or without the tenant;(bb) or for a tenant in common, joint tenant, or coparcener, to confess lease, and entry, and also ouster of the nominal plaintiff, in case an actual ouster of the plaintiff's lessor, by the defendant, shall be proved at the trial, but not otherwise:(cc) *after appearance*, and before

(b) *Post*, Chap. XXXVIII. Append. Chap. XXXVIII. § 4, 5.

(c) *Post*, Chap. XL. Append. Chap. XL. § 2, 3; and see 8 East, 28.

(d) *Prichard v. Peacock*, E. 35 Geo. III. K. B.

(e) Stat. 43 Geo. III. c. 46, § 3.

(f) *Ante*, 386, &c. 7 Taunt. 37, 467.

(g) *Post*, Chap. XLI.

(h) *Post*, Chap. XXIII.

(i) *Post*, Chap. XXXIII. Append. Chap. XXXIII. § 1.

(k) *Post*, Chap. XXXIII.

(l) *Post*, Chap. XXXVI.

(m) *Post*, 511.

(n) *Post*, Chap. XXXVIII.

(o) *Post*, Chap. XXXIX.

(p) *Post*, Chap. XL.

(q) Append. Chap. XLVI. § 42, 3, 4.

(r) *Id.* § 38, 9.

(s) *Id.* § 50, 52.

(t) Append. Chap. XL. § 9, 10. Chap. XLVI. § 126.

(u) Append. Chap. XL. § 13. Chap. XLVI. § 127, 8.

(aa) Append. Chap. XLVI. § 64, &c.

(bb) *Id.* § 75, &c.

(cc) *Id.* § 72.

trial, they are to consolidate ejectments; to stay proceedings against the defendant, until security be given for the payment of costs; or until the costs are paid of a former ejectment; (*d*) to stay execution, pending error; or to stay proceedings, on payment of rent, &c. on statute 4 Geo. II. c. 28; (*e*) or on payment of mortgage money, &c. on statute 7 Geo. II. c. 20, § 1; (*f*) and, *after trial*, for an attachment against the lessor of the plaintiff, in the King's Bench, or Common Pleas, (*g*) or *subpoena* in the Exchequer, (*h*) for non-payment of costs on the consent rule, where the plaintiff is nonsuited upon the merits, or there is a verdict for the defendant; or for restoring the possession of premises, improperly delivered to the lessor of the plaintiff, under the writ of possession, &c. These motions and rules will be treated of, in the order in which they occur, in the last chapter of the present work.

There are other motions and rules, not necessarily connected with any suit; such as to set aside an annuity, and deliver up the securities to be cancelled, &c.; to strike an attorney off the roll, for misconduct, (*i*) or, at his own instance, when there is no complaint against him; (*k*) to re-admit an attorney, who has neglected to take out his certificate for more than a year on payment of the arrears of stamp duty, (*l*) &c.; or to make a submission to arbitration, by bond or agreement, a rule of court. (*m*) The rule for striking an attorney off the roll at his own instance, or for making a submission to arbitration a rule of court, is drawn up on the signature of counsel, in the King's Bench: but in the Common Pleas, it is moved for in court, and absolute in the first instance: (*n*) In the other cases, the rule is only to show cause.

Rules, it has been said, are not *records*; but only *remembrances*, not entered on the rolls of the court. (*o*) A rule or order drawn up by an officer of a court of justice, and purporting to be the rule or order of the court, is so considered, until amended or set aside. (*p*) And if a rule of court be produced under the hand of the proper officer, there is no need to prove it to be a true copy, because it is as an original. (*q*) But the allegations in a rule of court, do not prove the facts alleged. (*r*)

*A motion is sometimes preceded by a *notice*; (*a*) and is in [*491] general accompanied with an *affidavit*, or *affidavits*, of the facts necessary to support it. (*b*) In the King's Bench, *notice* of motion is necessary in the case of an information, or to quash a conviction. (*cc*) And in other cases, though seldom necessary, it is frequently given, in order that the rule *nisi* may operate as a stay of proceedings; or to save time and expense, by affording the adverse party an opportunity of showing cause in the first instance, or by inducing the court to disallow the costs of proceedings had after notice, and before the motion. The statute 14 Geo. II. c. 17, § 1, requires *notice* of motion for judgment as in case of a nonsuit; but, in the King's Bench, the rule to show cause is considered a sufficient

(*d*) *Id.* § 91.

(*e*) *Id.* § 85, 6.

(*g*) Append. Chap. XL. § 9, 10.

(*i*) *Ante*, 89.

(*l*) *Ante*, 78, 9, 80.

(*n*) Append. Chap. XXXVI. § 19.

(*p*) 6 Moore, 501. 3 Brod. & Bing. 188, S. C.; but see 2 Barn. & Cres. 45. 3 Dowl. & Ry. 237, S. C. in Error.

(*q*) 1 Ld. Raym. 745; and see 1 Campb. 102.

(*a*) Append. Chap. XIX. § 1, &c.

(*cc*) *Rex v. Johnson*, M. 22 Geo. III. K. B.

(*f*) *Id.* § 87.

(*h*) Append. Chap. XLVI. § 127, 8.

(*k*) *Id. ibid.*

(*m*) *Post*, Chap. XXXVI.

(*o*) 1 Wils. 40. 2 Barn. & Ald. 61.

(*r*) 6 Taunt. 19.

(*b*) *Id.* § 5.

notice of itself; (*d*) though it is otherwise in the Common Pleas; (*e*) And, in the latter court, a rule *nisi* is no stay of proceedings, unless notice of motion be given, and an affidavit thereof filed, except in the case of rules for new trials, or in arrest of judgment. In the Exchequer, when a party gives notice of an intended motion, and no one appears on the appointed day to make it, the court will not give the other party, who has attended for the purpose of opposing it, the costs of his attendance, if one notice only has been given. (*f*) Such attendances, however, have been taken into consideration, when motions, of which several notices had been given, have been at length brought on; and the court have, in certain cases, after the motions have been disposed of, exercised a discretionary power, in giving directions respecting the costs. (*f*)

Affidavits are in general sworn in *court*, or before a *judge* or *baron* of the court, where the action is brought; or before a *commissioner* authorized to take affidavits, by virtue of the statute 29 *Car.* II. c. 5; (*g*) or, if made for the purpose of holding the defendant to special bail, they may be sworn before the officer who issues the process, or his deputy; (*h*) or, to prove the service of common process, before the clerk of the common bails, or filacer, by the statute 12 *Geo.* I. c. 29. (*i*) And, by a late rule of the court of King's Bench, (*k*) it is ordered, that "no commission for taking affidavits in that court shall be issued to any person practising as a conveyancer, unless such person be also an attorney or solicitor of one of the courts at *Westminster*; and that no such commission shall issue, without an affidavit, made by the person intended to be named therein, that he is not, and doth not intend to become a practising conveyancer, or that he is an attorney or solicitor, duly enrolled in one of the said courts, and hath taken out his certificate for the current year." Which rule was extended,

by a subsequent one, (*l*) to attorneys and solicitors duly enrolled [*492] and *practising in any of the courts of great sessions in *Wales*, or in either of the counties palatine of *Chester*, *Lancaster*, or *Durham*.

Affidavits may be considered with reference to their title, contents, *jurat*, stamp, and filing, &c.: The title also may be considered, as it respects the court, or the names of the parties. All affidavits should regularly be *entitled* in the court where they are made, or intended to be used; and in the King's Bench, we have seen, (*a*) if they be not so entitled, but only subscribed with the words, "*By the Court*," at the bottom of the *jurat*, they are not sufficient to entitle the party to read them; nor can they be read, if sworn before a *commissioner*, without stating him to be a *commissioner of this court*, unless they are so entitled. (*b*) In the Common Pleas,

(*d*) Lofft, 265.

(*e*) 1 H. Blac. 527. Append. Chap. XXXIII. § 16; and see 2 Taunt. 48.

(*f*) 9 Price, 14.

(*g*) For the form of the *jurat* in these cases, see Append. Chap. XIX. § 6, &c.

(*h*) *Ante*, 154, 164, 5; 179. Append. Chap. X. § 1.

(*i*) Append. Chap. XII. § 4.

(*k*) R. II. 3 & 4 *Geo.* IV. K. B. 1 Barn. & Cres. 288. 2 Dowl. & Ryl. 438.

(*l*) R. E. 4 *Geo.* IV. K. B. 1 Barn. & Cres. 656. 2 Dowl. & Ryl. 870. And see stat. 5 *Geo.* IV. c. 106, § 9, authorizing the judges of the courts of Great Sessions in *Wales*, to issue commissions, directed to persons resident out of their jurisdiction, for taking answers, examinations, and affidavits, &c.; and *id.* § 28, by which commissioners for taking affidavits in the King's Bench, Common Pleas, and Exchequer, or a master extraordinary in Chancery, are authorized to take them, of and concerning any matter arising within the jurisdiction of the said courts of Great Sessions.

(*a*) *Ante*, 180, 81. Append. Chap. XII. § 4.

(*b*) 13 East, 189; but see 7 Durnf. & East, 451.

we have seen, (*ante*, 179,) an affidavit of debt sworn before a commissioner in the country, without stating him to be a commissioner in the *jurat*, is insufficient, although entitled in this court. 1 Moore & P. 22, 4 Bing. 393, S. C. And, in the Common Pleas, a rule *nisi* was discharged, because the affidavit on which it was obtained, was not entitled in any court, although it appeared from the *jurat*, that it was sworn before one of the *judges* of this court.(c) But affidavits sworn before a judge of the court of King's Bench, though not entitled therein, may it seems be read:(d) And, in the Common Pleas, an affidavit entitled "In the Common Place," has been deemed sufficient.(e)

When a cause is depending in either court, the affidavits should regularly be entitled with the christian and surnames of all the parties,(f) and the character in which they sue, or are sued;(g) which must also be inserted in the title of affidavits, produced to show cause against any rule:(h) And an ambiguity in the title, such as styling the plaintiff "assignee," without saying of whom, or giving any further explanation, is fatal.(i) But where common process is sued out against A. and several other defendants, in the Common Pleas, if the latter be not brought into court, the affidavit to set aside the proceedings may be entitled in a cause between the plaintiff and A. only:(k) And in an action not bailable, against two, one defendant may, before declaration, well entitle his affidavits in a cause of A. against B. who is sued with C.(l) When no cause is depending, as in the case of affidavits to hold to bail, it is a rule in the King's Bench, that such affidavits be not entitled in any cause, nor read if filed:(m) And in the Common Pleas, we have seen,(n) if an affidavit to hold to bail be entitled in a cause, it is bad; and the defendant may be discharged, on entering a common *appearance. The affidavits on a motion for leave to file a criminal information, in the King's [*493] Bench, ought not to be entitled; and if they are, cannot be read: The affidavits produced on showing cause may,(a) or may not,(b) be entitled: but all affidavits made after the rule is absolute, must be entitled.(cc) So, where a submission to an award is made a rule of court under the statute, there being no action, the affidavits on which to apply for an attachment, for disobeying the award, need not be entitled in any cause; but the affidavits in answer must.(dd) In entering up judgment on an old warrant of attorney, the affidavit may be properly entitled in a cause:(ee) And, in moving to stay proceedings on a bail bond, the affidavit on which the motion is made, is to be entitled in the original action, and not in the actions against the bail.(ff) Motions and affidavits for

(c) 1 Bos. & Pul. 271.

(d) 13 East, 189.

(e) 4 Bing. 101.

(f) 2 Salk. 461. 2 Durnf. & East, 644. R. M. 38 Geo. III. K. B. 7 Durnf. & East, 454 661. 8 Taunt. 647. 2 Moore, 722, S. C. 1 Chit. Rep. 727, 8. 8 Dowl. & Ryl. 423; and see 1 Smith R. 457. 2 Smith R. 394. 1 Bos. & Pul. 36, 227. 3 Price, 199; but see 5 Taunt 333. 1 Marsh. 70, S. C.

(g) 3 Taunt. 377.

(h) 7 Durnf. & East, 661. 1 Chit. Rep. 727, 8.

(i) 3 Taunt. 377. 1 Chit. Rep. 728, *in notis*.

(k) 6 Taunt. 5. 1 Marsh. 403, S. C.; and see 6 Taunt. 286; but see 1 Chit. Rep. 727, 8,

(a), *scmb. contra*.

(l) 6 Taunt. 286.

(m) R. T. 37 Geo. III. K. B. 7 Durnf. & East, 454. *Ante*, 180.

(n) *Ante*, 180.

(a) 1 Str. 704. Andr. 313.

(b) 6 Durnf. & East, 60; and see 11 East, 457.

(cc) 6 Durnf. & East, 642.

(dd) 3 Durnf. & East, 601; and see 5 East, 21. 12 East, 166, (a).

(ee) 1 Barn. & Ald. 567. *Id.* 568, (a).

(ff) *Ante*, 304; but see 2 Chit. Rep. 109. 7 Moore, 521. 1 Bing. 142, S. C.

attachments in civil suits are, we have seen, *(gg)* in the King's Bench, proceedings on the *plea* side of the court, until the attachments are granted, and are to be entitled with the names of the parties; *(hh)* but as soon as the attachments are granted, the proceedings are on the *crown* side, and from that time the king is to be named the prosecutor: And motions and affidavits for attachments are entitled in like manner, in the Common Pleas, *(i)* and Exchequer. On moving for a rule *nisi* for a *certiorari*, it is, we have seen, *(k)* irregular to entitle the affidavits in any cause; and if they are entitled, they cannot be read. *(l)*[A]

In point of *form*, affidavits begin with stating the names, and places of abode, of the persons by whom they are made: And, in the King's Bench, it is a rule, *(m)* that "the addition of every person making the affidavit, should be inserted therein;" but there is no such rule in the Common Pleas: and, in the latter court, it is not necessary that an affidavit, made by the defendant in the cause, stating his name and place of abode, and styling him *defendant*, should also contain the addition of his degree. *(n)* The affidavits should contain a full statement of the circumstances necessary to support the application; *(o)* and the rather, as it is a rule not to receive supplementary affidavits, on showing cause, without leave of the court: *(p)* But there is said to be a diversity between affidavits which contain new matter, and such as tend only to confirm what was alleged and sworn when the rule was made; in the latter case, it seems they may be read, but not in the former. *(q)* Clerical errors, and mistakes in spelling, are not considered a sufficient ground for rejecting an affidavit, [*494] when the meaning is *clear. *(a)*[B] And when notice of motion has been given it should be sworn that it was duly served. *(b)*

By the general practice of all the courts, affidavits sworn before the attorney or solicitor in the cause, cannot be read. *(c)* And this practice extends to affidavits taken before attorneys, as commissioners, in causes wherein they are concerned for the parties on whose behalf such affidavits are made; except where they are made for the purpose of holding the defendant to special bail, *(d)* or entering an appearance in the Common Pleas: *(e)* and that court will discharge, with costs, a rule obtained by a party on affidavits, which are sworn before his own attorney in the cause. *(f)* It is also a rule in the Common Pleas, *(g)* that "when the acknowledgments of any person or persons levying fines, or suffering recoveries, shall be taken before commissioners, one at least of the commissioners for taking the acknowledgment of any party to such fine or recovery, shall

(gg) *Ante*, 480, 81.

(hh) 3 Durnf. & East, 253. 7 Durnf. & East, 439, 528. 12 East, 165.

(i) 2 Bos. & Pul. 517, *(a)*.

(k) *Ante*, 400.

(l) 1 Barn. & Cres. 267.

(m) R. M. 15 Car. II. reg. 1 K. B. *Ante*, 179.

(n) 6 Taunt. 73.

(o) For the forms of the affidavits in particular cases, see 1 Chit. Rep. 102, *(a)*, 316, 321. 3 Barn. & Ald. 582.

(p) *Post*, 496, 7, 501.

(q) 2 Salk. 461.

(a) 1 Chit. Rep. 562.

(b) Append. Chap. XIX. § 4.

(c) 2 Ken. 421. 3 Durnf. & East, 403, K. B. 3 Moore, 325, C. P. Wightw. 62. 1 Price, 116. 6 Price, 230. 9 Price, 478, Excheq. 3 Atk. 813. 1 Rose, 145, Chan.

(d) R. E. 15 Geo. II. reg. 2, K. B. R. E. 13 Geo. II. reg. 1, C. P. *Ante*, 179, 80.

(e) R. E. 13 Geo. II. reg. 1, C. P.

(f) 8 Taunt. 74.

(g) R. E. 8 Geo. IV. C. P. 4 Bing. 248; and see R. H. 7 & 8 Geo. IV. C. P. 4 Bing. 102.

[A] See *Whitney v. Warner*, 2 Cow. 299.

[B] See *ante*, p. 180, note [A].

be a person who is not concerned as the attorney solicitor or agent, or clerk to the attorney solicitor or agent, of any party thereto; and that in the affidavit to be made of the due taking of such acknowledgment, it shall be deposed, in addition to the facts now required, by the rules of the court, to be included in such affidavit, that one at least of the commissioners taking such acknowledgment, is not the attorney solicitor or agent, or clerk to the attorney solicitor or agent, of any of the parties to the fine or recovery, for taking the acknowledgment to which the commission, under which he has acted, has been issued; and the name and residence of such commissioner shall be stated in such affidavit." But the rule which prohibits the swearing of affidavits before the attorney or solicitor in the cause, does not extend to the attorney's clerk; and therefore an affidavit may be taken before a clerk of the attorney in the cause, if such clerk be empowered to take affidavits.^(h) So, in the Common Pleas, if the agent in town be the attorney on record, it is no objection to an affidavit of the party, that it is sworn before his own attorney in the country.⁽ⁱ⁾

The *jurat* of affidavits should state where, when, and before whom they are sworn:^(k) as that they are sworn in *court*, when there made; or, if the court be not mentioned at the top of the affidavit, "in the court of King's Bench, Common Pleas, or Exchequer, at *Westminster Hall*;"^(l) or, if made before a *judge* or *baron*, that they are sworn at his chambers, or house, describing the situation;^(m) or, if made before a *commissioner*, at the place *where he resides:⁽ⁿ⁾ adding, in each case, [*495] the day of swearing them;^(b) and, if sworn in court, subscribing these words, "By the Court;"^(c) or, if sworn before a judge, baron, or commissioner, his name;^(d) and, if the court be not mentioned at the top of the affidavit sworn before a commissioner, that he is a commissioner of the court of King's Bench,^(e) &c. In the King's Bench and Exchequer, it is a rule, that "where an affidavit is made before a commissioner, by a person who from his signature appears to be *illiterate*, the commissioner taking the affidavit shall certify, or state in the *jurat*, that it was read in his presence, to the party making the same, who seemed perfectly to understand it, and wrote his signature in the presence of the commissioner."^(f) It is also a rule in these courts, that "upon every affidavit sworn in court, or before any judge or commissioner thereof, and made by two or more deponents, the names of the several persons making such affidavit, shall be written in the *jurat*;^(g) and that no affidavit be read or made use of, in any matter depending in either of these courts, in the *jurat* of which there shall be any interlineation or erasure."^(hh) The same practice obtains in the court of Common Pleas. And, in that court, if the month be omitted in the *jurat* of the affidavit, it is defective, and

(h) 8 Durnf. & East, 638.

(i) 5 Taunt. 89, and see 8 Taunt. 435.

(k) 3 Maule & Sel. 493, and see 1 Chit. Rep. 228, 495.

(l) Append. Chap. XIX. § 6.

(m) *Id.* § 7.

(n) Append. Chap. XIX. § 8.

(b) 1 Chit. Rep. 228.

(c) Append. Chap. XIX. § 6.

(d) *Id.* § 7, 8.

(e) *Id.* § 8, but see 1 Moore & P. 22. 4 Bing. 393, S. C. *Ante*, 179, 492.

(f) R. E. 31 Geo. III. K. B. 4 Durnf. & East, 284. R. H. 40 Geo. III. & T. 1 Geo. IV. Excheq. Man. Ex. Append. 224. 8 Price, 501, 504. Append. Chap. XIX. § 9, and see 1 Chit. Rep. 660, *in notis*. 2 Chit. Rep. 92.

(g) Append. Chap. XIX. § 11.

(hh) R. M. 37 Geo. III. K. B. 7 Durnf. & East, 82. R. T. 1 Geo. IV. Excheq. 8 Price, 501, and see 11 Price, 509. But an erasure *over* the *jurat* does not vitiate it. 2 Chit. Rep. 19.

cannot be amended.(ii) In the Exchequer, it must appear by the *jurat* of every affidavit, that it has been sworn by all the deponents;(kk) but it is not necessary, as in the other courts, that they should be severally named in the *jurat*, as having been sworn.(ll) When an affidavit is made by a *foreigner*, in the *English* language, an interpreter must be sworn, by the officer taking the affidavit, to interpret it truly; and the *jurat* should state that the interpreter was so sworn, and did so interpret the affidavit: But it is not necessary that any affidavit should be made by the interpreter, or the officer taking the affidavit: It is sufficient that the latter certifies by the *jurat*, that the above steps were taken.(m) So, in the case of an affidavit made by a marksman, it is sufficient that the officer making the *jurat*, certifies that it was read over to, and seemed to be understood by the deponent, without any separate affidavit of that fact. But if the affidavit by the party be made in a *foreign* language, there must it seems be another affidavit, by an interpreter, to verify a translation of the affidavit of the party. When there is a defect in the *jurat* of an affidavit on which a motion is made, it cannot be used, nor will time be given, except in cases of bail.(n) But though the omission of the form [*496] directed to be inserted in the *jurat* *of an affidavit, may be an objection to its being received in the court whose rules have not been complied with, yet still it seems that perjury may be assigned upon it:(a) And on an indictment for perjury, in an answer to a bill in Chancery, it was holden, that the recital in the *jurat*, of the place where the answer purported to be sworn, was sufficient evidence that the oath was administered at the place named.(b)

By the general stamp acts,(c) “every affidavit, to be filed, read or used in any of the courts of law or equity at *Westminster*, or of the Great Sessions in *Wales*, or of the counties palatine of *Chester*, *Lancaster*, and *Durham*, or before any judge or master, or other officer of any of the said courts, &c., and the copy of every such affidavit, was formerly subject to the stamp duty of half a crown.” In the construction of these acts it was holden that an affidavit made in the same cause, and relating to the same subject matter, only required one stamp, though it were made by several persons: And, in the King’s Bench, an affidavit with a single stamp, was deemed sufficient to found several rules, on a *quo warranto* prosecution.(d) But in general, an affidavit that related to several causes, must have had as many stamps as there were cases to which it applied:(e) And, in the Common Pleas, where the affidavits in *four* causes were each of them entitled in all the four, but there was only one stamp on each affidavit, and an objection was taken on this account, the court held the objection fatal; but allowed the counsel to amend, by striking out *three* of the names, and reswearing the affidavits in the fourth cause, which made them good affidavits in that cause.(f) In like manner, two separate affidavits required separate stamps, though they were contained on the same paper.(g) And, on showing cause against a rule which had been pre-

(ii) 3 Moore, 236.

(kk) 1 Price, 338.

(ll) 2 Price, 1.

(m) 4 Barn. & Cres. 358. 6 Dowl. & Ry. 514, S. C. Ante, 180.

(n) 2 Chit. Rep. 20.

(a) Ry. & Mo. 94.

(b) *Id.* 97.

(c) 48 Geo. III. c. 149. Sched. Part. II. § III. 55 Geo. III. c. 184. Sched. Part. II. § III.; but see 4 Bing. 193.

(d) *Rex v. Muller*, T. 53 Geo. III. K. B. 1 Chit. Rep. 452, *in notis*.(e) *Id.* 451; and see 2 Chit. Rep. 14.

(f) 3 Taunt. 469; and see 8 Moore, 238.

(g) 1 Chit. Rep. 452, *in notis*.

viously before a judge at chambers, the same affidavits could not be used, unless they had been restamped. *(h)* The stamp duty, however, on affidavits, and copies thereof, was abolished by the statute 5 Geo. IV. c. 41.

The affidavit should be made before the rule is moved for, *(i)* and produced in court at the time of making the motion. *(k)* The party therefore moving for a rule cannot, without withdrawing his motion and moving it again, make use of affidavits *filed* after he obtained his rule *nisi*. *(l)* But though affidavits have been used, and a motion made thereon, they may be again referred to, in support of a fresh motion. *(m)* When an affidavit made in *town* has been used, but not before, it should be *filed* with the clerk of the rules in the King's Bench, in order that it may be given in evidence, if necessary, on an indictment for perjury. *(n)* But *country* affidavits must be filed sooner: it being provided by the statute 29 Car. II. c. 5, that "all *affidavits sworn before the commis- [*497] sioners appointed by virtue of that act, shall be filed in the proper office of the court where the action or matter is depending, and then read:" And it is necessary, in the King's Bench, *(a)* that "all such affidavits be brought to the clerk of the rules of this court, to be filed, in such convenient time that copies of them may be duly made, and delivered to the party filing the same." In the Common Pleas, it is a rule, that "the secondaries shall not file any affidavits, taken before any person that is not commissioned to take the same; and that no affidavit be read in court, before the same is filed." *(b)* Affidavits of the execution of articles of clerkship, and service under them, are filed with the *chief clerk*, or his deputy, in the King's Bench, or clerk of the *warrants*, in the Common Pleas; *(c)* affidavits to hold to bail, with the *officer* who issues the process, or his deputy; *(d)* affidavits of the service of process, with the clerk of the *common* bails, or *filacer*; *(e)* affidavits of the truth of pleas in abatement, with the clerk of the *papers*, or *prothonotaries*; and affidavits of increased costs, with the *master*, or *prothonotary*, *(f)* who taxes them. And when an affidavit has been read and filed, it becomes a record of the court, and cannot be taken off the file. *(g)* In the Exchequer, it is a rule, *(hh)* that "all affidavits, to be used on any special application to the court, be filed *one* clear day before the application is made; and that where a notice of motion is necessary to be given, the filing of any affidavit, in support of the application, be also mentioned at the foot of the notice, to enable the opposite parties to obtain a copy therefrom:" *(hh)* But this rule does not extend to the filing of affidavits of mere service of notice of motion. *(hh)* It is also a rule, in the Exchequer, that "no office copy of any affidavit filed in this court, be received and read, unless such office copy shall have been previously examined, and signed by the attorney or clerk in court making the same, or his accredited agent." *(ii)*

In the King's Bench, an attachment for non-payment of costs, and

(h) 4 Moore, 413.

(i) 3 Price, 259.

(k) R. H. 36 Geo. III. K. B.; and see 2 Chit. Rep. 218.

(l) 1 Chit. Rep. 136, *(a)*; and see 7 Price, 709.

(m) 2 Chit. Rep. 14.

(n) 7 Durnf. & East, 315.

(a) N. M. 9 Geo. II. K. B.

(b) R. T. 2 W. & M. reg. 2 C. P.

(c) *Ante*, 64.

(d) *Ante*, 164, 179, 491.

(e) *Ante*, 241, 2.

(f) R. H. 11 Geo. II. reg. 1, C. P.

(g) 2 Wils. 371.

(hh) R. H. 1 & 2 Geo. IV. Excheq. 9 Price, 88.

(ii) R. E. 2 Geo. IV. Excheq. 9 Price, 298.

against the sheriff for not returning the writ, or bringing in the body, may be moved for the last day of term.^(k) And where the rule to return the writ expires on the last day of term, the sheriff is attachable in the King's Bench, at the rising of the court on that day, if no return be made before; and the rule for the attachment is regular, though he make his return on a subsequent day in vacation, before he is actually served with the rule, and though, immediately after such service, he tender the sum levied, deducting his poundage.^(l) And the court, we have seen,^(mm) will permit insolvents to be brought into court on the last day of term, when the notices expire too late for the last appointed day. But the master's report cannot be moved for on that day, without previous leave [*498] of the court, except in *extraordinary cases, and upon personal service of the notice:^(a) And a motion for a rule to answer the matters of an affidavit cannot be made,^(b) or discussed,^(c) on the last day of term, or any motion which would operate as a stay of proceedings,^(d) unless it appear to the court that, under the circumstances, it could not have been made earlier.^(e) So, the courts will not, on the last day of term, hear a motion for a rule *nisi* for an attachment,^(f) or to set aside an award;^(g) nor can counsel be heard on that day, to show cause against the latter rule, but the same must be enlarged, and made a peremptory for the next ensuing term.^(h)

The last day of term is said not to be a day for *side-bar* rules, in the King's Bench; though it seems to be otherwise in the Common Pleas: and, in the King's Bench, if the party was entitled to such a rule before, he may take it out on the last day of term, dated as of the preceding day.⁽ⁱ⁾ A *prohibition* is not in general grantable the last day of term: but a rule may be obtained on motion, to stay proceedings till the ensuing term;^(kk) and in one instance it was granted on motion the last day of term, leave having been obtained the day before, to move it then.^(ll) A rule *nisi* for a criminal information against a magistrate, for misconduct in the execution of his office, ought in general to be moved for within the *first* term after the supposed offence; and it may be granted at the end of a term, against a magistrate for mal-practices during the term:^(mm) or, where no assizes have intervened, it may be moved for in the *second* term:⁽ⁿ⁾ though it cannot be moved for so late in that term, as to preclude the magistrate from the opportunity of showing cause against it the same term.^(o)

In the Common Pleas, we have seen,^(p) that upon writs of *distringas*, returnable the last day of term, the plaintiff might formerly have moved, at the rising of the court, to increase issues on the *alias* or *pluries dis-*

(k) 1 Bur. 651. 5 Bur. 2686. *Ante*, 480.

(l) 11 East, 591; and see 1 Chit. Rep. 249. *Ante*, 308, 481.

(mm) *Ante*, 378.

(a) 1 Blac. Rep. 311. *Per Cur.* T. 40 Geo. III. K. B.

(b) 4 Bur. 2502. 1 Chit. Rep. 744. (c) 1 Chit. Rep. 744.

(d) *Id. ibid.* 2 Price, 143; but see *id.* 143, 4.

(e) *Leader v. Harris*, M. 37 Geo. III. K. B. Cas. Pr. C. P. 130.

(f) 3 Smith R. 118. *Ante*, 481.

(g) *Nettleton v. Crosby*, H. 38 Geo. III. K. B.

(h) R. M. 36 Geo. III. K. B.; and see 1 M'Clel. & Y. 393, where it was said by *Hullock, B.*, that no questions on awards are heard, in any court of *Westminster Hall*, on the last day of term.

(i) *Ante*, 484.

(ll) 3 Bur. 1922.

(n) 13 East, 270.

(o) *Id.* 322.

(kk) *Latch*, 7. 2 Rol. Rep. 456.

(m) 7 Durnf. & East, 80.

(p) *Ante*, 111, 312.

tringas, to be issued in case of non-appearance, on the following day; or for a sale of the issues, to pay the costs of the writs; or, when a rule to bring in the body expired on the last day of term, for an attachment for not bringing it in, to be issued on the following day, provided bail should not then be perfected, or the defendant rendered in their discharge. But in that court, no motion for an attachment can be made on the last day of term, except for non-payment of costs on the prothonotary's *allocatur*, or against the sheriff, ^(g) for not returning the writ or bringing in the body; nor can a motion be made on that day, for a rule *nisi* to change the venue, *unless the declaration [*499] was delivered so late in the term, that the defendant had not an opportunity of making it earlier. ^(aa) So, that court will not entertain a motion, on the last day of term, for the amendment of fines or recoveries, or any of the proceedings therein, ^(b) or on any subject relating thereto; ^(c) nor will they set aside judgment, if the defendant could have applied sooner; ^(d) nor a motion in arrest of judgment, without previous notice: ^(e) And Mr. Justice *Twisden* used to cite the year book of *Edw.* IV. and say, they were to hear no law the last day of term. ^(f) In the Exchequer, the court will not, on the last day of term, grant a rule to show cause, why interlocutory judgment should not be set aside, on payment of costs, unless it be clearly shown, by affidavit, that the plaintiff has lost an opportunity of proceeding to trial: ^(g) And that court will not hear an argument on demurrer, on the last day of term. ^(h)

When a rule *nisi* is moved for, the party called upon may either show cause against it in the first instance, or on a subsequent day. In the former case, the counsel who applied for the rule has a right to reply in support of it: ⁽ⁱ⁾ In the latter, the rule to show cause is drawn up for a particular day in term, appointed by the clerk of the rules in the King's Bench, or secondaries in the Common Pleas, according to the place where the transaction appears to have happened, upon the face of the affidavits on which the rule was obtained, and so as to allow the party called upon sufficient time to answer the application: If in town, the rule in the King's Bench is usually drawn up for the *fourth* day, exclusive of the day of obtaining it; if in the country, for the *sixth* day in near, or for the *tenth* day in distant counties, unless it be otherwise ordered by the court. ^(k) In the Common Pleas, when the motion is pretty much of course, and the affidavits short, the rule in *town* causes is generally drawn up to show cause on the next day but one after the motion; but if the affidavits are long, or the matter arises in the *country*, the rule is commonly drawn up to show cause in about a week: and, previous to the day of showing cause, the rule should be duly served. The service, we may remember, cannot be on a *Sunday*: ^(l) And, in the King's Bench, "no rules, orders, or notices, in any cause or matter depending in that court, shall be served, nor any proceedings or pleadings

(g) Cas. Pr. C. P. 51. Pr. Reg. 104, S. C.

(aa) Barnes, 480, 486, 489. Pr. Reg. 426, 7.

(b) 5 Taunt. 856. 6 Taunt. 652. 2 Marsh. 328, S. C. R. H. 60 Geo. III. & 1 Geo. IV. C. P. 4 Moore, 320. 2 Brod. & Bing. 122. 2 Chit. Rep. 379.

(c) 4 Moore, 113. 1 Brod. & Bing. 468, S. C.

(d) Cas. Pr. C. P. 130.

(e) *Id.* 106. Pr. Reg. 238. Barnes, 247, S. C.

(f) 2 Salk. 624.

(g) 13 Price, 225.

(h) McClell. 493; but see 13 Price, 247.

(i) 4 Taunt. 690.

(k) 2 Chit. Rep. 372.

(l) *Ante*, 218, 481.

delivered or served, later than *ten o'clock at night*; and any service or delivery thereof, after that hour, shall be null and void;"(m) but the service of the copy of a writ of *latitat*, &c. is not within this rule.(n) [*500] In the Common Pleas, it is a rule that "all *declarations and pleadings shall be delivered, all demands thereof made, and all notices given, before *nine o'clock in the evening*:"(a) which rule has been applied to a notice of motion for judgment as in case of a nonsuit;(bb) and, in the latter court, the delivery of a notice sealed up in a letter, before *nine o'clock at night*, in the absence of the attorney to whom it was addressed, was held to be no service, but from the time when the letter was opened.(cc)

To bring a party into contempt, a copy of the rule must be *personally* served, and the original at the same time shown to him.(dd) And the court of King's Bench will not grant a rule to dispense with personal service of the master's *allocatur* for costs, with a view to an attachment, on an affidavit that the defendant keeps out of the way, to avoid being served.(e) In other cases, the same degree of strictness is not required in the service of the rule; but it is sufficient to leave a copy of it with the person representing the party, at his dwelling house or place of abode:(f) And, in the King's Bench, it does not seem to be necessary to show the original at the time of service:(g) but, in the Common Pleas, it seems that in order to make a perfect service of a rule, the original rule must be sworn to have been shown to the party, at the time of serving the copy.(h) It is not the practice, however, to serve *enlarged* rules; because both parties are before the court:(i) And where the party appears, it cures all irregularity in the service of the rule.(k) In the Exchequer, an affidavit of the service of a rule, by which it is not intended to bring the party into contempt, need not state that the original rule was shown at the time of service. 3 Younge & J. 30. And, in that court, all notices must be given and received in the names of the clerks in court.(l) When a rule is obtained, to set aside proceedings for irregularity, and to *stay proceedings in the mean time*, the proceedings are suspended for all purposes, till the rule is discharged:(mm) Therefore, where the plaintiff took an assignment of the bail-bond, pending a rule to show cause why it should not be given up to be cancelled, on the defendant's filing common bail, the court of King's Bench set aside the assignment, as having been made too soon. But when a defendant obtains a rule which stays the plaintiff's proceedings, he is not, we have seen,(nn) entitled, after it is discharged, to the same time, for taking the next step, as he had when he obtained the rule; though the defendant in such case should have a reasonable time allowed him, for the purpose of taking his next proceeding: and the whole of the day on which the rule is disposed of, has been

(m) R. M. 41 Geo. III. K. B. 1 East, 132.

(n) 2 Chit. Rep. 357. 1 Dowl. & Ry. 172. *Ante*, 168.

(a) R. E. 10 Geo. II. C. P.

(bb) 2 Taunt. 48.

(cc) 3 Taunt. 234. *Ante*, 261.

(dd) 3 Durnf. & East, 351. 7 Dowl. & Ry. 612; but see 2 Price, 2. 5 Dowl. & Ry. 614.

(e) 1 Chit. Rep. 503; and see 1 Dowl. & Ry. 529.

(f) 2 Price, 4.

(g) *Belairs v. Poultney*, E. 57 Geo. III. K. B. 1 Chit. Rep. 466, 7, (a); but see 2 Str. 877, *semb. contra*.

(h) Barnes, 403. Pr. Reg. 264, S. C.

(i) 1 Smith R. 199.

(k) *Noel & others v. Eyre*, T. 44 Geo. III. K. B.

(l) 1 Price, 385; and see 5 Price, 559, n.

(mm) 4 Durnf. & East, 176. *Ante*, 301.

(nn) *Ante*, 301.

deemed such a reasonable time.(o) And if the court direct proceedings to be set aside on terms, as the payment of costs, &c. the terms are considered as a condition precedent; and till they *are performed, [*501] the proceedings stand, and the plaintiff may pursue them, without applying to the court.(a)

On the day appointed for that purpose, the party called upon by the rule,(b) or his counsel may show cause against it, either upon or without an affidavit, as circumstances require: And, in showing cause against a rule, the party or his counsel must be prepared with affidavits in support of his whole case; and cannot, after showing cause, come on another day in the same term, with better affidavits.(c) It is also necessary, that an office copy should be taken of the rule, before cause is shown, and of the affidavit upon which it was granted;(d) otherwise counsel cannot be heard: And, in the King's Bench, when a special time is limited in any rule, before which any affidavit is required to be filed, no affidavit filed after that time can be made use of in court, or before the master, unless it appear to the satisfaction of the court, that the filing of such affidavit within the time limited, was prevented by inevitable accident.(e) In such case a motion should regularly be made, on the day limited by the rule, that the affidavits may be filed *nunc pro tunc*.(f) But affidavits which ought to have been filed a *week* before the term, may, under particular circumstances, be read, with leave of the court, though filed only *three* days before the day of showing cause.(g) And when no particular time is prescribed for filing the affidavits, they may be sworn and filed at any time before showing cause, though after the day appointed by the rule.(h) Previous to showing cause, it is usual to deliver over the affidavit to the counsel for the rule, who has a right to make any objection appearing on the face of it; and if a doubt arise, upon the statement of the facts contained in the affidavit, it is inspected by the judges, or read by the officer of the court.

If cause be not shown on the day appointed, the counsel for the party obtaining the rule may move, the next day, to make it absolute;(i) which is done as a matter of course, if no cause be shown, on an affidavit of service.(k) So, in the Common Pleas, if a rule be drawn up for a certain day, the plaintiff has till the last moment of that day to show cause, so that it cannot be made absolute till the next day.(l) And, in the latter court, it seems that cause cannot be shown after the day appointed by the rule; but the party called upon must wait until the other party move to make it absolute, unless notice of showing cause on a different day be previously given.(m) In the Exchequer, a rule to show cause cannot be made absolute, till the next day after that on which cause is to be shown, even although it have been enlarged:(n) And, in that court, it is said to be *necessary to give the opposite party notice of [*502] an application intended to be made, to discharge a rule *nisi*, for

(o) 5 Barn. & Cres. 771; and see 4 Barn. & Cres. 970. 7 Dowl. & Ry. 458, S. C.

(a) 5 Taunt. 1.

(b) 4 Taunt. 669.

(c) 1 Chit. Rep. 142; and see 5 Price, 384. McClel. 532.

(d) N. M. 9 Geo. II. K. B.

(e) R. M. 36 Geo. III. R. B.

(f) 1 Chit. Rep. 27.

(g) *Id. ibid.*; and see 8 Moore, 523.

(h) 1 Chit. Rep. 27. (a), 136.

(i) 3 Price, 198. Append. Chap. XIX. § 16.

(k) Append. Chap. XIX. § 15.

(l) 2 Taunt. 174.

(m) 1 Pr. Reg. 263, 4.

(n) 9 Price, 388.

payment of costs for not proceeding to trial.(a) But the matter frequently stands over, by consent of parties, or for the accommodation of counsel, till a subsequent day; when the counsel on either side may bring it on, by moving to make the rule absolute, or discharge it: though if not brought on or enlarged during the same term, it is of no effect, unless revived, as it may be, in any future term, upon being served anew, and motion made to revive it: This is sometimes done, to save the expense of new affidavits, and obviate the objection of its being a second attempt after the first was abandoned. And if a rule *nisi* has been discharged, in consequence of a mistake of counsel, in stating the terms of the affidavits on which it was founded, the case may be reheard in a subsequent term.(b) After the determination of the court of the King's Bench, upon a rule *nisi* for a *mandamus*, the question cannot be again discussed, as a special case, until a return be made to the writ.(c)

When the counsel for the party obtaining the rule is not ready to support it, he may move to *enlarge* the rule till a future day, in the same or the next term; which is pretty much of course, when it is in his own delay; but otherwise the courts will not enlarge the rule without consent, or some evident necessity: and they will never enlarge the plaintiff's rule, when it would have the effect of continuing the defendant in custody. In like manner, when the counsel for the party called upon by the rule is not prepared to show cause against it, he may apply to enlarge the rule till a future day; which is a matter of right, if the rule was not served in time, so as to give the party an opportunity of answering it;(d) but otherwise the courts may impose upon him what terms they think proper: and if the rule be enlarged to the next term, they commonly require him to file his affidavits a certain number of days before the term, so as to give the adverse party an opportunity of inspecting them; in which case, however, the party showing cause need not confine himself to the original affidavits, but is at liberty to read any affidavits made since the term, provided they were filed in time.(e) In cases of executions, and other matters requiring an early decision, the courts, towards the end of the term, will sometimes enlarge the rule till a day in *vacation*, when it is to be brought on before a judge at chambers. But rules for judgment as in case of a nonsuit in country causes, should be applied for early in an issuable term, in order that the plaintiff may have sufficient time to show cause in the same term; or the court will enlarge the rule till the next term, and not permit the parties to discuss it at chambers:(f) And the court will not, at the close of the term, grant a rule *nisi*, to show cause at chambers, when the party could have earlier.(g) In the Common [*503] Pleas, the court will enlarge *no rule for showing cause, unless notice be given of motion to enlarge such rule, and affidavit made of such notice:(aa) And in that court, if a rule be enlarged, it may be made absolute at any time on the last day to which it is enlarged.(bb) In the Exchequer, upon an enlarged rule, the affidavits must be filed

(a) 11 Price, 512.

(b) 1 Chit. Rep. 445.

(c) 7 Dowl. & Ry. 708.

(d) 2 Chit. Rep. 372.

(e) *Wrightson v. Mason*, E. 27 Geo. III. K. B.

(f) 1 Chit. Rep. 232.

(g) 2 Chit. Rep. 266.

(aa) N. M. 2 Geo. II. C. P.; and see Cas. Pr. C. P. 67.

(bb) 2 Taunt. 174.

before showing cause, although it be not so expressed in the rule of enlargement.^(c)

On showing cause against the rule, the courts either make it absolute, or discharge it; and that, either with, or without the *costs* of the application, or such costs are directed to abide the event of the suit. But, in the Common Pleas, costs cannot it seems be given, on refusal of a rule to show cause.^(dl) When the proceedings are regular, and the application is made to the favour and indulgence of the courts, the rule to show cause is commonly made absolute, on payment of costs by the party applying; but when the proceedings are irregular, it is in general made absolute, with costs to be paid by the opposite party,^(de) unless the rule be opposed in the first instance:^(df) And when a rule for setting aside the proceedings drawn up with costs, (as is commonly the case,) if it be made absolute generally, the party obtaining it is entitled, by the terms of the rule, to the payment of costs, which the master or prothonotaries will tax; and if they are not paid on demand, the courts on motion will grant an attachment. But if a rule *nisi* be granted for setting aside proceedings for irregularity, without saying with costs, and this rule be afterwards made absolute, no cause being shown, it must be made absolute in the terms in which it was moved, without adding costs.^(dg) And though the rule be drawn up with costs, yet the courts will sometimes, though rarely, make it absolute without costs,^(h) in which case each party pays his own; or they will direct the costs to abide the event of the suit, in which case the party ultimately succeeding is entitled to them: And whenever a rule is drawn up with costs, and the courts do not mean the party should have them, they will mention it. In the Exchequer, it has been ruled, that if a party have good ground for opposing a motion, he may be entitled to the costs of opposing it, notwithstanding the motion has been granted.⁽ⁱ⁾

If, upon showing cause, it appear that there was no ground or foundation for the rule, the courts will discharge it, with costs to be paid by the party applying: and it is a general rule, in the King's Bench, that in all cases where a rule is obtained to show cause, why proceedings should not be set aside for irregularity with costs, and such rule is afterwards discharged generally, without any special direction upon the matter of costs, it is understood to be discharged with costs, and the latter rule must be drawn up accordingly.^(k) But where an affidavit answered a rule *nisi*, for *setting aside proceedings for irregularity, with [*504] costs, but was written in a cramped and slovenly hand, the court, on that ground, refused to grant the costs of the application.^(a) And if there was any ground for the rule, and it is not drawn up with costs, the court will in general discharge it without costs;^(b) or they will sometimes order the costs to abide the event of the suit: And where nothing is said about costs in the rule, or by the courts on making it absolute, or discharging it, they are considered as costs in the cause, and must be paid to the party ultimately succeeding, if the rule be made before

(c) 1 Younge & J. 326.

(dl) 2 Blac. Rep. 769; and see 1 Man. & Ry. 142.

(de) 1 Chit. Rep. 398, 9, *in notis*.

(df) 2 Chit. Rep. 241, 401.

(dg) *Per Cur.* II. 37 Geo. III. K. B.; and see 1 Chit. Rep. 398, (a).

(h) *Stebbing v. Hunt*, 1 Chit. Rep. 384, 5, *in notis*. *Id.* 397, 399.

(i) *McClell.* 10.

(k) R. M. 37 Geo. III. K. B. 7 Durnf. & East, 82. 4 East, 313. 1 Chit. Rep. 136, 399.

499.

(a) 8 Dowl. & Ry. 114.

(b) 1 Chit. Rep. 399, *in notis*.

judgment;(c) but if it be not made till afterwards, they depend entirely on the rule; and if nothing be said therein concerning them, each party will have to pay his own costs. If a party obtain a rule to show cause, requiring two things with costs, although he be clearly entitled to one, yet if he fail as to the other, he shall not have costs; for the adverse party was under the necessity of coming into court to resist the latter.

In the King's Bench, particular days are appointed for certain business; as *Tuesday* and *Friday*, which are called *paper days*, for going through the paper of causes, wherein *concelliums* have been moved for, on the *plea* side, and *Wednesday* and *Saturday*, for transacting business on the *crown* side. All motions or rules in matters of length or consequence, are appointed for certain days, and called on first:(d) And special cases from the assizes should regularly be set down for argument, within the first *four* days of the following term.(e) But no cause can be set down for argument on the first paper day, or on the four last days of business in term: Yet, upon the day which would otherwise be the last paper day, common things may be set down, unless it be the last day of term. Special causes are to be entered for argument with the clerk of the papers, at least *four* days exclusive before the day of argument;(f) of which notice should be forthwith given to the attorney or agent on the other side: and all such causes must be argued in the order they are entered, and not adjourned to any future day, by consent or otherwise; unless the court shall for reasonable cause, verified by affidavit, upon application made by either of the parties, their attorney or agent, at least *two* days before the day of argument, otherwise order.(g) The paper books, in causes entered with the clerk of the papers for argument on *Tuesday*, must be delivered to the chief justice and the rest of the judges, on the *Saturday* preceding; and those entered for argument on *Friday*, must be delivered on *Tuesday* preceding.(h)

In the Common Pleas, if a special case be made at *nisi prius*, it may be set down for argument, in the court book or paper kept by [*505] the *secondaries, within the first *four* day of the term, as a matter of course; but it cannot be set down afterwards, without a special application to the court: And it is a rule in that court, that no cause be put in the book to be argued, after the last day of arguments, unless the court be thereupon moved, and shall order it.(a) Also, by a rule of the same court,(b) "all special arguments on demurrers, and other special arguments, are to be heard on the day next before the sitting day at *nisi prius* in *Middlesex*, and the day next after the sitting day at *nisi prius* in *London*, and on no other days:" and no argument is allowed on the *first* four, or *last* four days of the term.(cc) All special cases for argument must in this court be set down with the secondaries, *four* days exclusive before the day of argument; which is done on producing the

(c) *Id.* 559. 10 Moore, 97.

(d) Pref. to Bur. V.

(e) *Per Lord Kenyon*, in *Cutler v. Powell*, H. 35 Geo. III. K. B. *Lord Mansfield* wished to relax this, which is the old rule; but on consideration, the court of King's Bench, in the above case, thought it right to adhere to it: And in M. 38, Geo. III. this rule not having been observed, the court directed it to be peremptory in future.

(f) See a former rule of E. 1658.

(g) R. M. 30 Geo. II. K. B. 1 Bur. 52.

(h) R. T. 40 Geo. III. K. B. 1 East, 131.

(a) R. T. 12 Geo. I. C. P.

(b) R. M. 47 Geo. III. C. P. By a former rule, they were to be heard on *Mondays* and *Thursdays* only, R. H. 42 Geo. III. C. P. 3 Bos. & Pul. 110.

(cc) R. T. 12 Geo. I. (a), C. P.

case, signed by a serjeant on each side, with a motion paper for a *concilium*; and the rule is drawn up, and cause set down at the same time. Demurrers are set down in like manner on producing the entry on the roll; and such as are not intended to be argued may be set down of course, for any day except the first four and last four days of term; but if there be not *four* days between the day of setting them down and the day of argument, the court must be applied to for leave, which is always given, if it be a demurrer merely for delay, and not intended for argument; and they may even be set down for the last day of term.^(d) The paper books in this court are required to be delivered to the lord chief justice, and the other judges, *two* days (exclusive of the day of such delivery,) before the day on which the causes shall have been set down for argument;^(e) And, in both courts, the exceptions intended to be insisted upon in argument, should be marked in the margin.^(f) In the Exchequer, the court formerly never sat on the plea side on *Mondays* and *Thursdays*; because on those days, until a late act of parliament,^(gg) for enabling the Lord Chief Baron for the time being to sit alone in equity, the whole court always sat in the Exchequer chamber, bearing causes in equity.^(hh) Since that time, the three *puisne* Barons sit regularly on those days, as well for the dispatch of the ordinary business on the plea side of the court as for hearing motions in equity, unconnected with causes pending before the Lord Chief Baron.^(hh) But motions in causes proceeding to a hearing before the Lord Chief Baron, can only be made before him, when sitting alone.⁽ⁱ⁾

In the King's Bench, all rules enlarged till the next term,^(k) and rules for new trials which stand over from one term to another,^(l) are entered in the *peremptory* paper, and fixed for certain days, called *peremptory* days; *and must be heard upon the respective days for which [*506] they are made peremptory, unless special ground, by affidavit or otherwise, be shown to the court, for postponing such rules.^(a) And for enforcing this practice, it is ordered, that "no rules in causes entered in the peremptory paper be enlarged during the term, or put off from the appointed day, by consent of counsel, or the attorneys concerned therein, without previous application to, and special leave of the court."^(b) In the Common Pleas, enlarged rules are set down in the *peremptory* or *remanet* paper, for each of the first *four* days of the term, and called on after the common motions are disposed of. All rules for new trials, which stand over, are set down in the same paper, and proceeded in at the pleasure of the court: And such matters as have been argued, and in which the court have not given judgment, are likewise set down in the peremptory paper.

If a rule be drawn up wrong by mistake, the courts will order it to be set right; or it may be discharged, on terms;^(c) or if made absolute or dis-

(d) Imp. C. P. 7 Ed. 300, 303, 4; and see Barnes, 165. 2 Chit. Rep. 372.

(e) R. M. 49 Geo. III. C. P. 1 Taunt. 412.

(f) R. E. 2 Jac. II. revived by R. II. 38 Geo. III. K. B.; and see R. II. 48 Geo. III. C. P. 1 Taunt. 203.

(gg) 57 Geo. III. c. 60.

(hh) 9 Price, 15.

(i) *Id. ibid.*; and see 4 Price, 309.

(k) R. M. 30 Geo. II. R. II. 6 Geo. III. R. II. 15 Geo. III. R. M. 17 Geo. III. K. B. Pref. to Bur. V. 1 Bur. 9. 3 Bur. 1842.

(l) 1 Smith, R. 198.

(a) R. II. 36 Geo. III. K. B.

(b) R. E. 41 Geo. III. K. B. 1 East, 496.

(c) 8 Moore, 87.

charged by surprise, or in consequence of a mistake of counsel, in stating the terms of the affidavits on which it was founded(*d*) the courts will open it. But, in the King's Bench, if any cause shall have been moved in court, in the presence of the counsel of both parties, and the court shall have thereupon made a rule between them, the same shall not be again moved contrary to such rule, under peril of an attachment:(*e*) And the court of Common Pleas will not open the rule for an attachment, on the mere affidavit of the party, that he has not been served; at least, unless he show some mistake in the service:(*f*) nor will they rescind a rule, on the ground that, at the time of discussion, the parties omitted to present to the notice of the court, a statute which might have affected its decision.(*g*) In the Exchequer, where a rule *nisi* for a new trial having been peremptorily fixed for a day in the third term inclusive after being granted, and not having been then supported, was discharged, the court refused to open it in the ensuing term, on the suggestion that instructions had been prepared, and intended to be delivered to counsel, in the preceding term:(*h*) And if that court open a rule, made absolute on the usual affidavit of service, to give the party an opportunity of showing cause, they will not hear affidavits, sworn after the day on which the rule had been made absolute.(*ii*)

In hearing motions, the course formerly observed in the King's Bench was, to begin every day with the *senior* counsel within the bar, and then to call to the next *senior* in order, and so on, as long as it was convenient to the court to sit; and to proceed again, in the same manner, upon the next and every subsequent day, although the bar had not been half, or perhaps a quarter gone through, upon any one of the former [*507] days; so that *the *juniors* were very often obliged to attend in vain, without being able to bring on their motions, for many successive days.(*a*) This practice bearing hard upon *junior* counsel, Lord *Mansfield* introduced a different rule, which has ever since been adhered to, of going quite through the bar, even to the youngest counsel, before he would begin again with the *seniors*; though it should happen to take up two or more days before all the motions which were ready at the bar upon the first day, could be heard.(*b*) The same course is observed in the Common Pleas; where they begin with the king's *senior serjeant*, and go regularly through the bar, before they begin again. In the Exchequer, the court will not allow more than two motions to be made successively by the same counsel, till they have gone through the rest of the bar.(*c*)

When a matter comes before the court on a rule to show cause, as on a motion for a new trial,(*dd*) in arrest of judgment, or, in the King's Bench, to

(*d*) 1 Chit. Rep. 445. *Ante*, 502.

(*e*) R. H. 3 Jac. I. K. B.; and see 2 Chit. Rep. 265.

(*f*) 1 New Rep. C. P. 256; and see 5 Taunt. 628.

(*g*) 1 Bing. 398; 8 Moore, 462, S. C.

(*h*) 1 M'Clel. & Y. 508.

(*ii*) 5 Price, 384. *Ante*, 501.

(*a*) 1 Bur. 57.

(*b*) *Id.* 58.

(*c*) 4 Price, 345.

(*dd*) In *Hilary* term, 1824, the chief justice intimated to the bar of the court of King's Bench, that as it was of high importance to the public, and to the suitors in the particular causes in which rules *nisi* for new trials had been granted, that those rules should be disposed of during the term, or so soon after as possible, the court would wish to hear only one counsel on each side: They therefore requested, that the *juniors* in each case, would not address them, after their *senior* had been heard, unless they felt that he had omitted some important fact, or some material argument, which ought to have been presented to the attention of the court. They did not, however, mean to lay down a rigid rule, that they would hear only one counsel on each side, which might be productive of inconvenience; but they trusted to

quash an order of sessions, &c. all the counsel are heard on each side; the counsel who show cause first, and then the counsel on the other side: If there are several counsel, the *senior* begins. When a matter comes before the court on a rule for a *concilium*, as on a special verdict, or special case, demurrer, writ of error, or, in the King's Bench, on a motion to quash a conviction, &c. one counsel only (commonly the *junior*,) is heard on each side: And as there is only one plaintiff in *ejectment*, to whom the court can look, if the parties separately interested choose to join in the same ejectment, their interest must be treated as one and the same, as if there were but one plaintiff.(e) So, where a case is sent out of Chancery, for the opinion of the court of Common Pleas, they will only hear one counsel for each separate interest; though the parties who have a common interest, be placed adversely to each other in the suit.(f) On a special verdict or special case, the counsel for the plaintiff begins first,(g) or, on a demurrer, writ of error, or motion to quash a conviction, the counsel for the party objecting: the counsel for the other party is then heard in answer, and the counsel who began first replies. When the defendant is *brought up for [*508] judgment in the King's Bench, after trial in a criminal case, the defendant's affidavits are first read, and then the prosecutor's affidavits; after which, the defendant's counsel are first heard, and then the prosecutor's counsel. When he is brought up on a judgment by default, the prosecutor's affidavits are first read, and then the defendant's affidavits; after which the prosecutor's counsel are first heard, and then the defendant's counsel. But affidavits are not admissible to aggravate punishment upon a conviction for felony, even though the record be removed into this court:(a) And when there are no affidavits, the defendant's counsel always begin.(b) Upon an appeal to the sessions, against an order of filiation, the respondents are to begin by supporting their order, as in all other cases.(c) But on an appeal against a poor-rate, on the ground that the appellant was over-rated, the practice at the sessions requiring the appellant to begin by proving his case, which the appellant refusing to do, the appeal was dismissed; the court refused a *mandamus* to the sessions, to rehear the appeal on this objection.(d) In the King's Bench, when counsel has had his brief in due time, and is accidentally or inadvertently absent at the time the common paper is called over, the court will, on his moving for that purpose, allow him to take judgment as if he had been present.(e) But, in the Exchequer, if counsel on either side appear to argue a special case, on the day appointed by the rule for a *concilium*, and the counsel for the other party do not attend, the counsel in attendance will be heard, and the court will give judgment in the absence of the other counsel; and they will not, on any occasion, permit the case to be opened again, for the purpose of giving the counsel who may have been absent an opportunity of arguing it: the necessary attendance of counsel in another court, not being con-

the discretion of the bar, not to occupy their time, by going severally through the whole case, where it was not absolutely necessary to the interests of their client. A similar regulation was stated to have been made before, in the time of lord *Ellenborough*, when there was an arrear of rules for new trials; which regulation had for some time been rigidly observed, but it was understood that it would not be permanent.

(e) 6 Dowl. & Ryl. 294, *per Bayley, J.*

(f) 2 Marsh. 413.

(g) Barnes, 155.

(a) 6 Barn. & Cres. 148. 9 Dowl. & Ryl. 174, 179, S. C.

(b) R. M. 29 Geo. III. K. B.

(c) 12 East, 50.

(d) 6 Maule & Sel. 57.

(e) 2 Chit. Rep. 402, (a).

sidered to be a sufficient reason for their being absent from this court, on the day appointed for an argument here.(f)

After a special argument on a *concilium*, it is usual for the courts to call upon each of the counsel or serjeants concerned, to make a motion; which is called moving for their argument: but it seems that, in the King's Bench, it is not the practice to call upon the counsel to move for their argument as a matter of course, though it is said to be otherwise in the Common Pleas.(g) And where it was moved, in the latter court, for leave to justify bail, after two serjeants had moved for their arguments, the court would not receive this motion, till the paper was gone through.(h) On motions for judgment, without argument, on paper days in the King's Bench, one shilling is paid for each motion, by the counsel making it, to the box; which is called *box money*, or *high bar money*, and paid by the secondary on the plea side, into the hands of the clerk of the *junior* judge, in order to be by him paid over to the judges of the court in equal shares, to be disposed of by them for such charitable purposes, as they [*509] in their *discretion shall think proper.(aa) On the last day of term, two shillings are paid in that court for the first motion, and one shilling for every motion afterwards. In the Common Pleas, there are no payments of this nature: but, on entering satisfaction on the roll, it is usual for the plaintiff to pay one shilling for every hundred pounds recovered to the secondary, who pays it over to the *junior* judge's clerk, by whom it is distributed among the prisoners in the Fleet Prison.

A *petition* is usually exhibited, in order to obtain some favour or relief, proceeding from the court or a judge, &c., without calling upon the other party to show cause against it; as for *prisoners* to have day rules allowed them by the court in term time;(bb) or to be relieved against the extortion of gaolers,(c) &c., or discharged from imprisonment under the Lords' act;(d) or for *paupers* to be admitted to sue *in formâ pauperis*;(e) or *infants* to sue by *prochein amy*, or defend by *guardian*;(ff) &c. In the case of prisoners, the petition is exhibited to the *court*; in the other cases, to a *judge* at chambers; or it may be exhibited to the *master of the rolls*, for an original writ to be issued, after a writ of error on a judgment by default,(gg) or for *amending* an original writ;(hh) to the *lords of the treasury*, for the plaintiff to obtain money levied on a *capias utlagatum*;(i) to the *attorney-general*, for the allowance of a writ of error, where the king is concerned;(k) or to the *house of lords*, for the plaintiff in error to return a writ of *certiorari* out of the regular course,(l) or to have the cause appointed for a short day.(l)

Analogous to the proceedings in court, by *motion* and *rule*, is the practice by *summons* and *order* at a judge's chambers, of which something has been already said in a preceding chapter.(m) This practice seems to have arisen, partly from the overflowing of the business of the courts in term-time, and partly from the necessity of certain proceedings being had in

(f) 9 Price, 53; but see 1 Younge & J. 511, 536.

(g) 1 Wils. 76.

(h) Pr. Reg. 265.

(aa) R. T. 32, 33 Geo. II. K. B. 2 Bur. 867.

(bb) Ante, 374. Append. Chap. XV. § 57.

(c) Ante, 232.

(d) Ante, 375, &c. Append. Chap. XV. § 63.

(e) Ante, 97. Append. Chap. IV. § 8.

(ff) Ante, 99, 100. Append. Chap. IV. § 11, 12.

(gg) Ante, 108. Append. Chap. V. § 33.

(hh) Post, Chap. XLIV. Append. Chap. V. § 36.

(i) Ante, 138. Append. Chap. VII. § 26.

(k) Post, Chap. XLIV.

(l) Id. Append. Chap. XLIV. § 132.

(m) Chap. XVIII. p. 469, &c.

vacation, when the courts are not sitting: And although extremely burthensome to the judges, yet it manifestly tends to the advantage of the suitor, the case of the practitioner, and the general advancement of justice, by preventing the expense, trouble and delay, which would ensue, if an application to the courts were in all cases necessary.

It was formerly a rule, that "no attorney or other person, should be summoned to attend any justice of the King's Bench, nor any matters be transacted before such justice at his chambers, or elsewhere out of court, during the sitting of the court at *Westminster*.(n) But this rule has been recently discharged in the King's Bench:(o) and it is now the practice in *all the courts,(a) for one of the judges to attend daily at [*510] chambers, during term, from half past *three* until *five* o'clock: in consequence of which, the evening attendance of the judges at chambers, in term-time, is discontinued. Also, by a late act of parliament,(b) "the judges of the courts of King's Bench and Common Pleas, and barons of the Exchequer at *Westminster*, and the justices of *Chester*, are authorized, during their respective circuits for taking the assizes, to grant such and the like summonses, and make such and the like orders, in all actions and prosecutions depending in any of his majesty's courts of record at *Wesimister*, in which the issue, if brought to trial, would be to be tried upon such their respective circuits, as if such justices of the courts of King's Bench, &c., were respectively judges of the court in which such actions or prosecutions are depending, although such respective justices of the courts of King's Bench, &c., may not be judges of the court in which such actions or prosecutions are depending; and such summonses and order shall be of the same force and effect, as if such justices of the courts of King's Bench, &c. were respectively judges of the courts in which such actions or prosecutions are depending: And, for the purposes of this act, the counties palatine of *Lancaster*, *Durham* and *Chester*, shall be taken to be counties on the circuits of the respective justices of the courts of King's Bench,(c) &c." The judges of the courts of Great Sessions in *Wales*, are also authorized, by statute 5 Geo. IV. c. 106, § 11, 12, to make rules and orders, in all cases at law, when the said courts shall be sitting in any county within their jurisdiction; and also in all cases, both at law and in equity, when the said courts shall not be sitting in *Wales*, to hear motions and petitions, and make rules and orders thereon, in vacation, and out of the jurisdiction of the said courts.

The order of a judge is sometimes absolute in the first instance; as to hold to bail,(d) to charge a person in custody on a criminal account with a civil action, or to docket a roll after the lapse of a year, &c. And where a rule is drawn up in *term* time, as a matter of course, on a motion paper signed by counsel, as to bring money into court, to change the venue, to plead several matters, as for a special jury, or view, &c. a judge's order may be had in the first instance, in the King's Bench, for the clerk of the rules to draw it up in *vacation*, on producing a motion paper so signed. So, in the Common Pleas, a judge's order may be obtained in the first

(n) R. M. 11 Geo. I. K. B.; and see R. T. 14 Car. II. reg. 2, K. B. R. II. 17 Geo. II. C. P.

(o) R. M. 2 Geo. IV. K. B. 5 Barn. & Ald. 217.

(a) 5 Barn. & Ald. 217. Notice, M. 3 Geo. IV. C. P. & Excheq. 7 Moore, 460. 11 Price, 422.

(b) 1 Geo. IV. c. 55, § 5; and see 1 Car. & P. 138, n.

(c) § 6.

(d) Append. Chap. X. § 87.

instance, for the secondaries to draw up a rule in *vacation*, to bring money into court, or for a special jury, on producing a motion paper signed by a sergeant; for in these cases, a sergeant's hand would be sufficient in *term* time: but in the other cases, of changing the venue, &c. where an application must be made to the court in *term*, a summons must first be served in *vacation*, for the secondaries to be at liberty to draw up the rule. An

order, however, is in general preceded by a *summons*, for the attendance *of the attorney or agent of the opposite party, before a judge at chambers, to show cause against it: And where a judge has upon hearing a party on summons, refused an order, an appeal can only be made to the court.^(a) In some cases, a judge's order is drawn up, in default of appearance, on the *first* summons; as for a *supersedeas* to discharge the defendant out of custody in the King's Bench, for not declaring against him in due time: but in general, there must be *three* summonses, and an affidavit of attendance thereon,^(b) before the judge will make an order for non-attendance.^(cc) And in *vacation*, when the court is not sitting, some things are allowed to be done by a judge at chambers, which in *term* time must be moved in court; as to enter up judgment on a warrant of attorney, above *one* and under *ten* years old, or to refer it to the master, or prothonotary, to compute principal and interest on bills of exchange, or promissory notes, &c.:^(dd) in the former case, the order is granted in the first instance; but in the latter, it is preceded by three summonses. A judge at chambers will not set aside an execution, or other act of the court; but where the justice of the case requires it, he will stay the proceedings thereon in *vacation*, to give the party an opportunity of applying to the court in the ensuing term.

A judge's order for a stay of proceedings, must be drawn up and served forthwith; otherwise it will be considered as waived by the party, by whom it has been obtained.^(e) The order obtained upon a summons is, however, subject to an appeal, and the validity of it may be impeached in two ways; either by moving the court to set it aside,^(f) or, if made in *vacation*, by applying, in the next term, to set aside the proceedings that have been had under it.^(g) But if the order be acquiesced under, it is as valid as any act of the court:^(h) And, in the King's Bench, a judge's order for a prisoner's discharge under the Lord's act, made out of term, has been held to be final.⁽ⁱ⁾ Indeed, if it become necessary to enforce a judge's order by attachment, or other act of the court, there must be a previous motion to make it a rule of court.^(k)

(a) 5 Taunt. 850; and see 1 Chit. Rep. 124, 232, 246, (a).

(b) Append. Chap. XVIII. § 14 15.

(dd) *Ante*, 486.

(e) 4 Barn. & Cres. 865. 7 Dowl. & Ry. 422. S. C.

(g) 4 Bur. 2569.

(i) Doug. 68. *Webster v. Wilkinson*, II. 26 Geo. III. K. B. 3 Moore, 64. *Jameson v. Raper*, *id.* 65, (a). *Ante*, 382.

(k) 4 Bur. 2569. *Per* Ld. *Kenyon*, in *Curtis v. Taylor*, E. 35 Geo. III. K. B.

(cc) *Ante*, 369.

(f) 1 Chit. Rep. 246.

(h) 1 Taunt 47.

*CHAPTER XX.

Of SETTING ASIDE, and STAYING PROCEEDINGS.

HAVING stated, in the preceding chapters, the various modes of *commencing* actions, and the proceedings therein to the declaration, on behalf of the *plaintiff*, with the time allowed for pleading in *ordinary* cases, and whatever is *peculiar* to the proceedings in actions by or against *attorneys*, and against *prisoners* in custody of the sheriff, &c. or of the marshal or warden; and having taken a view of the means of *removing* actions from inferior courts, and of *motions* and *rules* in general, and the practice by *summons* and *order* at a judge's chambers, I shall next proceed to show what is to be done by the *defendant*, when an action is brought against him; and in so doing shall consider first, in what case, and upon what grounds, he may move the courts to set aside or stay the proceedings: secondly, what steps are to be taken by him, when he has no merits; and thirdly, if he has, in what manner he should prepare for and make his defence to the action, which will lead on to the consideration of *pleas* and *pleading*, &c. Upon a review of which it will appear, that the defendant, according to the circumstances of his case, either applies to the *equitable* jurisdiction of the court by motion, or relies on his *legal* ground of defence, by pleading it.

In the defence of an action, one of the first things to be attended to, on the part of the defendant, is the *regularity* of the proceedings; for if they are irregular, the courts, on motion, (a) will set them aside.

An *irregularity* may be defined to be, the want of adherence to some prescribed rule or mode of proceeding; and it consists, either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time, or improper manner. Thus, the want of *notice* is an irregularity, whether it be to process, upon a declaration, or of trial or inquiry: so, if the notice be not given in due time, or a proper manner. In general, an irregularity is either in *mesne* process, or the proceedings thereon before judgment, or in the *judgment* or *execution*. If there be any irregularity in the process, or notice to appear thereto, or in the delivery, filing or notice of declaration, or notice of trial or inquiry, the defendant, we have seen, (b) may move the court, on a proper *affidavit*, (c) to set aside the proceedings, and, if in custody, for [*513] his *discharge on filing common bail, or entering a common appearance; or, if he has given bail to the sheriff, that the bail bond may be delivered up to be cancelled. A *judgment* by default is irregular, when the defendant, in an action notailable, has not been served with a copy of process, or there has been no declaration regularly delivered or filed, and notice thereof given to the defendant; (aa) or when it is signed before the defendant's appearance, or without entering a rule to

(a) For notices of motion, to set aside proceedings for irregularity, see Append. Chap. XX. § 1, 2, 3, 4.

(b) *Ante*, 488.

(c) Append. Chap. XX. § 5. And for the rule *nisi* thereon, see *id.* § 6, and the notice to plaintiff, not to make it absolute, *id.* § 7.

(aa) 4 Taunt. 818.

plead, or demanding a plea, when necessary; before the time for pleading is expired; or after a plea has been regularly delivered or filed. *(bb)* And when an *execution* is irregular, the defendant may move to set it aside; and that he be discharged out of custody, or that the money levied may be restored to him. *(cc)*

The application to set aside proceedings for irregularity, should be made as early as possible, or as it is commonly said, in the first instance; *(d)* and when there has been any irregularity, if the party overlook it, and take subsequent steps in the cause, he cannot afterwards revert back to the irregularity, and object to it. *(e)* If there be any defect or irregularity therefore in mesne process, or the notice subscribed thereto, or in the service of process, the defendant should take advantage of it before he has appeared: *(f)* And if the irregularity be in the delivery, filing or notice of declaration, the application should be made, if possible, *two* days at least before the time appointed for the execution of the writ of inquiry. *(g)* Irregularity in the service of process, however, is waived by the defendant's attorney having written to the plaintiff's attorney, after the process was served, undertaking to appear, receive a declaration, and give security for costs; *(h)* or by the defendant's paying the debt and part of the costs, *(i)* or admitting the debt subsequently to the service of the writ, and requesting time for the payment of it. *(k)* So, where the service of a writ is irregular, but the defendant, on receiving notice of declaration, says, "it is all right; I will call and settle the debt and costs;" the irregularity is waived; 1 Man. & Ryl. 320. And, by taking the declaration out of the office, or obtaining time to put in bail to the action, the defendant, we have seen, *(l)* waives all objections to the regularity of the process; the intent of which is only to bring him into court. But this it seems is only a waiver of irregularities in the process, and not in the declaration. *(m)* Yet, where the plaintiff declared by the *bye*, before he had declared in *chief*, it was holden, that taking the declaration by [*514] the *bye* out of the office, was a *waiver of the irregularity. *(a)* So, where the declaration was delivered at the same time as a bill of particulars which was insufficient, and another order was afterwards obtained for better particulars, the court of Common Pleas held, that as the defendant's attorney had not returned the declaration, with the insufficient particulars, he had waived the irregularity: *(b)* And if the plaintiff take a plea out of the office, and keep it, he waives any objection to the plea, on the ground of its having been pleaded by a new attorney, without an order to change the former one. *(c)* In proceeding against prisoners, an irregularity

(bb) *Id.* 545.

(cc) *Ante*, 489. Append. Chap. XX. § 3, 4.

(d) 3 Durnf. & East, 7. 1 East, 335, 8 Dowl. & Ryl. 450. 9 Price, 637.

(e) 1 East, 77; and see 3 Durnf. & East, 10. 5 Durnf. & East, 254, 464. 1 East, 330. 2 Smith R. 391. 2 Chit. Rep. 236, 7. 6 Barn. & Cres. 76. 9 Dowl. & Ryl. 124, S. C. 6 Barn. & Cres. 77, *(b)*. 9 Dowl. & Ryl. 18, K. B. 1 H. Blac. 251. 1 Bos. & Pul. 250, 344. 1 Taunt. 59. 2 Taunt. 244. 4 Taunt. 545. 6 Taunt. 6. 1 Marsh. 403, S. C. 6 Taunt. 185. 1 Moore, 299, C. P. 9 Price, 637. 11 Price, 122, Excheq.

(f) *Ante*, 160, 61.

(g) 2 Smith R. 391. 2 Chit. Rep. 237. Cas. Pr. C. P. 69, 145. Pr. Reg. 127, 242, S. C. Barnes, 255, 6. 2 New Rep. C. P. 75; and see N. M. 2 Geo. II. C. P. 6 Price, 15.

(h) 1 Chit. Rep. 129; and see 2 Chit. Rep. 236. 1 Man. & Ryl. 320, 21, *(b)*.

(i) 11 Price, 122.

(k) 7 Moore, 461. 1 Bing. 132, S. C.

(l) *Ante*, 160.

(m) 2 New Rep. C. P. 83; and see 4 Durnf. & East, 349.

(a) 3 East, 342. *Ante*, 424, 5, *(l)*.

(b) 2 Moore, 90; and see *id.* 655. 8 Taunt 592, S. C.

(c) 2 New Rep. C. P. 509.

ity, we have seen, may be waived by the defendant's pleading, *(d)* letting judgment go by default, *(e)* or suffering the plaintiff to charge him in execution. *(f)* But the giving of a bail bond, *(g)* or paying or giving security for the debt, *(h)* by a defendant under arrest, will not operate as a waiver of the irregularity: And where the defendants had appeared to a *scire facias*, after a rule *nisi* had been obtained for setting aside proceedings, for irregularity, the court held, that the rule having been obtained the last day of term, which was no stay of proceedings, the defendants were obliged to appear, and therefore it was no waiver. *(i)* The defendant's pleading, however, to the *scire facias*, would in such case be a waiver of the irregularity. *(k)*

In the King's Bench, it is a rule to refuse motions to set aside process for irregularity, even though no new step has been taken in the cause, unless the defendant make his application in a reasonable time. *(l)* But, in the Common Pleas, a defendant may move to set it aside at any time before a new step is taken in the cause. *(m)* And this was formerly considered as necessary; it being holden, that a defendant who complained of an irregularity in process, must, if he had an opportunity, have applied to set it aside, before the plaintiff had taken any further step. *(n)* But where the plaintiff having served an irregular process, the defendant gave him notice of the irregularity, and that if he proceeded thereon, the defendant would move to set aside the proceedings, this was deemed an exception to the ordinary rule. *(o)* And now, according to later decisions, the court of Common Pleas will not bind the defendant to any particular time for applying to set aside the proceedings; nor refuse the application, unless the party who has served the defective process take some step, by which he shows that he means to proceed upon it; *(p)* in which case, they expect the application to be made immediately: *(p)* Therefore, where a defendant has been "served with notice of declaration, and interlocutory judgment signed, [*515] and notice given of executing a writ of inquiry, he is too late to take advantage of a defect in the process. *(aa)* And though an appearance entered by the plaintiff, according to the statute, is not of itself sufficient, in the Common Pleas, to cure a mistake in the service of process, *(b)* yet if notice be afterwards given to the defendant, of the declaration being filed he must apply to the court before judgment. *(c)* In the Exchequer, the application to set aside proceedings for irregularity, ought to be made in the first instance; and where the party cannot satisfactorily account for not applying sooner than he does, the court will not assist

(d) Ante, 357.

(e) Ante, 345.

(f) Ante, 357.

(g) 7 Durnf. & East, 375; but see 4 Moore, 317. 1 Brod. & Bing. 529, S. C.

(h) 1 Chit. Rep. 468.

(i) 5 East, 462; and see 13 East, 588.

(k) 1 Dowl. & RyL. 181.

(l) 6 Taunt. 191, 2. 1 Marsh. 551, S. C. *per Gibbs*, Ch. J. *Pearson v. Hodgson*, M. 55 Geo. III. K. B. 1 Chit. Rep. 14, *(b)*. 6 Taunt. 6. 1 Marsh. 403, S. C. 1 Moore, 300. 6 Barn. & Cres. 76. 9 Dowl. & RyL. 124, S. C. 6 Barn. & Cres. 77 *(b)*. 9 Dowl. & RyL. 18; but see 2 Chit. Rep. 165.

(m) 6 Taunt. 5. 1 Marsh. 403, S. C. 1 Chit. Rep. 14, *(b)*.

(n) 2 Taunt. 243.

(o) 5 Taunt. 330.

(p) 6 Taunt. 191, 2. 1 Marsh. 551, S. C.; and see 1 H. Blac. 251. 5 Taunt. 664. 1 Moore, 299. 2 Moore, 654. 8 Taunt. 591, S. C. Forrest, 31.

(aa) 6 Taunt. 191. 1 Marsh. 550, S. C.

(b) Barnes, 409. 1 Moore, 299. Ante, 161, *(d)*.

(c) Barnes, 242, 3; 256, 269, 296. Pr. Reg. 32, 355. Cas. Pr. C. P. 92, 105, 145, S. C.

him : (*d*) and it is said to be a rule, that all motions to annul proceedings, on the ground of irregularity, should be made the same term with the proceedings complained of. (*e*) In disposing of a rule *nisi*, for setting aside all proceedings subsequent to the writ of *quo minus*, and service thereof, and staying all further proceedings, on payment of the debt and costs of the writ and service, that court would not give an opinion on the alleged unreasonableness of an attorney's bill, stated as the sole ground for supporting the rule ; that being a proper subject of reference to the master : nor would they make such reference a part of the order for discharging the original rule. (*f*)

There are some distinctions deserving notice, between a mere *irregularity*, and a complete *defect* in the proceedings : The former may be waived by the adverse party, but not the latter. (*g*) For a mere irregularity in the copy, (*h*) or service, (*i*) of process, or in the declaration, (*k*) &c. the courts will only set aside the proceedings that are irregular, leaving the plaintiff at liberty to continue his suit from the last regular proceeding ; (*l*) but for a complete defect, the proceedings are stayed *in toto*. (*m*) On setting aside proceedings for irregularity, the party complained of is in general liable to the payment of costs, (*n*) unless the rule be opposed in the first instance ; (*o*) but on staying them as defective, the costs are in the discretion of the court.

Though the proceeding are *regular*, yet it sometimes happens that they are *defective*, as where the cause of action is frivolous, or the action [*516] *brought or conducted upon insufficient grounds, contrary to good faith, or without proper authority : and in such cases, the courts on motion will order the proceedings to be *stayed*, with or without costs, according to circumstances.

When the debt sued for, appears on the face of the declaration, (*a*) or is admitted by the plaintiff, or his attorney, (*bb*) or proved by the affidavit of the defendant, (*cc*) to be under *forty* shillings, and the plaintiff may recover it in an inferior jurisdiction, the courts on motion will stay the proceedings ; it being below their dignity to proceed in such an action. Formerly, when the plaintiff demanded more, the court of King's Bench, would not have permitted an affidavit to be read, that the defendant owed him less ; (*dd*) or that the defendant had applied to the plaintiff for his demand,

(*d*) 11 Price, 125.

(*e*) 3 Price, 37.

(*f*) 2 McClell. & Y. 105.

(*g*) 5 Durnf. & East, 254. 3 East, 155. 4 Barn. & Ald. 238. 1 Bos. & Pul. 383, (*a*). 2 Bos. & Pul. 110, 589. 1 Taunt. 59. 5 Taunt. 664. 2 Price, 9, but see 6 Barn. & Cres. 76. 9 Dowl. & Ryl. 124, S. C. 6 Barn. & Cres. 77, (*b*). 9 Dowl. & Ryl. 18.

(*h*) 1 Bing. 65. 7 Moore, 359, S. C.

(*i*) 5 Taunt. 651, 664.

(*k*) 4 East, 589. 2 New Rep. C. P. 82. 5 Taunt. 649. 1 Marsh. 274.

(*l*) *Holloway v. Whaley*, T. 41 Geo. III. K. B. ; and see 2 Chit. Rep. 238. 5 Barn. & Ald. 893.

(*m*) 1 Chit. Rep. 400. 2 Chit. Rep. 237, 239.

(*n*) Cas. temp. Hardw. 314.

(*o*) 2 Chit. Rep. 241.

(*a*) 3 Bur. 1592.

(*bb*) 2 Blac. Rep. 754. 2 New Rep. C. P. 84.

(*cc*) 4 Durnf. & East, 495. 5 Durnf. & East, 64. *White v. Griffiths*, T. 35 Geo. III. K. B. ; and see 1 Man. & Ryl. 322, 3, (*a*).

(*dd*) Say. Rep. 219, 240. 3 Bur. 1592. 2 Chit. Rep. 395.

who sent him a bill for goods, to the amount of 1*l.* 18*s.* :(*e*) but the practice has been since altered as above, agreeably to the usage of the court of Exchequer. In the latter court however, on a motion to set aside proceedings as *infra dignitatem*, on an affidavit that the debt sued for does not amount to 40*s.*, the court will not inquire into the amount, if an affidavit be put in, on showing cause, that the demand exceeded that sum; but will at once discharge the rule with costs.(*f*) And it should be observed, that an action cannot be brought in the county court, unless the cause of action arise, and the defendant reside within the county :(*g*) Therefore, though the demand be for less than forty shilling, if the cause of action arise in one county, and the defendant reside in another, the action may be brought in a superior court.(*g*) In an action for a debt recoverable in a court of requests, where the plaintiff might, after verdict, be deprived of costs, the court of King's Bench will stay the proceedings, on payment of the debt, without costs. 1 Man. & Ryl. 321. In *trover*, the Court of Common Pleas would not stay proceedings, on an affidavit from the defendant, that the cause of action did not amount to forty shillings; the amount of the value of the articles ought to be recovered by such action, being mere matter of calculation, to be ascertained by a jury.(*h*) And where a defendant, living within the jurisdiction of the court of requests for *Westminster*, was sued in the King's Bench, for a debt under forty shillings, and neglected to take advantage of the statute 23 Geo. II. c. 27, by pleading it in bar, the court would not, after verdict for the plaintiff, either suffer a suggestion to be entered on the record, that the defendant lived within the jurisdiction, or stay the proceedings.(*i*) So, where a cause has been removed from an inferior court, this court will grant a *procedendo*, if the debt or damages appear to be under forty shillings :(*k*) But the court refused to quash a *certiorari* upon this ground, in an action for an assault brought against excise officers, who could not have had an impartial trial in the inferior court.(*l*)

*By the statute 21 Jac. I. c. 4, § 1, "all offences against any *penal* statute, for which any common informer may lawfully [*517] ground any popular action, bill, plaint, suit or information, before justices of assize, justices of *nisi prius* or gaol delivery, justices of *oyer and terminer*, or justices of peace in their general or quarter sessions, shall be commenced, sued, prosecuted, tried, recovered and determined, by way of action, &c. before the justices of assize, &c. or before the justices of peace of every county, city, borough, or town corporate, and liberty, having power to inquire of, hear and determine the same, wherein such offences shall be committed, in any of the courts, places of judicature, or liberties aforesaid respectively only, at the choice of the parties which shall commence suit, or prosecute for the same, and not elsewhere: with an exception of certain offences, concerning popish recusancy, or for maintenance, champerty, or buying of titles, &c."(*a*) This statute has been construed to restrain the jurisdiction of the King's Bench, in actions of *debt* by

(*e*) *Per Cur.* T. 21 Geo. III. K. B.

(*f*) 2 Price, 8; and see 2 Chit. Rep. 395.

(*g*) 6 Durnf. & East, 175. 8 Durnf. & East, 235. 1 East, 353, (*a*). 1 Dowl. & Ryl. 359. 2 H. Blac. 29. 1 Bos. & Pul. 75. 3 Bos. & Pul. 617; but see 2 Chit. Rep. 395, 6.

(*h*) 8 Moore, 220. 1 Bing. 270, S. C.

(*i*) 3 Durnf. & East, 452, 1 East, 354, (*a*).

(*k*) Brownl. *Brev. Jud.* 140. 2 Brownl. 82. Moyle, 69. Clift, 374.

(*l*) 4 Durnf. & East, 499. *Ante*, 399.

(*a*) § 5.

common informers, in cases where the penalty may be sued for by action, bill, plaint, suit or information, either in the courts at *Westminster*, or at the assizes or sessions of the peace, as on the statute 5 Eliz. c. 4: and they cannot in such cases bring *debt* upon the statute, in the King's Bench, unless the cause of action arise in *Middlesex*, where the court sits; but must prosecute by information, &c., before justices of assize, &c., as the statute directs.(b) So, an action to recover a penalty, under the statute 5 & 6 Edw. VI. c. 14, must be brought in the county where the fact was committed, and not commenced in the superior courts at *Westminster*.(c) But the statute 21 Jac. I. c. 4, is confined to such statutes only as were in being at the time of making it, and does not extend to any offence created since that statute; so that prosecutions on subsequent penal statutes are not restrained thereby, but that statute is, as to them, as if it were repealed *pro tanto*.(d) It is also settled, that this statute does not give any new jurisdiction to the justices of assize, &c., where they had none before:(e) and therefore, where the penalty is to be recovered by action, &c., or information, either in the courts of record at *Westminster* only, or in the king's courts, *wherein no essoin, protection, or wager of law shall be allowed*, (which words are held to mean the courts at *Westminster*;) the statute 21 Jac. I. does not apply:(f) and a suit prosecuted at the assizes, &c., to recover such penalty is erroneous.(g) And, for the same reason, the statute only restrains the proceedings on penal statutes in the superior courts, where the informer, before the passing of that statute, might have sued in the inferior as well as the superior courts, by action, bill, plaint, suit, or information.(h) The true [*518] rule seems to be, that on all *penal laws antecedent to the statute 21 Jac. I. c. 4, where the justices of assize and superior courts at *Westminster* have a concurrent jurisdiction, *both as to the subject matter and mode of proceeding*,(aa) the suit must be commenced before justices of assize, or at the sessions, and not before the justices at *Westminster*: For though the statute 21 Jac. I. gives no new jurisdiction to inferior justices, yet it in terms takes away the jurisdiction of the courts at *Westminster*. But in suits on those statutes that give *debt*, &c., and mention not justices of assize or of the peace, or where the inferior court has not a concurrent jurisdiction, both as to the subject matter and mode of proceeding, they must be brought in the superior courts, otherwise there would be a defect of remedy.(bb)

By the same statute, § 4, "no officer or minister of any court of record, shall receive, file or enter of record, any information, bill or plaint, count or declaration, grounded upon the said penal statutes, or any of them, which are appointed to be heard and determined in their proper counties, until the informer or relator hath first taken a corporal oath, before some of the judges of that court, that the offence or offences laid in such information, &c., was or were not committed in any other county than where, by the said information, &c., the same is or are supposed to have been

(b) 1 Salk. 373.

(c) Willes, 634.

(d) 1 Salk. 372, 3. Sel. Ni. Pri. 6 Ed. 636, &c.

(e) Cro. Car. 112. Carth. 465. 4 Durnf. & East, 116.

(f) Cro. Car. 112. W. Jon. 193. T. Raym. 394. 3 Durnf. & East, 362.

(g) Cro. Car. 146. 2 Str. 1143.

(h) 4 Durnf. & East, 109. *Rez v. Ferris*, H. 37 Geo. III. in *Seac.* 1 Wms. Saund. 5 Ed. 312, b, in *notis*.

(aa) 4 Durnf. & East, 116.

(bb) Willes, 635, (a), *Id.* n. 1.

committed; and that he believeth in his conscience the offence was committed within a year before the information or suit, within the same county where the said information or suit was commenced, the same oath to be there entered of record:"(c) And upon this clause of the statute, the proceedings were stayed on motion, in a *penal* action on the 25 Edw. III. st. 4, c. 3, where the application was made in an early stage of the cause; because no affidavit had been filed, that the offence was committed within the county where the action was brought, or within a year before the bringing of it, according to the 21 Jac. I. c. 4.(d) But in a subsequent case, where the application was not made till after verdict, the court would not stay the proceedings on a similar ground, in a *penal* action on the 21 Hen. VIII. c. 13, § 26, for non-residence.(e)

In an action for *bribery*, on the 2 Geo. II. c. 24, the courts will stay the proceedings, even after verdict, upon the clause of discovery;(f) or if there has been any wilful delay in prosecuting the action.(g) But until the defendant appears to the writ, the question as to the wilfulness of the delay does not arise: Therefore, where the writ was returnable on the first return of *Trinity* term 1821, and the plaintiff did not declare till the 1st of *June*, 1822, and no appearance had been entered for the defendant; the court held, that the proceedings could not be stayed under the above statute.(h) The proceedings have been stayed in an action on the 18 Geo. II. *c. 34, § 1, for keeping a gaming house; because, [*519] by a previous statute,(a) the penalty is payable on conviction, before a justice of the peace. And they might also, it seems, have been stayed, in an action on the general turnpike act, 13 Geo. III. c. 84, § 19,(b) for using a greater number of horses than is thereby allowed for drawing wagons, &c., on the ground of its being necessary by reason of deep snow or ice; but, in order to stay the proceedings on that ground, an application must be made to the court above, in which the action is brought, and the defence is not available at *nisi prius*.(cc) In an action for *non-residence*, on the statute 43 Geo. III. c. 84, § 12, the proceedings were stayed after declaration, in the Common Pleas, on the statute 54 Geo. III. c. 6:(dd) But the court would not stay the proceedings, on a writ suggested to be the commencement of an action for non-residence, before the delivery of the declaration, without some other evidence of the nature of the action:(ee) and they refused to extend the relief of the statute, to a case where the defendant had obtained a rule to compound, before it had passed.(ff)

(c) § 5.

(d) 2 Durnf. & East, 274.

(e) 3 Durnf. & East, 362; and see 2 Str. 1081. 1 H. Blac. 546. 3 Maule & Sel. 429.

(f) 4 Bur. 2287. 1 Blac. Rep. 665, S. C.; but see 3 Wils. 35. 2 Wms. Saund. 5 Ed. 148, b, c, where the party was put to his *audita querela*.(g) 3 Durnf. & East, 5; but see the case of *Irwin, qui tam v. Sir William Manners*, E. 44 Geo. III. K. B.

(h) 1 Dowl. & Ryl. 512.

(a) 12 Geo. II. c. 23, § 1.

(b) This statute has been since repealed, by stat. 3 Geo. IV. c. 126; and see stat. 4 Geo. IV. c. 95, to explain and amend the latter act.

(cc) 11 East, 484.

(dd) 5 Taunt. 305. This statute was continued by the 54 Geo. III. c. 44. And, by the statute 54 Geo. III. c. 54, § 4, the court, or a judge, is authorized to stay the proceedings in such an action, upon certain conditions: And for determinations on this statute, see 5 Taunt. 629. 1 Marsh. 368. 5 Taunt. 807. 1 Marsh. 372, S. C. 5 Taunt. 843. 1 Marsh. 387, S. C. 6 Taunt. 198. 1 Marsh. 547, S. C. See also the statute 57 Geo. III. c. 99, § 5, &c., for enforcing the residence of spiritual persons on their benefices.

(ee) 5 Taunt. 304.

(ff) *Id.* 306.

Actions or prosecutions for the recovery of penalties on the *revenue* laws, must, by several acts of parliament, be commenced and carried on in the name of the attorney general, or other officer of the revenue. Thus, by the 26 Geo. III. c. 77, § 13, "if an action be commenced or prosecuted, for the recovery of any penalty or forfeiture, by virtue of any act relating to the *customs* or *excise*, unless the same be commenced and prosecuted in the name of the attorney general, or some officer of the said revenues, the same, and all proceedings therein, are declared to be null and void; and the court shall not permit or suffer any proceedings to be had thereupon." (g) By the 36 Geo. III. c. 104, § 38, "it shall not be lawful for any person or persons to commence or enter, or cause or procure to be commenced or entered, or filed or prosecuted, any action, suit, bill, plaint, or information, for the recovery of any penalty or penalties, inflicted by any of the laws touching or concerning *lotteries*, or by that act, unless the same be commenced, entered, filed and prosecuted, in the name of his majesty's attorney general, in the court of *Exchequer* at *Westminster*, if the offence shall be committed in *England*; or, in the name of his majesty's advocate general in the court of *Exchequer* in *Scot-*
 [*520] *land*, if the offence be there committed: *And if any action, &c., shall be commenced or entered in any other person's name or names, the same, and all proceedings thereupon had, are declared to be null and void; and the court where such proceedings shall be so commenced, shall caused the same to be stayed." And there is a similar clause in the statute 44 Geo. III. c. 98, § 10, with respect to actions, &c., for the recovery of penalties incurred by virtue of that or any other act or acts of parliament, relating to his majesty's *stamp duties*, or any other duties under the management of the commissioners of the duties on stamped vellum, parchment and paper. (a)

By the *Bank* acts, (b) the courts were authorized to stay proceedings, in actions brought against the governor and company of the Bank of *England*, during the continuance of the restriction thereby imposed on payments by the said governor and company in cash, to compel payment of any note of the said governor and company expressed to be payable on demand; or of any note of the said governor and company, made payable otherwise than on demand, or of any other debt, which the said governor and company should be willing to pay in their notes expressed to be payable on demand; until the expiration of the time limited for the continuance of such restriction.

By the *annuity* act, 17 Geo. III. c. 26, § 1, it was enacted, that "a memorial of every deed, bond, instrument, or other assurance, whereby any annuity or rent charge should be granted for one or more life or lives, or for any term of years, or greater estate, determinable on one or more life or lives, should within *twenty* days of the execution of such deed, &c., be inrolled in the high court of Chancery; and should contain the day of the month, and the year, when the deed, &c., bore date, and the names of all the parties, and for whom any of them were trustees, and of all the

(g) And see 6 Geo. IV. c. 108, § 100 *accord.*: and, by § 101, of that statute, the attorney general may enter a *noli prosequi*, on informations exhibited for penalties.

(a) And see the statute 35 Geo. III. c. 55, § 16.

(b) 37 Geo. III. c. 45, § 2. 37 Geo. III. c. 91, § 1. 38 Geo. III. c. 1, § 1. 43 Geo. III. c. 18. 59 Geo. III. c. 23. But by stat. 59 Geo. III. c. 49, § 1, the restrictions on payments in cash, under these several acts, finally ceased and determined, on the *first* day of *May*, 1823.

witnesses; and should set forth the annual sum or sums to be paid, and the name of the person or persons for whose life or lives the annuity was granted, and the consideration or considerations for granting the same; otherwise every such deed, &c., should be null and void, to all intents and purposes." By a subsequent clause,^(c) it was further enacted, that "in every deed, instrument, or other assurance, whereby any annuity or rent charge should be granted, or attempted to be granted, the *consideration* really and *bonâ fide*, (which should be in money only,) and also the name or names of the persons by whom, and on whose behalf, the said consideration, or any part thereof, should be advanced, should be fully and truly set forth and described in words at length; and in case the same should not be fully and truly set forth and described, every such deed, &c., should be null and void, to all intents and purposes."

*And, by the *fourth* section of the act, "if any part of the consideration should be *returned* to the person advancing the [*521] same; or, in case the consideration, or any part of it, was paid in *notes*, if any of the notes, with the privity and consent of the person advancing the same, should not be paid when due, or should be cancelled or destroyed, without being first paid; or if the consideration, or any part of it, was paid in *goods*; or if any part of the consideration was *retained*, on pretence of answering the future payments of the annuity, or any other pretence; in all and every of the aforesaid cases, it should and might be lawful for the person by whom the annuity or rent charge was made payable, to apply to the court in which any action was brought for payment of the annuity, or judgment entered, by *motion*, to stay proceedings on the judgment, or action; and if it should appear to the court, that such practices as aforesaid, or any of them had been used, it should and might be lawful for the court to order the deed, bond, instrument or other assurance, to be cancelled, and the judgment, if any had been entered, to be vacated."

By this latter clause the courts had, in certain cases, an *express* jurisdiction given them, by *motion*, to stay proceedings in an action brought for payment of the annuity, or on a judgment entered; and to order the deed, &c., to be cancelled, and the judgment to be vacated. In other cases, not specially provided for by the above clause, where a warrant of attorney has been given to confess a judgment, or judgment has been entered up in the King's Bench, for securing the payment of an annuity, the court, in virtue of their *general* jurisdiction, will enter into the validity of the warrant of attorney, or judgment, upon motion; and if the provisions of the act have not been complied with, will vacate the warrant of attorney, or set aside the judgment.^(a) And judgment was set aside for want of a memorial, though it had been omitted at the request of the grantor.^(b) But where an action was brought by *executors*, on a bond given by the defendant to their testator, for securing an annuity, and, upon a plea of *non est factum*, they obtained a verdict and

(c) § 3.

(a) 4 Durnf. & East, 694. 1 H. Blac. 659. 4 Bro. Ch. Cas. 310. 2 Ves. jun. 138, S. C. 6 Durnf. & East, 737. 1 Bos. & Pul. 451. 3 Taunt. 540. 10 Moore, 172. 2 Bing. 475, S. C. But where a warrant of attorney was given to enter up judgment in the Common Pleas, upon which judgment was entered up by mistake in the King's Bench, it seems that the latter court, though they will set aside the judgment, will not order the warrant of attorney to be vacated. 6 East, 241, (a).

(b) 2 Chit. Rep. 34.

judgment, and levied execution thereon, the court held this not to be a case where they could give relief, upon a summary application under the annuity act, for a defect in the memorial; *(cc)* for the act only meant to refer to such judgments on warrants of attorney, as were intended to be a part of the security for the annuity, and not to extend to cases where a judgment is obtained in the ordinary course of law, on any instrument given for securing the same. *(d)* And the court of Common Pleas [*522] set aside a judgment and warrant of attorney, *given to secure an annuity, for a defect in the memorial, without costs, because it was the case of an executor. *(a)*

Upon the *fourth* section of the act, it has been holden, that the application to the court should be made by the person by whom the annuity is payable; *(b)* but the court in one instance set aside a judgment entered on the annuity bond, and execution sued out thereon, for a defect in the memorial, upon the application of a judgment creditor of the grantor, with a view of letting in a subsequent judgment of his own. *(c)* In a later case however, where the grantor of an annuity had assigned a lease for securing the payment of it, and afterwards sold his interest in the lease to a fair purchaser, it was holden that the latter was not entitled, under that section, to apply to the court, to have the security delivered up to be cancelled, because the memorial required by the act was not duly registered. *(dd)* And where the attorney for the grantor of an annuity, at the time of the payment of the purchase money, took and retained an unreasonable part thereof for the expenses of the deed, the court on that ground would not set aside the annuity. *(e)* By the above section, the courts are expressly authorized to order the deed, &c. to be cancelled, as well as to set aside the judgment, or stay the proceedings: But where the application is made to the general jurisdiction of the court, it seems that they will only vacate the warrant of attorney, or set aside the judgment or execution; and not make any order respecting the deeds, &c. which are declared by the act to be null and void, to all intents and purposes. *(f)* And in general, the *fourth* section of the act is not imperative on the court; but it is in their discretion, either to vacate the securities given for an annuity, in case of a violation of that clause of the act, or to do so on certain terms, or to refuse to do so, according to the circumstances of each particular case. *(g)*

By the statute 53 Geo. III. c. 141, § 1, the former act was repealed, save and except so far as regarded any annuities or rent charges which had been previously granted: And it is enacted thereby, that “within *thirty* days after the execution of every deed, bond, instrument, or other assurance whereby any annuity or rent charge shall, from and after the passing of that act, be granted for one or more life or lives, or for any term of years, or greater estate, determinable on one or more life or lives, a memorial of the date of every such deed, bond, instrument, or other assurance, of the names of all the parties, and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent charge shall be

(cc) 7 Durnf. & East; 495.

(d) *Per* Ld. Kenyon, 7 Durnf. & East, 496.

(b) 7 Moore, 63. 3 Brod. & Bing. 255, S. C.

(dd) 6 Durnf. & East, 403; but see 2 East, 563.

(f) 2 Ves. jun. 138. 6 Durnf. & East, 404, 739. 7 Durnf. & East, 253. 3 East, 500. 1 Marsh. 483. 10 Moore, 172. 2 Bing. 475, S. C.; but see 1 Bos. & Pul. 66, 482.

(g) 6 Barn. & Ald. 61. 2 Dowl. & Ryl. 150, S. C.

(a) 1 Bos. & Pul. 335.

(c) 5 Durnf. & East, 9.

(e) 7 Taunt. 596.

granted, and of the person or persons by whom the same is to be beneficially received, the pecuniary consideration or *considera- [*523] tions for granting the same, and the annual sum or sums to be paid, shall be inrolled in the high court of Chancery, in the form or to the effect therein mentioned, with such alterations therein, as the nature and circumstances of any particular case may reasonably require: otherwise every such deed, bond, instrument, or other assurance, shall be null and void, to all intents and purposes."(a) And that "in every deed, bond, instrument, or other assurance, whereby any annuity or rent charge shall, from and after the passing of that act, be granted, or attempted to be granted, for one or more life or lives, or for any term of years, or greater estate, determinable on one or more life or lives, where the person or persons, to whom such annuity shall be granted, or secured to be paid, shall not be entitled thereto beneficially, the name or names of the person or persons who is or are intended to take the annuity beneficially, shall be described in such or the like manner, as is therein before required, in the inrolment; otherwise every such deed, instrument, or other assurance, shall be null and void."(b)

And "if any part of the consideration for the purchase of any such annuity or rent charge, shall be *returned* to the person advancing the same; or in case such consideration, or any part of it, shall be paid in *notes*, if any of the notes, with the privity and consent of the person advancing the same, shall not be paid when due, or shall be cancelled or destroyed, without being first paid; or if such consideration is expressed to be paid in money, but the same, or any part of it, shall be paid in *goods*; or if the consideration, or any part of it, shall be *retained*, on pretence of answering the future payments of the annuity or rent charge, or on any other pretence; in all and every the aforesaid cases, it shall be lawful for the person by whom the annuity or rent charge is made payable, or whose property is liable to be charged or affected thereby, to apply to the court, in which any action shall be brought for payment of the annuity or rent charge, or judgment entered, by motion, to stay proceedings on the action or judgment; and if it shall appear to the court that such practices as aforesaid, or any of them, have been used, it shall and may be lawful for the court to order every deed, bond, instrument, or other assurance whereby the annuity or rent charge is secured, to be cancelled, and the judgment, if any has been entered, to be vacated."(c) This act does not extend to *Scotland* or *Ireland*;(d) nor to any annuity or rent charge given by will, or by marriage settlement, or for the advancement of a *child*; nor to any annuity or rent charge secured upon *freehold*, or *copyhold* or *customary* lands, in *Great Britain* or *Ireland*, or in any of his majesty's possessions beyond seas, of equal or greater annual value than the said annuity, over and above any other annuity and the interest of any principal sum charged or secured thereon, of which the grantee had notice at the time of the grant, whereof the grantor is seised in fee simple, or fee tail in possession, or the fee simple whereof in possession the grantor is enabled to charge at the time of the *grant; or secured by the actual trans- [*524] fer of *stock*, in any of the public funds, the dividends whereof are of equal or greater annual value than the said annuity; nor to any *voluntary* annuity or rent charge, granted without regard to *pecuniary* consideration,

(a) § 2.

(b) § 4.

(c) § 6.

(d) § 10.

or money's worth; nor to any annuity or rent charge granted by any body corporate, or under any authority or trust created by act of parliament."

A mere *surety*, who charges with the payment of an annuity his estate in fee simple, of which he was seized in possession at the time of granting it, and which was of greater annual value than the annuity, is considered as a *grantor*, within the meaning of the annuity acts; (*aa*) and therefore, in such case, no memorial is required. (*bb*) Where, on a fair and *bonâ fide* sale of an interest in land, the consideration, in part or in the whole, is an annuity to be paid to the vendor, such consideration is not a *pecuniary* consideration, or money's worth, within the meaning of the statute 53 Geo. III. c. 141. Therefore, where the plaintiff had assigned an interest in coal mines to the defendant, in consideration of an annuity for her life, and for the payment of which a bond was conditioned; the court of Common Pleas held, that such bond did not require inrolment. (*c*) A memorial of an annuity deed, inrolled within *thirty* days after execution of the deed by the grantee, is good, though inrolled before execution by the grantor. (*d*) And a memorial, when necessary, need not state that the annuity is redeemable; (*e*) nor the name of the party, to whom the warrant of attorney for securing it was given; (*e*) nor for what penal sum it authorizes a confession of judgment. (*f*)

It is sufficient to state in the memorial, that the annuity was granted for the lives of A. B. &c. (naming them,) without stating their description, by residence or otherwise, or adding that the annuity was granted for their joint lives, or the life of the survivor, or for a term of years determinable on those lives. (*f*) And where an annuity deed contained a covenant by the grantor, that he would not at any time during the continuance of the annuity, go upon the seas, or to parts beyond them, without first giving the grantee *seven* days notice in writing of such his intention, in order to enable him to pay such additional *premiums* of insurance as might be incurred on account thereof, which premiums the grantor covenanted to pay to the grantee; the court of Common Pleas held, that it was not necessary to state such covenants in the memorial, under the statute. (*g*) So, where the grantor of an annuity assigned a policy of insurance on his own life to the grantee, whereby the latter was enabled to insure the life of the former at a less *premium* than he otherwise could have done, the

court held, that such assignment was no part of the consideration, and need not therefore have been set out in the memorial. [**525*]

(*a*) So, where an annuity was granted by an indenture, which also contained a release of a former annuity; the court held, that it was sufficient to describe the annuity deed in the memorial, as a grant of an annuity. (*b*)

When part of the consideration for an annuity had been deposited in the hands of the grantee's attorney, till certain houses, out of which the

(*aa*) 17 Geo. III. c. 26, § 8. 53 Geo. III. c. 141, § 10. (*bb*) 5 Barn. & Ald. 444.

(*c*) 5 Moore, 479. 2 Brod. & Bing. 702, S. C.; and see 5 Moore, 629, on stat. 17 Geo. III. c. 26, and 2 Barn. & Cres. 875. 4 Dowl. & Ryl. 549, S. C. 4 Bing. 214, on stat. 53 Geo. III. c. 141.

(*d*) 3 Bing. 215. 6 Barn. & Cres. 49. 9 Dowl. & Ryl. 113, S. C. in Error.

(*e*) 3 Barn. & Ald. 206.

(*f*) 4 Barn. & Ald. 281.

(*g*) 5 Moore, 63.

(*a*) 2 Barn. & Cres. 232. 3 Dowl. & Ryl. 263, S. C.; and see 2 Barn. & Cres. 251. 3 Dowl. & Ryl. 485, S. C. 6 Barn. & Cres. 639.

(*b*) 6 Barn. & Cres. 366.

annuity was granted, should be completed, but it appeared that the money deposited had all been paid over to the grantor, in a short time after the date of the deeds, and there was no fraud in the transaction, the court refused to set aside the annuity, on the ground that the power given to them by the above act was discretionary, and that this was not the case of a fraudulent *retainer* contemplated by the act.(c) But where, upon the grant of an annuity, the agent of the grantee, on paying the consideration money, *retained*, or caused to be returned to him, a considerable sum for the expense of deeds, investigating title, journeys, &c., (two witnesses, brought from a considerable distance for the purpose of attesting the execution of the annuity deed, having first retired,) the Court of Common Pleas held this to be an illegal *retainer*, for which the grantee was responsible; and on that ground set aside the annuity, *ten* years after it had been granted and acted on, though the grantee alleged that he had given no authority for, and was ignorant of, such *retainer*.(d) And where an annuity being in arrear, and the rents of an estate on which it was secured being unpaid, the trustee of the estate, who had negotiated the annuity between the grantor and grantee, advanced a sum to the latter, in anticipation of the coming rents, and received from him, on such advance, the commission he usually received on annuity payments, the court of Common Pleas set aside an execution, which, the rents proving insufficient, was afterwards issued for this sum, in the name of the grantee, against one who, as surety for the payment of the annuity, had given a warrant of attorney, to confess judgment;(e) and also another execution, which, under similar circumstances, the grantee afterwards issued for this sum, against the grantor.(f)

It having been decided by the court of the King's Bench, that the memorial of an annuity must contain the description and place of residence of the witnesses to the annuity deed,(g) it was, in consequence of that decision, enacted and declared, by the statute 3 Geo. IV. c. 92,(h) that "by the said act of the fifty-third year of the reign of his late majesty, no further or other description of the subscribing witness or witnesses to any deed, bond, instrument, or other assurance, whereby any annuity or rent charge was or might be granted, was required in the memorial thereof, besides the names of all such witnesses; and that so the said act [*526] should be deemed, construed and taken." And, in a case arising after the passing of 3 Geo. IV. c. 92, where the witnesses to the deeds were an attorney's clerks, the court of Common Pleas held, that they were sufficiently described in the memorial, as clerks to their employer, stating his place of residence.(a) It having been determined, however, by the court of King's Bench, that the memorial of an annuity must contain the *christian* names of the subscribing witnesses to the securities; the *initials* of their christian names not being deemed sufficient;(b) it was enacted and

(c) 4 Barn. & Ald. 281.

(d) 1 Bing. 234. 8 Moore, 109, S. C.; and see 6 Moore, 491. 8 Moore, 302. 1 Bing. 287, S. C. 8 Moore, 320, n. 9 Moore, 703. 2 Bing. 370, S. C. 3 Bing. 177. 4 Bing. 26. 6 Barn. & Cres. 165.

(e) 1 Bing. 171. 7 Moore, 579, S. C.; and see 8 Moore, 224. 1 Bing. 274, S. C. 8 Moore, 324. 1 Bing. 316, S. C. 6 Barn. & Cres. 165.

(f) 1 Bing. 190. 7 Moore, 621, S. C.

(g) 5 Barn. & Ald. 444, 717. 1 Dowl. & Ryl. 374, S. C.

(h) § 1.

(a) 1 Bing. 77. 7 Moore, 382, S. C.; and see 1 Bing. 292.

(b) 2 Barn. & Cres. 1. 3 Dowl. & Ryl. 185, S. C.; and see 6 Dowl. & Ryl. 292. 5 Barn. & Cres. 258. 7 Dowl. & Ryl. 773, S. C.

declared, by the statute 7 Geo. IV. c. 75, that "by the said act of 53 Geo. III. c. 141, no further or other name or names of the subscribing witness or witnesses to any deed, bond, instrument, or other assurance, whereby any annuity or rent charge is or may be granted, is or are required in the memorial thereof, besides the names of all such witnesses, as they shall appear signed to their attestations respectively, of the execution of such deed, &c.; and so the said act shall be deemed, construed and taken:" And if the witnesses to the deed are accurately described in the memorial, it is sufficient, though they did not see the parties execute.(c)

Doubts having also arisen, whether under the said act of the fifty-third year of the reign of his late majesty, the omission to enrol a memorial of any one of the assurances for securing an annuity or rent charge, did not vitiate the whole transaction, notwithstanding the enrolment of a memorial of another deed, bond, instrument or other assurance, granting the same,(d) it was further enacted and declared, by the statute 3 Geo. IV. c. 92,(e) that "every deed, bond, instrument, or other assurance, granting any annuity or rent charge, and of which a memorial shall have been, or shall be duly enrolled, pursuant to the said act, notwithstanding the omission to enrol any other deed, bond, instrument, or assurance, for securing such annuity or rent charge, shall be valid and effectual, according to the intent meaning and true effect thereof, notwithstanding a memorial of any other deed, bond, instrument, or assurance, for securing the same annuity, shall not have been duly enrolled, pursuant to the said act: Provided always, that nothing therein contained, shall extend to give any other force or validity, to any deed, bond, instrument, or other assurance, of which a memorial shall have been duly enrolled as aforesaid, than such deed, bond, instrument, or other assurance, would have had, if any deed, bond, instrument, or other assurance, for securing the same annuity, of which a memorial shall not have been duly enrolled, had never been executed."

[*527] *The *laches* of the party applying, under the above acts, does not, it seems, furnish of itself an answer to the application.(a)

But where it appeared that he had acquiesced in the payment of the annuity, and had lain by till the persons acquainted with the original transaction were dead, the court refused to interfere, and relieve him in a summary way.(b) So, where an *ejectment* was brought to recover possession of lands extended under an *elegit*, upon a judgment confessed, which had been entered up on a warrant of attorney given for securing an annuity, it was holden to be too late for the grantor to object to the consideration of the annuity, upon a summary application for staying the proceedings, after verdict in such ejectment; because he had an opportunity of making his defence to the action.(c) And it seems that an annuity paid without objection for more than *six* years, shall be protected, by analogy

(c) 3 Bing. 215. 6 Barn. & Cres. 49. 9 Dowl. & Ry. 113, S. C. in error.

(d) 4 Bro. Ch. Cas. 310. 2 Ves. jun. 154, S. C. 6 Durnf. & East, 471. 8 Durnf. & East, 183. 1 Bos. & Pul. 451. 2 East, 563. 3 East, 500. 6 East, 243; but see 4 Durnf. & East 694. 6 Taunt. 124. 1 Marsh. 478, S. C., by which it seems, that the courts would only have set aside the deeds which were defective, or not properly memorialized.

(e) § 2.

(a) *Grant v. Foley*, T. 23 Geo. III. K. B.; and see 1 Bos. & Pul. 451. 8 Taunt. 435. 4 Moore, 402. 2 Brod. & Bing. 19, S. C.

(b) 5 Durnf. & East, 139; and see 8 Durnf. & East, 323. 2 East, 85, 565. 2 Chit. Rep. 32, 3. 4 Dowl. & Ry. 344. 7 Taunt. 596.

(c) 7 Durnf. & East, 540; and see *id.* 495. *Ante*, 521.

to the statute of limitations, against any objection *dehors* the memorial, for a supposed defect of consideration, without strong reasons to the contrary.(*d*) But where the objection to the annuity was, that some of the deeds were not witnessed by all the persons mentioned in the memorial, the court on application set aside the warrant of attorney, though at the distance of near *twenty* years, and after the principal parties and witnesses to the transaction were dead; the merits of such objection not depending on any testimony lost by the delay.(*e*) And a *seire facias* to revive a judgment entered up by warrant of attorney, given to secure the payment of an annuity, and a *fiery facias* issued thereon, have been holden, in the Exchequer, not to be such proceedings, as to call upon the grantor of the annuity to avail himself of an objection to the memorial.(*f*)

If a question, respecting the validity of an annuity, has been decided by a court of competent jurisdiction, the court of King's Bench will not suffer it to be agitated again, if the point has been directly determined: but that is not the case, where the question has only incidentally occurred, and has not been positively decided.(*g*) In a modern case however, where, upon a previous application to set aside an annuity, for non-compliance with the requisites of the act, the rule was discharged upon discussion of the merits, the court of King's Bench would not entertain a similar application between the same parties, on the same state of facts, though grounded upon a new objection to the annuity, which was not before urged or considered.(*h*) And "where a rule to show cause is obtained in this court, for the purpose of setting aside an annuity or annuities, the several objections thereto, intended to be insisted upon by the counsel, at the time of making the rule absolute, must be stated in the rule *nisi*:"(*i*) which practice has also been adopted in the court of Common Pleas.

*In an action of *trespass*, the proceedings were stayed, in the [*528] court of King's Bench, on the ground that the plaintiff had before brought an action of *replevin*, and recovered damages for the same cause of action.(*a*) But, in a *qui tam* action for insuring lottery tickets, contrary to the 16 Geo. III. c. 34, the court of King's Bench would not stay the proceedings, upon an affidavit of the defendant, that a former action had been brought against him in the Common Pleas, for the same offence, in which he had had leave to compound; but said he must plead such matter specially.(*b*) And the court would not stay the proceedings, in an action against a sheriff's officer, on the 32 Geo. II. c. 28, § 12, though a similar action had been commenced against the sheriff, for the same offence.(*c*) Yet, where actions had been brought against both, and a verdict obtained in each, the court stayed the proceedings, on payment of one penalty, and the costs in both actions.(*dd*) So, where A. and B. having recovered in separate actions for *libels*, against different parties engaged in the management and publication of the same newspaper, commenced fresh actions against the same parties, each suing that party against

(*d*) 2 East, 85.

(*e*) *Id.* 563; and see 8 Taunt. 435. 4 Moore, 402. 2 Brod. & Bing. 19, S. C.

(*f*) Forrest, 125.

(*g*) 6 Durnf. & East, 471; and see 8 Durnf. & East, 328. 2 East, 85, 565.

(*h*) 7 Durnf. & East, 455; and see *id.* 495, 540. 1 East, 537. 2 East, 565, 6. 13 East, 590.

(*i*) R. T. 42 Geo. III. K. B. 2 East, 569.

(*a*) *Lamb v. Nutt*, T. 29 Geo. III. K. B.; and see 1 Bing. 307.

(*b*) Cowp. 744.

(*c*) 2 Durnf. & East, 512.

(*dd*) *Id.* 712.

whom the other had recovered, the court would not interfere in a summary way, to set aside the latter proceedings.(e) And where the plaintiff brought *replevin* for goods levied under a warrant of distress, for an assessment made by a special sessions under the highway act, 13 Geo. III. c. 78, § 47, on the ground of the premises for which he was assessed, being situated without the township which was liable to repair the road, the court of Common Pleas refused to set aside the proceedings.(f) And they would not stay proceedings in an action, on the ground of a bill depending in Chancery for the same cause;(g) nor in order to abide the event of a decision in the mayor's court, as to the existence of the debt, on a foreign attachment.(h) So, in a late case, the court of King's Bench refused to stay execution after verdict and judgment, which was affirmed on error, until the trial of an indictment for perjury against two of the plaintiff's witnesses in the action; and because this seemed to be a new and dangerous experiment, the court ordered the rule to be discharged with costs.(i)

And where a true bill of indictment for perjury was found, and [*529] the judge at the assizes having refused to try it, on *account of manifest imperfections in the record, a new bill was preferred, whereupon the defendant was found guilty, but a new trial was granted; and then the prosecutor, instead of taking down the old record again, preferred a new indictment for the same offence, and removed it into the King's Bench by *certiorari*; the court refused to stay the proceedings upon that indictment, until the prosecutor paid the costs of the former proceedings.(a)

In an action brought against the sheriff, for money levied under a *feri facias*, without any previous demand, the court of King's Bench stayed the proceedings, upon payment of the sum levied, without costs.(b) But the court of Common Pleas would not stay the proceedings, in an action for the escape of a certificated bankrupt, taken in execution, and released by the sheriff upon production of his certificate:(c) nor, in an action on a *replevin* bond, because the action was commenced before breach; for it might have been pleaded:(d) So, where a plaintiff deposited a negotiable instrument, on which he was suing, in the hands of a third person, at the same time giving him notice of the action; the court held, that he did not thereby part with his right of action; and though the depositary sued on the same instrument, they would not, at the instance of the defendant, stay the proceedings in the first action.(ee) And that court refused to stay the proceedings in an action brought by the provisional assignee of the

(e) 2 Bos. & Pul. 69.

(f) 2 New Rep. C. P. 399; and see 6 Durnf. & East, 522. 8 Taunt. 521. 2 Moore, 574, S. C., *accord*. Where an act of parliament orders a distress and sale of goods, as for a penalty, after conviction, on the game laws, 1 Str. 567. 8 Mod. 208, 9, S. C. 2 Str. 1184; or on the highway act, 1 Barnardist. K. B. 110; Willes, 668; or for a fine imposed on an officer, by commissioners of land tax, Bunb. 14; or for the wages of labourers, on the statute 20 Geo. II. c. 19, § 1; 3 Moore, 294, this is in the nature of an execution; and the conviction being conclusive, a *replevin* will not lie: But the court in these cases will not stay the proceedings; though, in some of them, they granted an attachment for contempt against the officer for granting, and the party for obtaining the *replevin*: and see Gilb. Rep. 121, 2. Bac. Abr. tit. *Replevin*, C. *Bradshaw's case*, Willes, 672, (b). 2 Blac. Rep. 1330. 3 Maule & Sel. 525. 2 Dowl. & Ry. 13.

(g) 2 Bos. & Pul. 137; and see 9 Price, 391.

(h) 6 Taunt. 74.

(a) 5 Barn. & Cres. 761. 8 Dowl. & Ry. 590, S. C.

(b) 3 Barn. & Ald. 696.

(d) 5 Taunt. 776.

(i) 4 Maule & Sel. 140.

(c) 4 Taunt. 631.

(ee) 1 Taunt. 109.

insolvent debtors' court, on an objection that it was not proved, at the trial of the cause, that the assignee had the authority of the latter court to proceed, pursuant to the statute 1 Geo. IV. c. 119, § 11.(f)

When an action is brought pending a reference, which it has been agreed shall operate as a stay of proceedings.(g) or otherwise contrary to good faith, the courts will not suffer the plaintiff to proceed in it: And they will stay the proceedings, when the action is brought by an attorney, without proper authority; for otherwise the defendant might be twice charged.(h) So, where an action was brought against an agent for prize money, the court of King's Bench set aside the proceedings, with costs to be paid by the attorney; because the letter of attorney from the plaintiff, to receive the prize money, was not duly attested, pursuant to the 20 Geo. II. c. 24, § 6.(i) And, in the Common Pleas, where claims were made on a prize agent, by several persons, for prize money due to a sailor, he was permitted, as a public officer, to pay the money into court, for the benefit of the claimant who should prove his authority to receive it.(k) But where a feme covert living apart from her husband, under a sentence of separation, with alimony allowed *pendente lite* in the ecclesiastical court, brought *trespass* in her husband's name, for breaking and [*530] entering her house, and taking her goods, the court of King's Bench refused, on the application of the defendants, to set aside the proceedings; though supported by an affidavit of the husband, that the action was brought without his authority.(l)

On showing cause against a rule for staying proceedings, in an action on a promissory note, in the King's Bench, on an affidavit that the note was obtained without consideration, it being objected that the court would not interfere in this matter, which was proper for the trial of the cause; the court said, it was often done on such applications, if the other side did not contradict the assertion of the defendant; but when there were contradictory affidavits, the court would not interfere in this summary way, but put the defendant to insist on it as a defence at the trial.(b) And where an action had been settled, by payment of the debt, and giving a note of hand for the costs, amounting to 1*l.* 11*s.* 6*d.* which note not being paid on demand, the plaintiff's attorney signed judgment, the court set it aside; saying, that by taking the debt, and note for the costs, the amount was liquidated, and judgment could not be signed in an action that was so settled; and that an action might certainly have been brought on the note in the county court, and the value recovered, at much less expense than by signing judgment in the court above.(e) But where there was an undertaking to pay the costs of an action in a limited time, and they were not so paid, it was holden that the plaintiff might proceed in the action for nominal damages.(d)

There are other grounds for staying the proceedings; not absolutely,

(f) 3 Bing. 370.

(g) *Post*, Chap. XXXVI.; but see 2 Moore, 30.

(h) 1 Durnf. & East, 62. 1 Chit. Rep. 194; but see *id.* 193. (b) *Ante*, 93.

(i) *O'Hara v. Innes*, M. 27 Geo. III. K. B.; and see the statutes 26 Geo. III. c. 63, § 1, 2. 32 Geo. III. c. 34, § 1, 2. 55 Geo. III. c. 60. 1 Bos. & Pul. 161. Man Ex. Pr. 407.

(k) 1 Taunt. 166.

(a) 9 East, 471; and see 2 Chit. Rep. 392.

(b) *Turner v. Taylor*, E. 23 Geo. III. K. B.

(c) *Brown, Executor, v. Middleton*, E. 22 Geo. III. K. B.

(d) *Butcher v. Holland*, H. 25 Geo. III. K. B.

but for a time, or until something be done for the benefit of the defendant: These are, pending a writ of error; until security be given for the payment of costs; or until the costs are paid, of a former action for the same cause.

A writ of error regularly sued out is a *supersedeas* of execution, in the King's Bench, from the time of its allowance; *(e)* or, in the Common Pleas, from the delivery of it to the clerk of the errors: *(f)* provided bail, when requisite, be put in thereon in due time. *(g)* But this does not prevent the plaintiff from proceeding by *seire facias*, or action of *debt* on the judgment, against the principal; nor, after the return of *non est inventus* to a *capias ad satisfaciendum*, by *seire facias*, or action of *debt* on the recognizance, against the bail. In such cases, however, if the writ of error be not evidently brought for the mere purpose of delay, the courts will stay the proceedings upon terms, pending the writ of error. *(h)* But this is not a matter of course: *(i)* and if it be apparent to the court, that the writ of error is brought merely for delay, they will not stay the proceedings. *(k)* *How that is to be made out, depends upon the circumstances of each particular case. In general, the court will not stay the proceedings, where the defendant or his attorney has declared, that the writ of error was brought only for delay, or used expressions tantamount to such a declaration: *(a)* But the declaration of an attorney's clerk, *(b)* or of one of several defendants, *(c)* or the *belief* of the plaintiff, or his attorney, *(dd)* that it is brought for delay, is not sufficient; nor that the defendant had acknowledged the debt to be due, before and since the commencement of the action; *(ee)* nor that he had said to the plaintiff, that when he could put off the matter no longer, he would go to gaol; *(ff)* nor that his attorney had declared, that the debt would be settled, and that time was all the defendant wanted. *(gg)* The court of King's Bench, in one case. *(hh)* ordered the proceedings to be stayed, pending a writ of error, on a judgment of *nonsuit*; although there was no declaration of the defendant, or his attorney, that it was brought for delay: and there was a similar decision in the Common Pleas. *(ii)* But it is now settled, in both courts, that the proceedings cannot be stayed, pending a writ of error on such judgment, unless some real error be pointed out. *(kk)* And where the defendants, on a judgment recovered in the Common Pleas, first brought a

(e) 1 Salk. 321. 1 Bur. 340.

(f) Barnes, 265, 269.

(g) 2 Str. 781. 1 Durnf. & East, 279; and see 2 Chit. Rep. 106.

(h) 1 Str. 419. 1 Wils. 120. 3 Bur. 1389. Cowp. 72. 3 Durnf. & East, 78.

(i) 2 Durnf. & East, 78.

(k) Carter v. Roberts, M. 28 Geo. III. K. B. Per Buller, J. 4 Durnf. & East, 436, n, *(c)*. 1 Smith, R. 335, accord. Cowp. 72, *semb. contra*.

(a) 3 Durnf. & East, 79. 5 Durnf. & East, 714. 2 H. Blac. 30. 2 Bos. & Pul. 329. Forrest, 26, 7. 2 Chit. Rep. 191. 2 Maule & Sel. 474, 476. 1 Barn. & Cres. 287. 6 Dowl. & Ryl. 509. 3 Bing. 169.

(b) Per Cur. M. 45 Geo. III. K. B. 2 Smith, R. 60, S. C. 2 Chit. Rep. 193.

(c) 9 Moore, 563. 2 Bing. 304, S. C.

(d) 3 Durnf. & East, 78. Cleghorn v. Ireland, E. 28 Geo. III. K. B. 2 Price, 299. 3 Dowl. & Ryl. 233, 4.

(ee) 6 Moore, 45.

(ff) Per Cur. M. 41 Geo. III. K. B.; and see 2 Chit. Rep. 191. 7 Taunt. 537. 1 Moore, 253, S. C. 9 Price, 606.

(gg) 1 New Rep. C. P. 307; and see 9 Price, 606.

(hh) 5 Durnf. & East, 669.

(ii) Bishop v. Fry, T. 2 Geo. IV. C. P.

(kk) 4 Durnf. & East, 436. 2 Dowl. & Ryl. 208, K. B. 1 H. Blac. 432. 9 Moore, 603. 2 Bing. 626, S. C. C. P.

writ of error in the King's Bench, and then brought another returnable in Parliament, after which they *nonprossed* the first writ of error, and then obtained a rule to show cause, why the proceedings in an action upon the judgment brought in the King's Bench should not be stayed, pending the second writ of error, the latter court discharged the rule with costs; as it plainly appeared, from the defendant's own conduct, that there was no foundation for a writ of error, and that it could only be brought for vexatious purposes.(l)

In order to stay the proceedings in an action of *debt* on judgment, pending a writ of error, it is necessary, if the action be bailable, that the defendant should be first in court, by putting in and perfecting bail.(m) And where an action is brought upon a judgment of the Common Pleas, the court of King's Bench will not stay the proceedings, pending a writ of error, without the defendant's giving judgment in the second action,(n) and *undertaking not to bring a writ of error upon that [*532] judgment.(a) But if the action be brought upon a judgment of the King's Bench, these terms make no part of the rule; because in general, actions on judgments are vexatious, and the plaintiff might have his execution on the first judgment:(b) And where the proceedings were stayed without imposing these terms, and the plaintiff died before judgment affirmed, the court would not afterwards permit judgment to be entered *nunc pro tunc*.(c)

If the defendant bring a writ of error, after which the plaintiff bring an action on the judgment and recover, he cannot sue out execution on the second judgment, in the King's Bench, till the writ of error be determined.(d) But where, several years having elapsed after judgment obtained, the plaintiff brought an action upon the judgment, and after judgment signed in that action, the defendant sued out a writ of error upon the first judgment; the court of King's Bench held, that the plaintiff might notwithstanding take out execution on the second judgment:(e) And so, in the Common Pleas, the plaintiff may take out execution on the second judgment, notwithstanding the writ of error, unless the defendant move to stay the proceedings.(f)

On a *scire facias*, or action of *debt* on recognizance against bail, when a writ of error is allowed on the judgment in the original action, before the expiration of the time allowed for the bail to surrender their principal, the court of King's Bench, without regard to the time when the application is made, will stay the proceedings, until the writ of error be determined;(g) the bail undertaking to pay the condemnation money, or surrender the defendant into the custody of the marshal, within *four* days next after the determination of the writ of error, in case the same shall be

(l) 2 Durnf. & East, 78; but see 6 Durnf. & East, 400.

(m) 5 Durnf. & East, 9. 6 Durnf. & East, 455. 5 Barn. & Ald. 903.

(n) *Per Buller*, J. T. 21 Geo. III. K. B. 4 Durnf. & East, 638; and see Cas. Pr. C. P. 112. Pr. Reg. 82, S. C.

(a) Cowp. 72. *Swann v. Boulton*, II. 35 Geo. III. K. B.; and see 2 Blac. Rep. 780, C. P.

(b) *Per Buller*, J. T. 21 Geo. III. K. B. 4 Durnf. & East, 638; and see Cas. Pr. C. P. 112. Pr. Reg. 82, S. C.

(c) 1 Durnf. & East, 637.

(d) 3 Durnf. & East, 643. 4 Bur. 2454, S. P.; but see 1 Str. 526, *scmb. contra*.

(e) 3 Barn. & Ald. 275; and see 1 Str. 526, *accord*.

(f) Barnes, 202. Cas. Pr. C. P. 129, S. C. Willes, 183. Cas. Pr. C. P. 159, S. C. Willes, 184. Barnes, 203, S. C.

(g) 1 Str. 419.

determined in favour of the defendant in error: *(h)* And so, in the Common Pleas, where the application is made by the bail, within the time allowed for surrendering their principal, the court will stay the proceedings against them, pending the writ of error, without their giving judgment in the *scire facias*, or action of *debt* on the recognizance; which would preclude them from surrendering the defendant. *(i)* But if the bail in that court do not apply to stay the proceedings pending error, till their time to surrender is out, the court will not give them any time for that purpose, but only *four* days to pay the money in, after the judgment is affirmed: *(k)* And in such case, they must undertake to pay not only the condemnation

[*533] money, but also the costs of the action against themselves, *the costs of the application, and, where there is no bail in error, the costs of the proceedings in error. *(a)* In the Exchequer, when a writ of error is allowed in the original action, and the bail apply within the time allowed them for surrendering their principal, the court will give them the same time to surrender him after judgment affirmed, or writ of error non-prossed, as they would have had at the time of the allowance of the writ of error: *(b)* And where the application is not made by the bail, until after the expiration of the time allowed for surrendering the principal, the court will stay proceedings against them, until the writ of error brought in the original action is determined. *(c)* But bail, in that court, are not allowed *four* days to surrender their principal, after the determination of a writ of error, where the plaintiff has proceeded by *subpœna*, and the writ of error was brought after the return of the *capias ad satisfaciendum*. *(d)*

Where error was not brought till it was too late for the bail to surrender, the court of King's Bench in one case would not stay the proceedings. *(e)* But, in a subsequent case, *(f)* the proceedings were stayed; the bail undertaking to pay the condemnation money, and the costs on the *scire facias*, in *four* days after affirmance; and in this case, there being no bail on the writ of error, the court made the bail also undertake to pay the costs on the writ of error, in case the judgment was affirmed; and said, it was a favour they were asking, and they would make them submit to equitable terms. By the affirmance of the judgment in these cases, is meant the final affirmance of it; and therefore where the judgment on a writ of error was affirmed in the Exchequer Chamber, and afterwards another writ of error was brought, returnable in Parliament, the proceedings against the bail were further stayed, till the determination of the second writ of error. *(g)*

The plaintiff got judgment on the *scire facias* against bail, pending error by the principal, and took them in execution; and, on their moving to be discharged, the court of King's Bench said: "Though you might have applied, and had the proceedings stayed, yet we will not set them aside: If an action of *debt* had been brought upon the judgment, we should have granted an imparlance, if it had been asked: but we never set aside the judgment, when it is once signed; because we take it you, by your

(h) 1 Bur. 340. 11 East, 316; but see 2 Str. 781, 872, 1270. 3 East, 546, *semb. contra*.

(i) Barnes, 66, 68. Cas. Pr. C. P. 112. Pr. Reg. 82, S. C.

(k) 1 New Rep. C. P. 67. 11 East, 319; and see Barnes, 86.

(a) 1 New Rep. C. P. 67.

(b) 2 Price, 296.

(c) Forrest, 25.

(d) Wightw. 79. *Ante*, 284.

(e) 1 Str. 443.

(f) 2 Str. 877.

(g) 5 Bur. 2819.

not applying in time, have submitted to meet the plaintiff. *Quod fieri non debet, factum valet.*"(h)

In *ejectment*,(i) or actions *qui tam*,(k) when the lessor of the plaintiff, or the plaintiff himself, is unknown to the defendant, the latter may call for an account of his residence or place of abode, from the opposite attorney; and if he refuse to give it, or give in a fictitious account, of a person who cannot be found, the courts will stay the proceedings, until security be *given for the payment of costs.(a) So, in a joint action [*534] by three plaintiffs for a libel, the defendant may call on the attorney of one of them, for an account of the places of residence and occupations of the other two.(b) So, in an action of *trespass* and *assault*, the court compelled the plaintiff to disclose to the defendants his proper addition and place of residence; his identity being material to their defence on the trial, and the proceedings were stayed until the disclosure was made.(c) And, where the defendant in *assumpsit* having pleaded in abatement, that four others were jointly liable with himself, the plaintiff applied to the defendant's attorney to give the places of residence and additions of those persons, which he refused, unless the action were discontinued; the court of King's Bench, under these circumstances, made a rule absolute for the defendant to deliver such particulars, or in default thereof for setting aside the plea.(d) But, except in the above instances, the defendant is not allowed to call on the plaintiff's attorney, for an account of the residence or place of abode of his client:(e) And after verdict in a penal action, the court of Common Pleas would not compel an attorney to discover it.(f)

It was not formerly usual to require security for costs, where the plaintiff resided abroad.(g) except in *ejectment*,(hh) or actions *qui tam*:(ii) For it was considered, that such a proceeding might have affected trade, by excluding foreigners from our courts; and would be a means of clogging the course of justice. But now, although a plaintiff is not compellable to give security for costs, merely as a foreigner, if he reside in this country:(kk) yet, whether he be a foreigner or native, if he reside abroad, out of the reach of the process of the court, the proceedings may in general be stayed, on a proper *affidavit*,(l) till his return, or security be given for the payment of costs:(m) And upon this ground proceedings have been stayed,

(h) 1 Str. 526. Barnes, 202, *accord*; but see 4 Bur. 2454. 3 Durnf. & East, 643, *semb. contra*.

(i) 2 Str. 681. Ad. Eject. 2 Ed. 315.

(k) 2 Str. 697, 705. Barnes, 126.

(a) Ad. Eject. 2 Ed. 315.

(b) 6 Moore, 110.

(c) 5 Barn. & Ald. 540. 1 Dowl. & Ry. 174, S. C.

(d) 4 Barn. & Ald. 93; and see 1 Younge & J. 257.

(e) 2 Str. 705; but see 1 Str. 402.

(f) 1 H. Blac. 534; and see Barnes, 126.

(g) 2 Str. 1206. 1 Wils. 266. Say. Costs, 155. 2 Bur. 1026. 4 Bur. 2105. Cowp. 24, 158, 322. 1 H. Blac. 106. And see 2 Austr. 359, by which it seems that, in the Exchequer, a plaintiff residing abroad is not compellable to give security for costs.

(hh) 2 Bur. 1177. Say. Costs, 531, S. C.

(ii) 1 Str. 697. 2 Str. 1206. 1 Wils. 266.

(kk) 1 Ken. 469. Say. Costs, 155, c. S. C. 1 H. Blac. 106. 6 Taunt. 20. 1 Marsh. 421, S. C. 3 Moore, 78. 8 Taunt. 737, S. C.

(l) Append. Chap. XX. § 9.

(m) *Elan v. Rees*, H. 24 Geo. III. K. B. *Lando v. Corbett & others*, M. 26 Geo. III. K. B. 1 Durnf. & East, 267, 362, 491. 2 H. Blac. 118. 2 Austr. 359. 1 Taunt. 64. 2 Chit. Rep. 152, (a).

where the plaintiff has been resident in *Scotland*,⁽ⁿ⁾ or *Ireland*.^(o) So, if the plaintiff, being a foreigner by birth, and having no house of trade or permanent residence in this country, has expressed his determination of going abroad, to reside there permanently, the court will compel him to give security for costs.^(p) And where the plaintiff, after issue [*535] joined, has *been convicted of felony, and received sentence of transportation, the court of King's Bench will compel him, or his attorney, to give security for costs, retrospective as well as prospective.^(a) In an action by *executors*, the plaintiffs, residing abroad, may be compelled to give security for costs:^(b) And, by a late act of parliament,^(c) it may be required in an action for non-residence. A defendant in *replevin*, residing out of the jurisdiction of the court, is compellable to give security for costs.^(d) And where a plaintiff in error resides abroad, he may be compelled to give such security: and in default thereof, the defendant in error will be permitted to proceed on his judgment, notwithstanding the writ of error.^(e) The rule requiring such security, however, has been relaxed by the court of Common Pleas, in favour of foreign seamen, serving on board *English* ships;^(f) or being in the habit of navigating them to and from the ports of this country:^(g) And where the plaintiff was a prisoner in *France*,^(h) or an *English* officer serving in *South America*,⁽ⁱ⁾ that court refused to grant a rule, compelling him to give security for costs. The reason for obliging a plaintiff to give such security, is not mutual: Therefore, where a defendant moves that the plaintiff, residing abroad, should give security for costs, the court will not make the rule mutual, on the ground that the defendant is also resident abroad.^(k) If the plaintiff be a native of *England*, and go abroad for a mere temporary purpose, the court will not compel him to give security for costs.^(l) And if one of several plaintiffs reside in this country, the courts will not require security to be given for costs, though the other plaintiff be a foreigner, residing abroad;^(m) even though the first-mentioned plaintiff be a bankrupt, in execution for debt.⁽ⁿⁿ⁾ In the Exchequer, plaintiffs, being resident in a foreign country, out of the jurisdiction, may be restrained from proceeding, until they give security for costs.^(oo)

The above are the principal, and were formerly considered as the only grounds upon which the proceedings can be stayed, for want of security for costs: It being holden, that they shall not be stayed, even in *ejectment*,^(pp) or a *qui tam* action,^(qq) merely on account of the poverty of the plaintiff, or his lessor; or because the plaintiff is protected as a foreign

(n) *McLean v. Austin*, M. 36 Geo. III. K. B. *Sheriff v. Farquharson*, M. 37 Geo. III. K. B. S. P. 6 Taunt. 379. 2 Marsh. 80, S. C.; but see 2 Bur. 1026.

(o) 1 Purnf. & East, 362. *Still v. McLeer*, M. 36 Geo. III. K. B. 2 Chit. Rep. 151. 4 Moore, 356. 5 Barn. & Ald. 265. 1 McClel. & Y. 213.

(p) 5 Barn. & Ald. 908. 1 Dowl. & Ry. 560, S. C.

(a) 1 Barn. & Ald. 159.

(b) 3 Moore, 602. 1 Brod. & Bing. 277, S. C.

(c) 57 Geo. III. c. 99, § 45.

(d) 4 Moore, 280. 1 Brod. & Bing. 505, S. C.

(e) 5 Barn. & Ald. 265.

(f) 2 H. Blac. 383. 1 Bos. & Puk. 96.

(g) 2 Taunt. 253; and see 3 Moore, 33. 8 Taunt. 711, S. C.

(h) 1 Taunt. 18.

(i) 3 Moore, 77. 8 Taunt. 736, S. C.

(k) 6 Taunt. 379. 2 Marsh. 80, S. C.

(l) 2 Chit. Rep. 152; and see 7 Moore, 613.

(m) 1 East, 431. 7 Taunt. 307.

(nn) 1 East, 431. 1 Marsh. 478, n.

(oo) 13 Price, 603; and see *id.* 489.

(pp) *Cas. Pr. C. P.* 15; and see 2 Str. 1121. *Goodtitle v. Mayo*, H. 29 Geo. III. K. B. Ante, 98, 9.

(qq) Cowp. 24. Barnes, 126. 2 H. Blac. 27.

ambassador;(r) or his servant;(s) or, in *ejectment*, where the lessor of the plaintiff is known, of full age, and resident in this country.(t) The court *of King's Bench will not stay proceedings on a *quo* [*536] *warranto* information, until the prosecutor give security for costs, on the ground that the relator is in insolvent circumstances, where it appears that he is a corporator, and no fraud is suggested.(a) And the court of Common Pleas refused to require the plaintiff to give security for costs, although it was sworn that he was insolvent, and that the action was brought in his name, for the benefit of J. S. who was alone beneficially interested in the result.(b) So, where an insolvent debtor, having assigned his property under the insolvent acts, brought an action to recover a debt incurred before the assignment, the assignees having refused to sue, that court would neither set aside the proceedings in such action, nor require the insolvent to give security for costs.(c) But where the plaintiff had been discharged under the insolvent act, after issue joined and before notice of trial given, the court of King's Bench stayed the proceedings, until the assignee, or some creditor of the plaintiff, should give security for costs.(d) And where, in *trespass* against parish officers for distraining for poor's rates, it appeared that the plaintiff had refused to pay the rates by the desire of his landlord, who was also attorney in the cause, the court stayed the proceedings, until he gave security for the costs.(e) An *infant* plaintiff cannot be compelled to give security for costs, on the ground of the insolvency of his *prochein ami*;(f) nor an uncertificated *bankrupt*, suing for his own benefit, as for the produce of his earnings since the bankruptcy;(g) though it is otherwise, where the action is brought or proceeded in by a bankrupt, whether certificated or uncertificated, for the benefit of his assignees;(h) And where the plaintiff having become bankrupt before plea pleaded, the defendant obtained an order for giving security for costs, and afterwards pleaded bankruptcy, the court of King's Bench held that the plea could not be set aside; but that the order for giving security for costs should be rescinded, the plaintiff paying the costs of that application, and the defendant's rule discharged.(i) So, where a commission of bankruptcy issued against the plaintiff, who was gone with his family to *New York*, upon the petition of the defendant, who was the only creditor, and chose himself sole assignee; and the plaintiff brought an action against the defendant, to try the commission; the court of Common Pleas refused to stay the proceedings, till he should give security for costs; for in this case, the defendant having possessed himself of all the plaintiff's property as assignee, had thereby rendered it impossible for the latter to give any

(r) 5 Maule & Sel. 503.

(s) *Davies qui tam v. Solomon*, T. 25 Geo. III. K. B.; but see 2 P. Wms. 452. 1 Eq. Cas. Abr. 350, pl. 4.

(t) 1 Durnf. & East, 491; and see 2 H. Blac. 383. 1 Bos. & Pul. 96. 2 Bos. & Pul. 236, 437. Ad. Eject. 2 Ed. 315, 16.

(a) 2 Maule & Sel. 346; and see 2 Chit. Rep. 369, (a).

(b) 7 Moore, 344.

(c) 6 Taunt. 123. 1 Marsh. 477, S. C.

(d) 2 Barn. & Cres. 579. 4 Dowl. & Ryl. 81, S. C.

(e) 5 Barn. & Cres. 208.

(f) 1 Marsh. 4. 2 Dowl. & Ryl. 423; and see 2 Chit. Rep. 359. *Ante*, 102.

(g) *Cohen v. Bell*, T. 44 Geo. III. K. B.; and see 7 Durnf. & East, 297. 1 East, 431. 2 Taunt. 61. 7 Moore, 345.

(h) 7 Durnf. & East, 296. *Sanders v. Purse*, H. 35 Geo. III. K. B. *Cohen v. Bell*, T. 44 Geo. III. K. B. 3 Maule & Sel. 283. *Robertson v. Arnold*, H. 58 Geo. III. K. B. 2 Chit. Rep. 150.

(i) 1 Chit. Rep. 215.

pledge or counter security to those who might become bound for [*537] him.(k) *And that court would not compel such security, in an action brought by assignees, on the ground that one of the plaintiffs was a bankrupt, and the other a prisoner in *Newgate*.(a)

The motion for a rule to compel security for costs, should in all cases be made as soon as the defendant can reasonably do it, after knowledge of the fact of the plaintiff's residence abroad;(b) and a rule has been granted, in the King's Bench, after plea pleaded:(c) but where it might have been made earlier, it comes too late after issue joined, and notice of trial given.(d) In the Common Pleas, on moving for a rule *nisi*, to compel the plaintiff to give security for costs, the defendant must state in what stage the proceedings are; and the court will not grant the rule *nisi*, in a cause in which interlocutory judgment has been signed, until the judgment has been set aside.(e) But in that court it does not seem to be necessary that the motion should be made before issue joined;(f) though, after a defendant has undertaken to accept short notice of trial, he cannot compel a plaintiff, resident abroad, to give security for costs.(g) In the Exchequer, the application ought to be made in the earliest stage of the proceedings; and the court will not grant it in any case, after issue joined.(h) The defendant, if sued alone, must put in bail previous to the application:(i) But if a foreigner sue two defendants, and only one of them put in bail, that one may require the plaintiff to give security for costs, without putting in bail for the other defendant.(k) It was formerly the practice, in the King's Bench, to compel the plaintiff to give security for costs, without requiring a previous application to be made to him, or his attorney:(l) but it was afterwards determined, that where the plaintiff resided in this country, the court would not grant a rule requiring him to give such security, on the ground of bankruptcy, &c. unless application had been made to him for that purpose.(m) A distinction however was made, between compelling security for costs, and ordering a stay of proceedings; it having been determined, that where the plaintiff resided abroad, the court would compel security for costs, without a previous application to his attorney; but they would not order a stay of proceedings, unless such application had been made.(n) And at length it was decided, agreeably to the original practice, and seems to be now settled, that the court will grant a rule for the plaintiff to give security for costs, though an application has not been made to

(k) 2 New Rep. C. P. 352.

(a) 2 Taunt. 61.

(b) 2 Chit. Rep. 151, (a).

(c) *Id.* 151; and for the form of the rule *nisi* in K. B. see Append. Chap. XX. § 10.

(d) 5 East, 338. — *v. Cazenove*, T. 44 Geo. III. K. B. 2 Chit. Rep. 359. *Du Belloix v. Lord Waterpark*, E. 2 Geo. IV. 1 Dowl. & Ry. 348, (a). 5 Barn. & Ald. 702. 1 Dowl. & Ry. 348, S. C. *accord.* 6 Durnf. & East, 597, *contra.*

(e) 1 Marsh. 376.

(f) *Id.* 4, 5.

(g) 3 Taunt. 272; and see *Steel v. Lucy*, *id.* 273, (a). 1 Brod. & Bing. 278, *per Dallas*, Ch. J. 7 Moore. 361. 1 Bing. 67, S. C.

(h) 5 Price, 610; and see 1 McClel. & Y. 213.

(i) 4 Durnf. & East, 697. 2 Chit. Rep. 152.

(k) 6 Durnf. & East, 496.

(l) *Per Bayley*, J. 1 Barn. & Ald. 332.

(m) 3 Maule & Sel. 283; and see 2 Smith, R. 661.

(n) 1 Barn. & Ald. 331; and see 2 Chit. Rep. 151.

him, if it appear upon the *affidavits, that the case is such as to [*538] require the security to be given.(a)

In a second *ejectment*, the courts will stay the proceedings, until the costs are paid of a prior one, for the trial of the same title:(b) and also the costs of an action, if any has been brought, for the mesne profits.(c) In other actions, it was not formerly usual to stay the proceedings in a second action, until the costs were paid of a prior one for the same cause:(d) and particularly if the merits did not come in question on the former trial.(e) And there is said to be no general rule, by which a plaintiff is compelled to pay the costs of a first action, before he is suffered to proceed with the second: If that were the case, it might in many instances work injustice; for the plaintiff might have no other means of paying the costs, than by proceeding for the recovery of his debt.(f) And therefore, where a plaintiff having declared in *assumpsit*, against trustees of a turnpike road *generally*, went to trial, and withdrew his record, and after suffering himself to be nonprossed, sued the same trustees a second time *by name*, for the same cause of action; the court refused to stay the proceedings in the second action, until the costs of the first were paid.(g) So where a plaintiff, being nonsuited, was taken in execution by the defendant for the costs, and whilst in execution, brought another action for the same cause: the court refused to stay further proceedings in the second action, until the costs of the first were paid.(h) And it seems, that where proceedings have been set aside for irregularity, the plaintiff is not bound to pay the costs of them, before he commences a fresh action.(i) But in actions of *tort*, for a malicious arrest or prosecution, or for a trespass, &c. the court will compel the plaintiff to pay the costs of a first action, before he is allowed to proceed in a second for the same cause:(k) And in actions for the recovery of a debt, though they will not in general stay the proceedings in a second action, until the costs of a former one are paid, yet of late years this has been done in several instances, on the ground of vexation:(l) and *that, whether the former action was in the same or a dif- [*539] ferent court.(aa) In the King's Bench, this practice was not for-

(a) 2 Chit. Rep. 150. And for the form of the notice of motion, and *affidavit* to stay proceedings, till security be given for costs, see Append. Chap. XX. § 8, 9. And for the rule in K. B. for staying proceedings in *ejectment*, till such security be given, see Append. Chap. XLVI. § 89.

(b) 1 Salk. 255, 258, 9. 1 Str. 548, 554. 8 Mod. 225, S. C. 2 Str. 1152, 1206. *Smith ex dem. Jordan v. Roe*, M. 22 Geo. III. K. B. 1 Durnf. & East, 492. 1 Chit. Rep. 195, K. B. Pr. Reg. 174. *Barnes*, 133. 2 Blac. Rep. 904. Say. Costs, 239, S. C. 2 Blac. Rep. 1158, 1180, C. P.

(c) 4 East, 585. But they will not extend the rule, so as to include the *damages* in the action for the mesne profits, however vexations the proceedings of the lessor of the plaintiff may have been. 15 East, 233.

(d) 2 Str. 1206. Cowp. 322. Say. Costs, 251, S. C. 1 Durnf. & East, 491, 2. K. B. *Barnes*, 125, C. P.; but see 1 Vent. 190.

(e) 1 Ld. Raym. 697. 2 Blac. Rep. 809. 1 H. Blac. 10.

(f) *Per Bayley, J.* 3 Dowl. & Ry. 51. 8 Dowl. & Ry. 43.

(g) 3 Dowl. & Ry. 53.

(h) 8 Dowl. & Ry. 42.

(i) 2 Chit. Rep. 146.

(k) 2 Durnf. & East, 511. 8 Taunt. 497. 2 Moore, 460, S. C. 3 Dowl. & Ry. 54.

(l) *Bond v. Gooch*, E. 23 Geo. III. K. B. Say. Costs, 245, 247. 2 Blac. Rep. 741. 3 Wils. 149, S. C. C. P.; but see 1 H. Blac. 10. 2 Smith, R. 423.

(aa) *Nevitt v. Lade*, E. 24 Geo. III. K. B. 1 Taunt. 565. 8 Taunt. 407. 2 Moore, 460, S. C.

merly confined to cases where a trial was had in the former action; but applied equally where the cause was put an end to by a judgment of *non-pros*,^(a) or as in a case of nonsuit.^(b) And, where an action was brought by husband and wife, the court stayed the proceedings, until the payment of costs in a former action, at the suit of the husband only; it being for the same demand.^(c) In the Common Pleas, the court, it is said, never interferes, unless the merits of the case have been tried in the former action.^(d) But where the plaintiff discontinued an action stayed in the King's Bench by a consolidation rule, and commenced an action against the same defendant for the same cause in the Common Pleas, that court stayed the proceedings, until after the trial of the cause mentioned in the rule.^(e)[1]

(a) *Nevitt v. Lade*, E. 24 Geo. III. K. B. 1 Taunt. 565. 8 Taunt. 407. 2 Moore, 460, S. C.

(b) *Per Cur.* M. 41 Geo. III. K. B. Ad. Eject. 2 Ed. 318.

(c) *Lampley and wife v. Sands*, H. 25 Geo. III. K. B.

(d) 3 Bos. & Pul. 23, (a); and see 2 Blac. Rep. 809. 1 H. Blac. 10.

(e) 1 Taunt. 565.

[1] It may here be proper to notice, as connected with the subject of staying proceedings, the provisions of the statute 1 & 2 W. IV. c. 58, to enable courts of law to give relief against adverse claims, made upon persons having no interest in the subject of such claims. These provisions are of two kinds; first, such as relate to the property in money or goods, where claims are made by different parties, one of whom has brought an action against the person in possession of them, and the defendant does not claim any interest therein; and secondly, for the relief of sheriffs and other officers, in execution of process against goods and chattels.

Before the making of the above statute, it often happened, that a person sued at law for the recovery of money or goods, wherein he had no interest, and which were also claimed of him by some third party, had no means of relieving himself from such adverse claims, but by a suit in equity against the plaintiff and such third party, usually called a bill of *Interpleader*, which was attended with expense and delay; for remedy whereof, it is enacted by the above statute, that "upon application made by or on the behalf of any defendant, sued in any of his majesty's courts of law at *Westminster*, or in the court of Common Pleas of the county palatine of *Lancaster*, or the court of pleas in the county palatine of *Durham*, in any action of *assumpsit*, *debt*, *detinue*, or *trover*, such application being made after declaration and before plea, by *affidavit* or otherwise, showing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed, or supposed to belong to some third party, who has sued, or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into court, or to pay or dispose of the subject-matter of the action, in such manner as the court, or any judge thereof, may order or direct; it shall be lawful for the court, or any judge thereof, to make rules, and orders, calling upon such third party to appear, and to state the nature and particulars of his claim, and maintain or relinquish his claim; and upon such rule or order, to hear the allegations as well of such third party as of the plaintiff, and in the mean time to stay the proceedings in such action; and finally, to order such third party to make himself defendant in the same, or some other action, or to proceed to trial on one or more *feigned* issue or issues; and also to direct which of the parties shall be plaintiff or defendant on such trial; or, with the consent of the plaintiff and such third party, their counsel or attorneys, to dispose of the merits of their claims, and determine the same, in a summary manner; and to make such other rules and orders therein, as to costs and all other matters, as may appear to be just and reasonable: Stat. 1 & 2 W. IV. c. 58, § 1; and that the judgment in any such action or issue as may be directed by the court or judge, and the decision of the court or judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them." *Id.* § 2.

"That if such third party shall not appear, upon such rule or order, to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the court or judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators; saving,

*CHAPTER XXI.

Of Compromising, and Compounding the Action.[A]

WHEN the proceedings are regular, and cannot be stayed, on any of the

nevertheless, the right or claim of such third party against the plaintiff; and thereupon to make such order, between such defendant and the plaintiff, as to costs and other matters, as may appear just and reasonable." *Id.* § 3.

"Provided always, that no order shall be made in pursuance of that act, by a single judge of the court of pleas of the said county palatine of *Durham*, who shall not also be a judge of one of the said courts at *Westminster*: and that every order to be made in pursuance of that act, by a single judge not sitting in open court, shall be liable to be rescinded or altered by the court, in like manner as other orders made by a single judge." *Id.* § 4. "Provided, also, that if, upon application to a judge in the first instance, or in any later

[A] The compromise of doubtful claims is a good consideration to uphold a contract, and courts will not investigate the merits or demerits of the different claims, for the purpose of setting aside such compromise. *Fisher v. May*, 2 Bibb, 449. *Taylor v. Patrick*, 1 Bibb, 168, S. P. *Union Bank v. Geary*, 5 Pet. 114. But a compromise obtained from a party ignorant of his rights, will be set aside by a court of chancery. *Anderson v. Bacon*, 1 Marsh. 51. Or founded on misinformation and delusion. *Mosby v. Leeds*, 3 Call, 439. Or if it be obtained from a plaintiff, through the misrepresentation of a witness, and by the influence of his testimony and the persuasion of arbitrators to whom the matter in dispute had been submitted, if the defendant knew of such misrepresentation, and unduly availed himself of such influence. *Hoge v. Hoge*, 1 Watts, 163.

A party who has agreed by way of compromise, to abide the action of the legislature on his rights, cannot, in avoidance of his agreement, avail himself of the unconstitutionality of an act that destroys his claim. *Walker v. Lipton*, 3 Dana, 5. Where two parties claim title to land, and they compromise by one party's conveying the land with warranty, and the other party paying him a sum of money for such conveyance, the adjustment is binding if there be no fraud or imposition in obtaining it. *Moore v. Fitzwater*, 2 Rand. 442. A promissory note, given to compromise a contingent liability, cannot be avoided by showing that the maker was not in fact or in law liable. *Holcomb v. Stimpson*, 8 Verm. 141. If parties compromise after an action of ejectment is brought, and the defendant buys the plaintiff's title and mortgages the premises to secure the purchase money, and judgment is obtained on the mortgage, and the premises are sold, and an action of ejectment is brought to recover possession, the defendant cannot in this action, defend his possession by the same evidence which he might have given in the first action. The compromise concludes him. *Bennett v. Paine*, 5 Watts, 259. *Paine v. Bennett*, 2 Watts, 427. If a vendor of land covenants that if any part of it is lost, he will convey, of another tract, two acres for one, and a paramount title appears, of which the vendor has notice, and he sells the land out of which indemnity was to be made for a price per acre equal to that which he received for the tract first sold, he may be held accountable to the first vendee for the proceeds of twice as many acres as he lost, though the amount be double the sum which such vendee paid for it; and the vendor's bond given for a compromise on this principle cannot be relieved against. *Butler v. Triplett*, 1 Dana, 154.

Propositions made by either party, on a treaty for compromising their difficulties, if ineffectual, are not to be used in evidence in a future action in court. *Baird v. Rice*, 1 Call, 18. *Williams v. Price*, 5 Munf. 507. *Spence v. Spence*, 4 Watts, 168. *Miller v. Halsey*, 2 Green, 49. *A fortiori*, an unaccepted offer of compromise cannot be set up in bar of an action on the disputed claim, 2 Green, 49. Nor is an unexecuted agreement of compromise evidence on trial between the parties. *Spence v. Spence*, 4 Watts, 165. Where a suit has been compromised, and a doubtful question settled, it will not be opened unless there has been fraud or imposition, especially where the agreement of compromise indicates an intention to end the matter in dispute. *Worrall's Accounts*, 5 Watts & Serg. 111. A. and B.

grounds stated in the preceding chapter, the defendant in general, if he

stage of the proceedings, he shall think the matter more fit for the decision of the court, it shall be lawful for him to refer the matter to the court; and thereupon the court shall and may hear and dispose of the same, in the same manner as if the proceeding had originally commenced by rule of court, instead of the order of a judge." *Id.* § 5.

This statute is confined to actions of *assumpsit*, *debt*, *detinue*, and *trover*: and therefore, where the declaration contained a count in *case*, as well as in *trover*, the court would not interfere: *Lawrence v. Matthews*, 5 Dowl. Rep. 149. 12 Leg. Obs. 230, S. C. And the court cannot give relief to stakeholders, who are only threatened with proceedings: an action must be brought, and the plaintiff declare, before the court can interfere. *Parker v. Linnett*, 2 Dowl. Rep. 562. 8 Leg. Obs. 398, S. C., *per Patteson, J.* So, where a defendant obtained a rule under the interpleader act, upon a suggestion that a third party claimed the amount in his hands for which he was sued, and it afterwards appeared that the defendant had no just expectation that he should be sued by the third party, the court discharged the rule, with costs. *Harrison v. Payne*, 2 Hodges, 107. It has also been decided, that a party who, by his own act, is placed in a situation to be sued, cannot call on the court to substitute another defendant in his stead: *Belcher v. Smith*, 9 Bing. 82. 2 Moore & S. 184, S. C. And the holder of title deeds cannot apply to the court for protection against opposing claims. *Smith v. Wheeler*, 1 Gale, 163. So, a rule for interpleading will not be granted, after a suit has been stayed by injunction. *Aragne v. Lloyd*, 1 Bing. N. R. 720. 1 Hodges, 166. 1 Scott, 609, S. C. And a contested claim to a reward advertised for the apprehension of a felon, cannot be made the subject of a motion under the above act. *Grant v. Fry*, 4 Dowl. Rep. 135. *Collis v. Lee*, 1 Hodges, 204. A defendant who is sued for the recovery of property in his possession, in which he has no interest, but which is claimed by a third person, cannot apply to be relieved under the interpleader act against the claims of the plaintiff and such third party, if he has an indemnity from the claimant. *Tucker v. Morris*, 1 Dowl. Rep. 639. 1 Crompt. & M. 73, S. C. And the case of a wharfinger, who claims a lien on goods for wharfage, &c., which attaches only upon one of the parties by whom the goods are claimed, is not, it seems, within the meaning of the statute. *Braddick v. Smith*, 2 Moore & S. 131. 9 Bing. 84, S. C.; but see *Gladstone v. White*, 1 Hodges, 386. But a lien attaching upon the goods in dispute, and which must be satisfied by whichever party ultimately turns out to be entitled to them, does not prevent the party who holds the goods from applying to the court for relief, under the above act. *Cotter v. Bank of England*, 3 Moore & S. 180. 2 Dowl. Rep. 728, S. C. And where goods consigned to A. and warehoused at the London docks, were claimed by B., and the dock company having required an indemnity of A., the original consignee, before delivering them to him, A. refused, and brought an action of *trover*, with counts for special damage, for the detention: on motion by the company for relief, under the interpleader act, B. not appearing upon due notice, the court held that the claim of B. against the company, was barred; but that A. ought not, by reason of the act,

being in litigation with regard to a tract of land, entered into articles of compromise by which it was agreed that B. should "have full possession of the land," reserving to A. "the one half of a mill site." Held, that these articles of agreement conveyed to B. no title, and did not estop A. from asserting any subsequently acquired rights against B., or any purchase from him. *Walton v. Neuson*, 1 Humph. 140. Where one party offers to pay or give the other a certain sum by way of compromise, and the offer is rejected, it is in no way obligatory; nor is it an admission of the fact that the defendant owed the sum offered; and when a proposition of that kind is rejected, the rights of the parties remain precisely as they were before it was made. *Poteat v. Badget*, 4 Dev. & Batt. 268. A party's admission of particular facts are receivable in evidence against him, though they were made while he was negotiating for a compromise. *Dickinson v. Dickinson*, 9 Met. 471. *Mount v. Bogert*, Anthon, 190. In the trial of an action of *trover*, evidence was received that the defendant, while negotiating with the plaintiff for a compromise of the suit, admitted that he had sold the property in question, and that the plaintiff had demanded it of him, and that the plaintiff then said to him, "I suppose you would do better by me than you offered yesterday." Held, that these admissions of the defendant were properly received, and that though the words spoken by the plaintiff, if they had been unconnected with the other conversation of the parties, would have been inadmissible, yet that they were not, when taken in connection with that other conversation, so objectionable as to require that the verdict for the plaintiff should be set aside. *Dickinson v. Dickinson*, 9 Met. 471. The rule excluding offers of compromise made by a party, from being given in evidence against him, was much considered in *Brown v. Shields*, 6 Leigh, 440, which will repay perusal.

has no merits, either settles or compromises the action, by paying or giving security for the debt and costs, compounds it, (if penal,) confesses it, or lets judgment go by default.

In actions for the recovery of a sum *certain*, where the parties are agreed as to the amount of the debt, it is of course to stay the proceedings, on payment of the same, together with the costs of the action. (a) But where the prothonotary, on a rule to stay proceedings on payment of debt and costs, refused to allow costs, on account of gross misconduct on the part of the plaintiff's attorney, the court of Common Pleas would not direct the prothonotary to review his taxation. (b) If the parties are not agreed, the defendant cannot move to stay the proceedings; but must either pay into court, on the common rule, what he conceives to be due, or let judgment go by default: and, in actions for *general damages*, wherein the defendant cannot pay money into court, he has no option, but must let judgment go by default, unless he can settle amicably with the plaintiff. A judge's order, that upon *payment* of debt and costs by a certain day, all proceedings shall be stayed, is only conditional on the defendant: and therefore, if the debt and costs are not paid, the plaintiff must proceed in the action. (c) But the order is sometimes drawn up, so as to make it obligatory on the defendant

(a) For the form of the *summons* and *order*, to stay proceedings, on payment of debt and costs, see Append. Chap. XXI. § 1, 2.

(b) 1 Bing. 69. 7 Moore, 365, S. C.

(c) 11 East, 319; and see 2 New Rep. C. P. 473. 8 Moore, 102.

to be precluded from recovering for his special damage, if any; *Lucas v. London Dock Company*, 4 Barn. & Ad. 378. Where an auctioneer has one action brought against him in the Common Pleas, and another in the King's Bench, by different claimants, for the same property, he must, in order to relieve himself under the Interpleader act, obtain rules in both courts; *Allen v. Gilby*, 3 Dowl. Rep. 143: And if part of a sum claimed by the parties has been paid to one of them, before an adverse claim made, the adverse claimant has a right to have the whole sum he claims paid into court, on the holder's applying for relief under the act; *Allen v. Gilby*, 3 Dowl. Rep. 143.

On an application to a judge at chambers, under the interpleader act, an order having been made, by consent of all parties, to refer the cause, on certain terms, to a barrister, instead of an issue being directed, the court refused to grant a rule *nisi* for varying the order, by introducing a fresh term into the reference, in consequence of information which one of the parties (an administratrix) had obtained, since the hearing at chambers: *Drake v. Brown*, 2 Crompt. M. & R. 270. And where the plaintiff, in an issue directed under the interpleader act, does not proceed to the trial of it, the court will not permit another person's name to be substituted, without making the plaintiff originally appointed a party to the rule. *Lyddal v. Biddle*, 5 Dowl. Rep. 244. The costs of the applicant, where he has acted *bonâ fide*, will, in the first instance, be directed to be paid out of the fund, or proceeds of the goods in dispute, to be repaid by the party ultimately unsuccessful; *Deuar v. Mockintosh*, 3 Moore & S. 174. 2 Dowl. Rep. 734, S. C. *Cotter v. Bank of England*, 3 Moore & S. 180. 2 Dowl. Rep. 728, S. C. *Parker v. Linnet*, 2 Dowl. Rep. 562. 8 Leg. Obs. 398, S. C. *per Patteson, J.* *Agar v. Bletbyn*, 1 Tyr. & G. 160. And where an issue has been directed by the court, to try the rights of contending parties to the property in question, and the intermediate party has paid money into court, to abide the event of the issue, the successful party cannot move to have the money paid out to him, until final judgment has been signed; *Cooper v. Lead Smelting Company*, 2 Moore & S. 714, 810. 9 Bing. 634. 1 Dowl. Rep. 728, S. C. For the notice of motion, and rules of court in this case, see Append. to Tidd. *Sup.* 1833, p. 296, 7. In the Exchequer, a rule *nisi*, under the first section of the interpleader act, is no stay of proceedings, unless notice of the motion for that purpose has been given to the parties against whom it has been obtained; *Smith v. Wheeler*, 9 Leg. Obs. 318. And although, it has been said, cause cannot be shown at chambers against such a rule obtained by a sheriff, under the sixth section of the act, *Show v. Roberts*, 2 Dowl. Rep. 25. 6 Leg. Obs. 444, 5, S. C. *Brackebury v. Lawrie*, 3 Dowl. Rep. 186, *per Alderson, B.*; but see *Powder v. Lock*, 4 Nev. & M. 852, 3, *per Ld. Deaman, Ch. J.* *Beames v. Cross*, 4 Dowl. Rep. 122. *Hailey (or Haines) v. Disney*, 1 Hodges. 189, 2 Scott, 183, S. C. *contra*, yet it may be so shown, where the rule has been obtained under the first section; *Smith v. Wheeler*, 1 Gale, 15. 3 Dowl. Rep. 431. 9 Leg. Obs. 318, S. C.

to pay the costs, in which case the plaintiff may proceed for the recovery of them by attachment.(d) And an attorney who stays proceedings, upon an undertaking to pay costs, is bound to fulfil his engagement, although his client die before bail is put in.(e)

The practice of staying the proceedings, on payment of the debt and costs, though frequently confounded with, is in reality very different from that of bringing money into court, on the common rule; upon which the proceedings are not always stayed, but the plaintiff is at liberty to proceed at his peril, for more than the sum brought in: And the practice we are now treating of extends to every sort of action, brought for the [*541] recovery of a *sum certain; as *assumpsit* or *covenant* to pay money,(a) and *debt* for rent,(b) &c. If separate actions are brought against the acceptor, drawer, and indorser of a bill of exchange, the court of King's Bench will stay proceedings against the drawer, or any of the indorsers, on payment of the bill, and costs of that action; but not against the acceptor, without payment of costs in all the actions:(c) And if the plaintiff proceed to judgment, the proceedings may still be stayed, on payment of the debt and costs;(d) but in that case, each defendant is only liable for his own costs, and the plaintiff cannot take out execution against one defendant, for the costs of another. So, where *separate* actions were brought against several persons for the same debt, who, (if at all) were *jointly* liable, the defendant in one action having paid the debt and costs in that action, the court stayed the proceedings in the others, without costs.(e) Where an indorsement was made upon a note of hand by the payee, that if the interest was paid on stipulated days during his life, the note should be given up; default having been made in payment of the interest, the court of Common Pleas refused to stay the proceedings, on payment of it, and costs.(f)

In *debt* for the penalty of *five* pounds, for killing a hare, with no other count, the court of King's Bench let the defendant bring in the penalty and costs.(g) And where the action was brought for several penalties, the defendant had leave to pay one penalty into court, leaving the plaintiff at liberty to proceed for the rest.(h) In *debt* on a single bill, proceedings were stayed by the court of Common Pleas, on payment by the obligor of principal and costs, without interest.(i) And so, in *debt* on bond, conditioned for the performance of covenants, or to account, indemnify, &c. or on a bastardy bond, the proceedings may be stayed, on payment of the whole penalty and costs.(k) But, in an action on a money bond, the court of King's Bench, in one case,(l) would not stay the proceedings, on payment of the penalty; being of opinion, that damages might be recovered beyond that amount. This case, however, seems to have been since

(d) 11 East, 321. Barnes, 283. Pr. Reg. 259.

(e) 10 Moore, 360. 3 Bing. 70, S. C.

(a) 8 Durnf. & East, 326, 410.

(b) Cas. temp. Hardw. 173.

(c) 4 Durnf. & East, 691; but see 2 Barn. & Ald. 192. 2 Dowl. & Ry. 57. Ante, 315.

(d) 1 Str. 515.

(e) 6 Barn. & Cres. 124. 9 Dowl. & Ry. 126, S. C.

(f) 4 Taunt. 227.

(g) 2 Str. 1217; and see 2 Ken. 292. 2 Blac. Rep. 1052.

(h) Per Cur. E. 22 Geo. III. K. B. *Harcourt v. Knapp*, H. 23 Geo. III. K. B.

(i) 1 Bos. & Pul. 337; but see 2 Ld. Raym. 773.

(k) 2 Blac. Rep. 1190. 6 Durnf. & East, 303. 1 Taunt. 220. 2 Marsh. 226; and see 6 East, 110.

(l) 2 Durnf. & East, 388; and see Ry. & Mo. 105.

(m) 6 Durnf. & East, 303. 1 Taunt. 220; and see 1 Atk. 75. Doug. 49. 3 Bro. Chan. Cas. 489, 496. 1 East, 436. 3 Price, 219. 1 Madd. Chan. 613. Ry. & Mo. 105.

overruled;(m) and it is now settled, that the proceedings may be stayed in all cases, on payment of the penalty and costs. We have already seen,(n) in what cases the courts will stay the proceedings, in actions upon bail bonds: It will be sufficient to add in this place, that as the bail may render the principal, after an assignment of the bail bond, and before they justify,(o) so, when they have rendered him, the proceedings [*542] on the bail bond may be stayed, on payment of costs,(a) provided the plaintiff has not lost a trial. But in order to stay the proceedings on the bail bond, the bail, in the Common Pleas, must pay the costs of the actions against the principal and the other bail, as well as the debt and his own costs;(b) though it is otherwise in the King's Bench, where the court, we have seen,(c) will stay the proceedings in all the actions on the bail bond, on payment of the costs of one of them. In an action of *debt* on recognizance, where the proceedings are stayed on payment of the debt and costs, the bail above must pay the costs in that, as well as the debt and costs in the original action, though they apply within the time allowed them for surrendering the principal:(d) But where the principal is surrendered in time, the plaintiff cannot afterwards proceed against the bail, for the recovery of costs, in the action on the recognizance.(e)

In debt on *bond*, conditioned for the payment of a less sum, it was usual for the courts, even before the statute 4 Ann. c. 16, § 13, to relieve the defendant against the penalty of the bond, on payment of the principal, interest and costs; but then the whole penalty must have been brought into court, and when the plaintiff was satisfied, the defendant might have taken what remained.(f) By the above statute it is enacted, that "if at any time, pending an action upon any such bond with a penalty, the defendant shall bring into court all the principal money and interest due on the bond, and also such costs as have been expended in any suit or suits in law or equity upon such bond, the said money, so brought in, shall be deemed and taken to be in full satisfaction and discharge of the said bond; and the court shall and may give judgment to discharge every such defendant of and from the same accordingly." Upon this statute, the application to the court may be and is usually made *before* judgment:(g) And in an action upon a bond, conditioned for the payment of money generally, without naming any day of payment, the court of King's Bench will refer it to the master to compute interest, as well as the principal and costs;(h) interest being due on such a bond, though not *expressly reserved.(aa) And the [*543]

(n) *Ante*, 302, 3.

(o) 5 Durnf. & East, 401.

(a) 5 Durnf. & East, 534; and see 7 Durnf. & East, 529. 2 Durnf. & East, 222.

(b) 2 Blac. Rep. 816.

(c) *Ante*, 300.

(d) 5 Durnf. & East, 363. 3 Bos. & Pul. 13, *accord*.

(e) *Dawson v. Shuter*, T. 26 Geo. III. K. B. *Bartrum & others v. Howell*, T. 31 Geo. III. K. B. 3 East, 306. 16 East, 168, 9; and see R. T. 1 Ann. reg. 1 K. B. R. M. 1654, § 12, C. P. It was indeed said by the court, upon reference to the master, in the case of *Hughes v. Poiderin*, 15 East, 254, that it was usual to pay the costs, when the proceeding on the recognizance was by action; and accordingly a rule was made in that case, for the payment of them; and a similar rule was made, in the case of *Thomas v. Bayley's bail*, E. 53 Geo. III. K. B. But these decisions were overruled by the court, in a subsequent case of *Creswell v. Hearn & another*, 1 Maule & Sel. 742. And it seems to be now settled, as stated in the text, that where the principal is surrendered in time, the plaintiff cannot afterwards proceed against the bail, for the recovery of costs, in an action on the recognizance.

(f) 2 Salk. 597. 6 Mod. 101; and see 3 Bur. 1370.

(g) 3 Moore, 590.

(h) For the notice of motion for this purpose, see Append. Chap. XXI. § 3.

(aa) 7 Durnf. & East, 124; but see 1 Bos. & Pul. 337. *Ante*, 511.

plaintiff is entitled to the costs of proceedings in equity, relating to the same matter; (*bb*) but not to the costs of a former suit, wherein the judgment has been reversed on a writ of error: (*cc*) for there is no reason, why the defendant should pay for the error or mistake of the plaintiff. In the Exchequer, the court granted an application, on behalf of the defendants, to refer it to the master, to see what was due for principal interest and costs on a bond, which was the cause of action; and to stay all proceedings, upon payment of the sum due and costs. (*d*) But that court would not refer it to the master, to take an account of what was actually due for principal and interest upon a bond, after it had been put in suit, and the plaintiff had obtained a verdict thereon. (*e*)

It was formerly holden, that this statute did not extend to an action of debt on bond, conditioned for the payment of an *annuity*, or of money by instalments. (*f*) But it is now settled, upon the equity of the statute, that in such an action, when the defendant is *solvent*, the courts will stay the proceedings, on payment of the arrears and costs, and giving judgment as a security for future payments, with a stay of execution till they become due: (*g*) And where, in an action on an annuity bond, it appeared that there were mutual accounts subsisting between the parties, the court of King's Bench made a rule for referring them to the master; and that upon payment of what, if anything, should be found due to the plaintiff, all further proceedings should be stayed. (*h*) But the courts will not stay the proceedings, when the defendant appears to be *insolvent*; or the bond is conditioned for the payment of a gross sum of money absolutely, at a day certain, and afterwards defeazanced, in consequence of a subsequent agreement to pay the money by instalments; (*i*) or where, though the bond be conditioned for the payment of money by instalments, it is expressly agreed, that if default be made in any one payment, the bond is to stand in force for the whole principal and interest then remaining due. (*k*) So, where the defendant gave a warrant of attorney to secure a sum certain, to be paid half yearly by instalments, with interest, on specified days, and that the plaintiff should be at liberty to enter up judgment thereon immediately, "but no execution to be issued, till default made in payment of the said sum, with interest as aforesaid, by the instalments, and in the manner hereinbefore mentioned;" the court held, that the plaintiff might take out execution for the whole, on default of payment of the first instalment. (*l*) If default be made in payment of the interest on a

[*544] bond, the principal whereof is not yet due, the courts will not stay proceedings, on *payment of the interest and costs; (*a*) but judgment must be entered as a security for future payments, with a stay of execution till they become due; though it seems that execution may in such case be restrained to the interest and costs. (*a*) And if an instalment of an annuity secured by bond, be not paid on the day, the bond is forfeited, and the penalty is the debt in law; therefore, where the defendant had

(*bb*) Cas. temp. Hardw. 116; but see 2 Str. 699, *contra*.

(*cc*) 2 Str. 699.

(*d*) McClell. 309.

(*e*) 3 Price, 219.

(*f*) 1 Atk. 118. 1 Str. 515.

(*g*) 2 Str. 814, 957. 2 Blac. Rep. 706. Barnes, 288. 1 Barn. & Ald. 214; and see 2 Barn. & Cres. 82. 3 Dowl. & Ryl. 278, S. C.

(*h*) *Wilkinson & Jordan*, H. 23 Geo. III. K. B.

(*i*) 3 Bur. 1370.

(*k*) 2 Blac. Rep. 953.

(*l*) 1 Maule & Sel. 706.

(*a*) 2 Taunt. 387. 1 Barn. & Ald. 214.

been charged in execution for the penalty of 1000*l.* under such circumstances, previous to the insolvent act of 34 Geo. III. c. 69, the court of King's Bench refused to order that sum to be reduced in the marshal's book, to the sum actually due for the arrears of the annuity, in order that he might take the benefit of that act.^(b)

In actions for *general* damages, it is a rule, that the proceedings cannot be stayed, on making satisfaction to the plaintiff: And accordingly, in an action against the sheriff, for a false return to a *fieri facias*, the court of King's Bench refused to stay the proceedings, on payment of the money levied.^(c) But there are some exceptions to this rule. In *replevin* for instance, where the defendant avows for rent, the courts will stay the proceedings, on bringing it into court, and payment of costs.^(d) But the proceedings cannot be stayed, when the avowry is for *damage feasant*; ^(e) because the courts in such case have no rule to guide them in ascertaining the damages. Where the defendant in *replevin* made cognizance as bailiff of the lord of a manor, under a distress on the plaintiff as constable of a township, for palfrey rent, the court of Common Pleas would not stay the proceedings, upon payment of costs, on the application of the defendant.^(f) But, in a subsequent case, where cognizance was made by the defendants, as bailiffs of the commissioners appointed by an inclosure act, under a warrant of distress, for non-payment of several sums of money, ordered by the commissioners to be paid by the plaintiff by virtue of the said act, the proceedings in *replevin* were stayed by the court of King's Bench, on payment of the costs of the action and distress and replevying the goods, and delivering up the *replevin* bond to be cancelled; there being no special damage.^(g) There is indeed a case, where the latter court, under particular circumstances, stayed the proceedings in an action of *trespass* for seizing goods, on the defendant's undertaking to restore the goods, or pay the full value of them, with the costs of the action:^(h) But this seems to be contrary to their usual practice, in actions of that nature; and in a subsequent case, the court of Exchequer refused to stay the proceedings in such an action, upon the like terms, where it would not end the suit, and particularly as the value of the goods was not admitted.⁽ⁱ⁾ So, where the assignees of a bankrupt, in their own names, and not in their character of assignees, brought *trespass* against the sheriff and execution creditor, for seizing goods, consisting of stock on a farm which had belonged to the bankrupt, and on the issuing of the commission, the assignees took possession of the farm, managed it for the benefit of the creditors, and purchased additional stock and farming utensils, and continued in possession several months before the goods were seized by the sheriff under a *fieri facias*; the court of King's Bench refused to stay the proceedings in the action of *trespass*. 7 Barn. & Cres. 379.

*In *trover* for money, the courts will give the defendant leave [*545] to bring it into court;^(a) And where *trover* is brought for a specific chattel, of an ascertained quantity and quality, and unattended with any circumstance that can enhance the damages above the real value, the courts will make an order for staying the proceedings, upon delivering it to

(b) 6 Durnf. & East, 399; but see 2 Blac. Rep. 760.

(c) 7 Durnf. & East, 335.

(d) 2 Salk. 597. 1 H. Blac. 24. 1 Bos. & Pul. 382.

(f) 3 Bos. & Pul. 603.

(h) 7 Durnf. & East, 53.

(e) 8 Mod. 379.

(g) 3 Maule & Sel. 525.

(i) 3 Anstr. 896.

(a) 1 Str. 142.

the plaintiff, and payment of costs : (b) And this is the more reasonable, as the action of *trover* comes in place of the old action of *detinue*. But the courts will not stay the proceedings, when there is an uncertainty, either as to the quantity or quality of the thing demanded ; (cc) or there is any *tort* that may enhance the damages above the real value, and there is no rule whereby to estimate the additional damages. (d) In *trover* for a promissory note, alleged to have been dishonoured, the court of King's Bench made an order for staying the proceedings, upon delivering up the note, and payment of costs, with liberty for the plaintiff to proceed for damage sustained, but not for *nominal* damages, by reason of the detention. (e) And, in a subsequent case, where *trover* was brought by the assignees of a bankrupt, for a steam engine, &c., the court made a special rule for staying the proceedings, on delivering to the plaintiffs a part of the goods for which the action was brought, and payment of costs up to that time, provided the plaintiffs would accept thereof in discharge of the action ; or otherwise, that the articles delivered should be struck out of the declaration, and the plaintiffs be subject to costs, unless they should obtain a verdict for the remainder of the goods, or prove a deterioration of the part delivered up. (f) But, in an action of *trover*, where the value of the goods converted was not ascertained, the court of Common Pleas refused to stay proceedings, upon delivery of the goods to the plaintiff, or payment of the value of them. (g)

The *security* usually given by the defendant to the plaintiff, on compromising an action, and which is also frequently given where no action is depending, is a *warrant of attorney* ; so called, from its authorizing the attorney or attorneys, to whom it is directed, to appear for the defendant, and receive a declaration, in an action to be brought against him, and thereupon to confess the same action, or suffer judgment therein to pass by default, (h) &c. And, by a late rule of all the courts, (i) "every attorney, and side clerk in the office of pleas of the Exchequer, or other person who shall prepare any warrant of attorney to confess judgment, which [*546] is to be *subject to any defeazance, must cause such defeazance to be written on the same paper or parchment, on which the warrant of attorney is written ; or cause a *memorandum* in writing to be made on such warrant of attorney, containing the substance and effect of such defeazance," (a) In the construction of this rule, it has been determined, that if the attorney employed to prepare a warrant of attorney to confess judgment, which is to be made subject to a defeazance, neglect to insert such defeazance on the warrant, the security is not thereby avoided against the innocent party ; but the attorney is guilty of a breach of duty

(b) 3 Bur. 1364. Say. Rep. 80. 2 *Eunom.* 144, 5. Cas. Pr. C. P. 59, 130. Barnes, 281. Pr. Reg. 260, S. C. ; but see 2 Salk. 597. 2 Str. 822. *Id.* 1191. 1 Wils. 23, S. C. Say. Rep. 120. 9 Price, 460, *contra*.

(cc) Barnes, 284.

(d) 3 Bur. 1364. 2 Blac. Rep. 902.

(e) *Moss v. Thwaite*, H. 17 Geo. III. K. B.

(f) *Brunsdon and others, assignees, &c., v. Austin*, T. 34 Geo. III. K. B. ; and see 7 Durnf. & East, 54. 1 Moore & P. 254. 4 Bing. 462, S. C.

(g) 3 Bing. 601.

(h) Append. Chap. XXI. § 4.

(i) R. M. 42 Geo. III. 2 East, 136. K. B. R. M. 43 Geo. III. 3 Bos. & Pul. 310. C. P. R. M. 43 Geo. III. in *Seac. Man. Ex.* Append. 225. 8 Price, 505.

(a) Append. Chap. XXI. § 5.

imposed on him by the court, and answerable for it on motion: *(b)* And the court of King's Bench will not set aside a warrant of attorney, on the ground that the defeazance only states the amount of the sum secured by the judgment, without noticing collateral securities. *(c)* So, in the Common Pleas, the rule does not require the consideration of a judgment to be indorsed on a warrant of attorney: *(dd)* And if a warrant of attorney be given to confess judgment absolutely for a certain sum, although it be understood between the parties that it is given only to indemnify the plaintiff against his suretyship for a smaller sum, that is not such a defeazance as is necessary to be indorsed on the warrant of attorney; and the plaintiff need not defer execution till the contingency happen. *(e)* It is no ground for impeaching an annuity, that the memorial does not state the defeazance of the warrant of attorney, in the recital of that instrument; it being explicitly set out in the recital of the deed. *(f)* But if the defeazance on a warrant of attorney state that it is given to secure the payment of a sum on demand, and, in case default shall be made, then judgment to be entered up, and execution issue, an actual demand must be made, and a proposal to settle amicably does not amount to such a demand. *(g)* Where a warrant of attorney was given with a defeazance, stating it to be given as a security for a certain sum, and lawful interest thereon; the court held, that it was to be construed as a continuing security, and not merely as a security for money then due. *(h)*

A warrant of attorney to confess judgment need not be by deed; nor does it require an attesting witness. *(i)* This instrument was formerly liable to the stamp duty of *ten* shillings only, though it contained an authority to release errors; *(k)* But it was afterwards made liable to the stamp duty of *fifteen* shillings: And by the last general stamp act, *(l)* "a warrant of attorney, with or without a release of errors, which is given as a security for the payment of any sum or sums of money, or for the *transfer of any share or shares in any of the government or [*547] parliamentary stocks or funds, or in the stock and funds of the governor and company of the Bank of *England*, or of the *East India* company, or *South Sea* company, is subject to the same duty as a bond for the like purpose; save and except where such payment or transfer is already secured by a bond, mortgage, or other security, which has paid the *ad valorem* duty on bonds or mortgages: and also except where the warrant of attorney is given for securing any sum or sums of money, for which the person giving the same is in custody under an arrest: and in those cases, it is subject to a duty of *one* pound." A defeazance, however, upon a warrant of attorney, does not require a separate stamp from that upon the warrant of attorney: *(a)* And where an instrument has an insufficient stamp, it may at any time be made available, by affixing a proper

(b) 14 East, 576. 7 Taunt. 307. 1 Moore, 54, S. C.

(c) 2 Barn. & Ald. 568. 1 Chit. Rep. 311, S. C.; but see 3 Taunt. 235, *semb. contra*; which latter case, however, seems to be now overruled.

(dd) 3 Taunt. 465.

(e) *Id. ibid.*; and see 7 Taunt. 307. 1 Moore, 54, S. C.

(f) 6 Taunt. 189. 1 Marsh. 533, S. C.

(g) 5 Moore, 307. 2 Brod. & Bing. 464, S. C.

(h) 5 Barn. & Cres. 165. 7 Dowl. & Ry. 824, S. C.; and see 4 Bing. 154.

(i) 5 Taunt. 264; and see 4 East, 431. 1 Chit. Rep. 707.

(k) 4 East, 431.

(l) 55 Geo. III. c. 184. *Sched.* Part I. Part II. § III.; and see the statutes 41 Geo. III. c. 93. *Sched.* A. 48 Geo. III. c. 149. *Sched.* Part II. § III.

(a) 1 New Rep. C. P. 279.

stamp, and paying the penalty : Therefore, where a rule *nisi* was obtained to set aside a judgment on a warrant of attorney, on the ground of an insufficient stamp, the court of Common Pleas discharged the rule, the instrument having been properly stamped since the motion.(b)

Every warrant of attorney should be given voluntarily, and for a good consideration : Therefore, if a warrant of attorney be obtained by fraud,(c) or misrepresentation,(d) or for a corrupt and usurious consideration,(ee) or for securing an annuity which is void by the annuity act,(ff) or to induce the plaintiff to live in prostitution with the defendant,(g) the courts will order it to be delivered up, and set aside the judgment and proceedings, if any, which have been had under it. And the court of King's Bench will set aside a judgment founded on an usurious security, without compelling the defendant to repay the principal and interest.(h) But, in the Common Pleas, where securities had been acted on, and the money partly paid by the borrower, the court would not set aside a judgment and execution on the ground of usury, but upon the terms of the defendant's repaying the principal and legal interest.(i) And that court would not decide the question, whether a joint stock company was a nuisance, within the statute 6 Geo. I. c. 18, upon motion to set aside a judgment confessed to them on a warrant of attorney.(k) So, where a joint warrant of attorney had been altered after its execution, in the christian name of one of the parties, who had re-executed the same, without the knowledge of the other, the court refused, on the application of the former, to set aside the judgment which had been signed thereon.(l) And a subsequent assignment of goods,

for the sum secured by a warrant of attorney, is not a waiver of [*548] the *warrant of attorney.(a) If a warrant of attorney be given by an infant,(bb) or by one of several executors to confess a judgment against all,(cc) the courts will order it to be delivered up, &c.: And a joint warrant of attorney, to confess a judgment by an infant and another, may be vacated against the infant only.(dd) But a warrant of attorney under seal, executed by one person for himself and his partner, in the absence of the latter, but with his consent, is a sufficient authority for signing judgment against both.(e) And where a young man gave bills for the amount of a gaming debt, and when they were due, renewed them with the holder, and for the last bills, when due, confessed a judgment by warrant of attorney, the court of Common Pleas would not set aside the judgment, unless he could affect the holder of the bills with notice, but permitted him to try that fact in an issue.(f) A warrant of attorney given to confess a judgment at the suit of a feme covert, is void:(gg) And the court, on motion, set aside a judgment on a warrant of attorney, given by a feme covert, although she had been divorced *a mensâ et*

(b) 7 Taunt. 174. 2 Marsh. 480, S. C.

(c) Doug. 196. 4 Taunt. 473; and see 4 Barn. & Ald. 691. 10 Moore, 97. 2 Bing. 441, S. C.

(d) 2 Ken. 294.

(ee) Cowp. 727. 1 Bos. & Pul. 270. 4 Barn. & Ald. 92.

(ff) *Ante*, 521, 2.

(g) *James v. Hoskins*, T. 25 Geo. III. K. B.

(h) 4 Barn. & Ald. 92.

(i) 1 Taunt. 413.

(k) 4 Taunt. 587.

(l) 8 Taunt. 439. 2 Moore, 495, S. C.

(a) 2 Chit. Rep. 423.

(bb) 1 H. Blac. 75. *Chambers v. Burnett*, T. 32 Geo. III. C. P. Imp. C. P. 7 Ed. 597. 10 Moore, 97. 2 Bing. 475, S. C.

(cc) 1 Str. 20; and see 1 Rol. Abr. 929, *pl.* 5. 2 Ves. & B. 54. 1 Chit. Rep. 708, *in notis.*

(dd) 2 Blac. Rep. 1133. 1 Chit. Rep. 708, *in notis.*

(e) 1 Chit. Rep. 707; but see 10 Moore, 389. 3 Bing. 101, S. C.

(f) 4 Taunt. 683.

(gg) 2 Wils. 3.

thoro.(*hh*) But where a feme covert, who lived by herself, and acted as a feme sole, gave a warrant of attorney to confess a judgment, and afterwards moved to set aside the judgment, because she was covert, the court of King's Bench would not relieve her, but put her to her writ of error.(*ii*) And where it appeared, by the plaintiff's affidavit, that she was resident in an enemy's country, the court of Common Pleas refused to allow judgment to be entered up on an old warrant of attorney.(*kk*)

When the defendant is in custody by arrest, it is a rule of both courts.(*ll*) that "no bailiff or sheriff's officer shall presume to exact or take from him, any warrant to acknowledge a judgment, but in the presence of an attorney for the defendant, who shall subscribe his name thereto: which warrant shall be produced, when the judgment is acknowledged; and if any bailiff or sheriff's officer shall offend therein, he shall be severely punished: And no attorney shall acknowledge or enter, or cause to be acknowledged or entered, any judgment, by colour of any warrant, gotten from any defendant being under arrest, otherwise than as aforesaid." Upon this rule, the defendant, in the Common Pleas, was holden to be in custody, though the officer left him for some time, whilst the plaintiff got from him the warrant of attorney:(*m*) And, in that court, a defendant lodging within the rules of the *Fleet*, at the house of the officer who arrested him, and who was his security to the warden, was *deemed to be [*549] a prisoner within the meaning of the rule.(*a*) So, where a defendant, on being arrested at the suit of a third person, is taken to the house of a sheriff's officer, to whom he voluntarily offers to give a warrant of attorney, it is necessary for an attorney to be present on his part, at the time of its execution.(*b*) But it having been deemed sufficient for the plaintiff's attorney to be present, and subscribe the warrant, as attorney for the defendant,(*c*) another rule was made, in the King's Bench.(*d*) that "no warrant of attorney executed by any person in custody of a sheriff or other officer, for the confessing of judgment, shall be valid or of any force, unless there be present some attorney on the behalf of such person in custody, to be expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant of attorney, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof." And, to prevent frauds and impositions in the execution of warrants of attorney for confessing judgments, a rule was made in the Common Pleas, that "every warrant of attorney for confessing judgment, shall be read over by the person who is to execute the same, or by some other person to him, before the execution thereof: and that if judgment shall be entered up on any such warrant of attorney, which shall not be so read over as aforesaid, such judgment, upon motion, may be set aside as irregular:"(*e*) But this latter rule appears to be disused.(*f*)

The object of these rules was not merely to procure the attendance of an attorney, to explain the nature of the instrument to be executed, but also to advise the defendant confidentially, and as a friend; and rules thus framed for the protection of a prisoner, cannot be waived by him, when in a situa-

(*hh*) 6 Maule & Sel. 73.

(*ii*) 1 Salk. 400; and see 3 Bos. & Pul. 128, 220.

(*kk*) 2 New Rep. C. P. 97.

(*ll*) R. E. 15 Car. II. *reg.* 2, K. B. R. H. 14 & 15 Car. II. *reg.* 4, C. P.

(*m*) Cas. Pr. C. P. 128.

(*a*) 2 Blac. Rep. 1297; and see *id.* 1097.

(*b*) 2 Moore, 176. 8 Taunt. 233, S. C.

(*c*) 2 Str. 1245.

(*d*) R. E. 4 Geo. II. K. B. 2 Str. 902. Cowp. 281.

(*e*) R. T. 14 & 15 Geo. II. C. P.

(*f*) 2 H. Blac. 383.

tion where he is incapable of exercising his judgment: Therefore, when a defendant in custody executes a warrant of attorney to confess a judgment, there must be an attorney present on his part; the presence of the plaintiff's attorney being insufficient, though the defendant consent to his acting as his attorney also.(g) And, in the Common Pleas, if a prisoner on mesne process give a warrant of attorney, the rule that his attorney must be present is not dispensed with, though two other persons not in custody join in the warrant:(h) The presence of an attorney's clerk is not sufficient.(i) And the above rules have been construed to extend to warrants of attorney executed abroad.(k)

But still it is sufficient, if there be an attorney present on behalf of the defendant, though he be not an attorney of the same court in which the judgment is to be entered:(l) And, in the Common Pleas, if the defendant himself be an attorney, or practise as such, it is deemed sufficient,* though no other attorney be present on his behalf.(a) So, a warrant of attorney given by a defendant in custody, was in that court holden to be good, where an attorney was present on his behalf, though he was a total stranger to the defendant, and introduced by the plaintiff's attorney.(b) These rules only extend to warrants of attorney given by a defendant in custody upon *mesne* process in a civil action, to a plaintiff at whose suit he is in custody: Therefore, where a warrant of attorney is given by a defendant in custody upon process of *execution*,(c) or upon criminal process,(d) or to a third person, at whose suit the defendant is not in custody,(e) an attorney's presence is unnecessary. And where a warrant of attorney was executed in the presence of an attorney's clerk, and it appeared from the defendant's affidavit, that he was the more induced to execute it, because he had been informed, that if he did execute it under an arrest, and without his attorney being present, it would be void, the court refused to set aside the proceedings.(f)

On the other hand, though the case is not strictly within the rule, yet the courts will sometimes interpose and give relief, under particular circumstances; for it is their province to guard against the arts of designing men, practised upon persons under the pressure of distress and imprisonment. Thus, if it could be shown, that a party, even in execution, had been prevailed on to acknowledge a judgment, for more money than was really due, the courts would give relief under the circumstances;(gg) because cases of fraud and impositions are exceptions to all rules whatsoever. And in a case where, interlocutory judgment being signed against a prisoner in custody of the marshal, the plaintiff's attorney took a *cognovit* from him for 200*l.* with a defeazance on paying 49*l.* (the real debt,) and costs, but no attorney was present on the part of the defendant; though this case was not strictly within the rule, which only mentions prisoners in custody of sheriffs' officers, yet the court of King's Bench

(g) 7 Durnf. & East, 8. 1 East, 243, *per Lawrence, J.*

(h) 2 Taunt. 49.

(i) Barnes, 42.

(k) 2 Str. 1247.

(l) 1 Str. 530. Barnes, 44.

(a) Barnes, 37. Cas. Pr. C. P. 94, S. C.

(b) 4 Taunt. 797.

(c) 2 Str. 1245. Cowp. 281. 1 Durnf. & East, 715. 7 Durnf. & East, 19, S. P.

(d) 4 Durnf. & East, 433.

(e) 5 Mod. 144. 2 Ld. Raym. 797. 3 Bur. 1792. Cowp. 142. 1 East, 241. 2 Moore, 175.

(f) Cowp. 142.

(gg) *Id.* 281.

interfered for the relief of the prisoner.(h) So where a defendant, on being arrested by a sheriff's officer, gave a *cognovit* to the plaintiff, who was attorney in the cause, without an attorney being present on his part, such *cognovit* was holden to be void, by the court of Common Pleas, although the plaintiff swore he did not know the defendant was in custody.(i) But, in the King's Bench, a *cognovit* given by a defendant in custody on *mesne* process is valid, although no attorney be present on the part of the defendant, unless it be shown that some undue advantage was taken of him.(kk)

By the course of the courts, a warrant of attorney given to confess a judgment is not revocable; and if the party giving, endeavour to revoke *it, the courts will notwithstanding give the other party [*551] leave to enter up judgment.(a) But the death of either party is, generally speaking, a countermand of the warrant of attorney:(b) And therefore, upon a motion to enter up judgment on an old warrant of attorney, if it appear to the courts that either party is dead, they will not grant the motion.(c) Yet, if the warrant of attorney be to enter up judgment at the suit of A. his *executors or administrators*, it seems that on the death of A., the courts will give his executors or administrators leave to enter up judgment thereon.(d) And if either party die in *vacation*, within a year after giving the warrant of attorney, judgment may be entered up of course, at any time after, in that vacation;(e) and it will be a good judgment at common law, as of the preceding term, though it be not so upon the statute of frauds, in respect of purchasers, but from the signing:(f) And even where the party dies after a year, if the courts can be prevailed upon to grant a rule for entering up judgment, they will not afterwards set it aside.(g) When a warrant of attorney is given to enter up judgment at the suit of *two* persons, judgment may be entered up thereon, after the death of one of them, in the name of the survivor.(hh) And, in the Common Pleas, where a warrant of attorney was given by two persons, to enter up judgment on a joint bond against *me*, not *us*, the court, after the death of one of them, gave leave to enter up judgment against the other.(ii) But a joint warrant of attorney, given to enter up judgment against *us*, upon a joint and several bond, will not, in either court, authorize the entering up judgment against the survivor only.(k) And a judge at chambers will never make an order for entering up judgment on a warrant of attorney, against a surviving defendant.

When a warrant of attorney is given to a feme sole, who marries before

(h) 3 Durnf. & East, 616; and see 1 East, 242, (a). 8 Dowl. & Ry1. 56.

(i) 7 Taunt. 701. 1 Moore, 428, S. C.; and see 2 Taunt. 360. *Arnold v. Lowe*, T. 57 Geo. III. C. P. 7 Taunt. 703, (a).

(kk) 1 Chit. Rep. 267.

(a) 2 Ld. Raym. 766, 850. 1 Salk. 87. 7 Mod. 93, S. C. 2 Esp. Rep. 565.

(b) Co. Lit. 52, b. 1 Vent. 310.

(c) 2 Str. 718, 1081. 8 Durnf. & East, 257. Vin. Abr. tit. *Judgment*, W. 7. Barnes. 270.

(d) Barnes, 44, 5.

(e) 2 Ld. Raym. 18. 2 Ld. Raym. 766, 850. 1 Salk. 87. 7 Mod. 2, 93, S. C. 2 Str. 882. 3 P. Wms. 399. 6 Durnf. & East, 368. 7 Durnf. & East, 20. Cas. Pr. C. P. 11. Willes, 427, 8. Barnes, 267, 8, 270; but see Cas. Pr. C. P. 6, *contra*.

(f) 1 Salk. 401. 7 Mod. 39, S. C. *Id.* 93. 6 Durnf. & East, 368. 7 Durnf. & East, 20.

(g) 2 Str. 882, 1081. Vin. Abr. tit. *Judgment*, W. 7. Barnes, 270.

(hh) Barnes, 40. *Id.* 48. 1 Wils. 312. Say. Rep. 5, S. C. 2 Blac. Rep. 1301. 2 Maule & Sel.

76. 7 Taunt. 453. 1 Moore, 145, S. C. 1 Younge & J. 206; but see Barnes, 45, *contra*.

(ii) Barnes, 53. 1 Chit. Rep. 315, *in notis*; but see 7 Taunt. 453. 1 Moore, 145, S. C.

(k) 15 East, 592. 7 Taunt. 453. 1 Moore, 145, S. C.; and see 1 Chit. Rep. 322, (a).

judgment, the authority is not deemed to be countermanded or revoked; because it is for the husband's advantage: *(l)* And therefore, notwithstanding the marriage, judgment may be entered up in the names of the husband and wife. But, in order to warrant this entry, there should be a previous application to the court, founded on an affidavit of the marriage, and of the due execution of the warrant of attorney, and non-payment of [*552] *the debt. *(aa)* And, in an early case, *(bb)* it was ruled upon motion, that if a woman give a warrant of attorney, and then marry, the plaintiff may file a bill, and enter judgment, against both husband and wife, by the practice of the court. But, in a subsequent case, *(cc)* it is said, that if a feme sole give a warrant to confess a judgment, and marry before it is entered, the warrant is countermanded, and judgment shall not be entered against husband and wife, for that would charge the husband. *(d)* In a still later case, however, judgment was allowed to be entered up against husband and wife, on a warrant of attorney given by the feme, *dum sola.* *(e)*

In entering up judgment on a warrant of attorney, the authority given by it must be strictly pursued: Therefore, if a plaintiff enter up judgment in debt on a *mutuatus*, on a warrant of attorney to enter up judgment in debt on *bond*, the court will set it aside as irregular. *(f)* So, judgment cannot be entered up against *two* defendants, on a warrant of attorney to confess a judgment against *three* persons, one of whom afterwards refused to execute; and the judgment against the two was set aside on motion, but without costs, and on the terms of no action being brought. *(g)* And if a warrant of attorney be given to appear and confess judgment of a particular term, the judgment should be entered accordingly of that term, and cannot be entered of any other. *(h)* But if the warrant of attorney be given, to appear and confess judgment generally, or, (as is most usual,) of a particular or any subsequent term, judgment may be entered of any term after giving the warrant. *(i)* Where a warrant of attorney was given in vacation, and judgment was entered up thereon as of the preceding term, the court of King's Bench ordered the judgment to be set aside, for the danger that might otherwise ensue to purchasers: *(k)* And where a warrant of attorney was given to confess judgment, at the suit of an executor, as of the preceding term, when the testator was living, and the judgment was entered up accordingly, the court held it to be irregular; *(ll)* for the attorney could have no authority to appear in that term, at the suit of the executor, and the judgment must be considered of that term, though to other purposes the day of signing is material.

Within a year and a day next after the date of the warrant, judgment

(l) 12 Mod. 383. 7 Mod. 53. 1 Salk. 117, S. C. Barnes, 45.

(aa) 3 Bur. 1471. 6 Dowl. & Ry. 46.

(bb) 1 Show. 91. Say. Rep. 6. 3 Bur. 1470, S. C. cited.

(cc) 1 Salk. 399. 7 Mod. 53, S. C. cited.

(d) *Tamen quare*; for it seems as reasonable that he should be charged in this case, as for a bond or other debt, which he is liable for during the coverture, though not after. 1 Salk. 117, cites 1 Rol. Abr. 351. F. 1, G. 2. F. N. B. 120, F; and see 4 East, 522.

(e) 2 Chit. Rep. 117.

(f) 8 Durnf. & East, 153. *Per Cur.* T. 45 Geo. III. K. B.

(g) 1 Chit. Rep. 322.

(h) 1 Mod. 1. 7 Mod. 53.

(i) *Id.* *ibid.* Barnes, 52.

(k) 1 Sid. 222. But note, this was before the statute of frauds, by which judgments affect purchasers, only from the time of signing.

(ll) 2 Str. 1121.

may be entered of course, without applying to the court, or a judge. But if it be not entered within that time, the court of King's Bench must be moved in *term* time,^(m) or, if the warrant of attorney be not above *ten* years old, an application may be made to a judge in *vacation*, for leave to enter *up the judgment, on an *affidavit* of the due [*553] execution of the warrant of attorney, that the debt, or part of it, is still due, and that the parties are living.^(a) This affidavit may be properly entitled in the cause in which judgment is entered up:^(b) And it seems that an affidavit, sworn before a justice of the peace in *Scotland*, is admissible, if the handwriting of the justice be authenticated.^(c) If the warrant of attorney be above *ten* years old, the application must be made to the court; and where it is above *twenty* years old, there must in general be a rule to show cause,^(dd) founded on an affidavit, stating facts which rebut the presumption of payment.^(e) But where, upon such a warrant of attorney, the party had admitted the debt within two months preceding the motion, the court granted it absolute in the first instance.^(f) In the Common Pleas, if a warrant of attorney to enter judgment be above a year and under *ten* years old, leave to enter judgment may be given by a side-bar or treasury rule;^(g) and accordingly, the practice in that court is, for the plaintiff's attorney to move at side-bar on the *first* day of term, or in the treasury chamber on other days, for leave to enter up judgment, which is granted of course, on the usual affidavit; and thereupon the secondaries will draw up the rule: In *vacation*, a judge at chambers will make an order for entering up the judgment. But if the warrant of attorney be above *ten* years, the court must be moved for leave to enter up judgment.^(g) If the warrant of attorney be under *twenty* years old, the common affidavit of the due execution of the warrant, that the debt is unpaid, and parties living, is sufficient to induce the court to grant an absolute rule; but if the warrant be above *twenty* years old, the rule must be to show cause, and served on the defendant:^(h) And where judgment had not been entered within a year and a day, on a warrant of attorney given with a *post obit* bond, and the obligee did not apply for leave to enter it till after the death of the person on whose death it was payable, the court of Common Pleas would not grant leave, without a rule to show cause.⁽ⁱ⁾ If judgment, however, be entered up on a warrant of attorney, more than a year old, without leave of the court, the objection, though available if urged at the instance of the defendant himself, cannot be taken advantage of by a third party, a stranger to the proceeding, as a ground of irregularity.^(k)

The affidavit of the due execution of the warrant of attorney, should regularly be made by the attesting witness; or, if he cannot be met

(m) 3 Salk. 322. 7 Mod. 94. 6 Mod. 212. 1 Wils. 36. *arg.*

(a) Append. Chap. XXI. § 6; and for the form of the rule, see *id.* § 7.

(b) 1 Barn. & Ald. 567, 8. (a). *Ante*, 493.

(c) 1 Chit. Rep. 721, 2. But an affidavit sworn before a justice of the peace at *Edinburgh*, was deemed insufficient for entering up judgment on an old warrant of attorney, in the case of *Knight v. Hennell*, M. 46 Geo. III. K. B. And, in the case of *Sinclair v. Assignees of Rentoul*, M. 23 Geo. III. K. B., it was said, that the affidavit should have been made before a lord of session.

(dd) 1 Chit. Rep. 618. *in notis. Ante*, 485, 6. (y), 487.

(e) 2 Barn. & Cres. 555. 4 Dowl. & Ryf. 5, S. C.

(f) *Blakeley v. Vincent*, T. 35 Geo. III. K. B.

(h) *Id. ibid.*; and see *Cas. Pr. C. P.* 115, 6.

(k) 1 Dowl. & Ryf. 558. *Ante*, 551.

(g) Barnes. 47.

(i) 1 H. Blac. 94.

[*554] with, (l) *or reside out of the jurisdiction of the court, (a) an affidavit verifying his handwriting will be deemed sufficient. But the court must be informed by affidavit, of the endeavours which have been made to find him, before they will admit secondary evidence; (b) and, in the King's Bench, the acknowledgment of the warrant of attorney by the defendant, will be no waiver of the objection: (c) but, in the Common Pleas, if A. agree to acknowledge an old warrant of attorney given by him, so as to enable B. to enter up judgment thereon, judgment may be entered up, under a judge's order, without an affidavit of the attesting witness. (d) If the witness will not join in the necessary affidavit, the court will compel him, by rule, to do so. (e) And where the plaintiff, being a lunatic, did not swear that the money was unpaid, but another did, who had received the interest upon the bond for three years, ever since the plaintiff was lunatic, the court of Common Pleas held this to be sufficient. (ff) In the King's Bench, if the defendant reside in town, it should appear by the affidavit, that he was alive at a *certain* time, within two or three days, or, if in the country, within a *week* or *ten* days, before the application is made; an affidavit that he was alive *on* or *about* a particular day, being deemed insufficient: (g) And as all judgments, in actions by *bill*, relate to the first day in full term, (and the judgment on a warrant of attorney is always so entered,) it must be *positively* sworn that the defendant was alive, either on the first, or upon some subsequent day in full term: (h) Information and belief, even though the party keep out of the way to avoid being seen, is not sufficient: (i) And judgment cannot be entered up on a joint warrant of attorney, against any of the makers of it, unless they are all proved to be alive within the term. (k) In the Common Pleas, it must in general appear by the affidavit, that the defendant was alive within a *fortnight* before the making of the application: (ll) And by a late rule, (m) the affidavit must state that "he was alive, at a day *within the term* in which the motion is made:" in the construction of which rule, it has been holden not to be sufficient to swear that he was alive on the *essoin* day. (n) But where the defendant resides abroad, a longer time is of course allowed, according to circumstances: (o) and, in a late case, the court gave leave to enter up judgment, on an old warrant of attorney in *Michaelmas* term; the affidavit stating, that the defendant was alive at *New* [*555] *South Wales*, in the *month of *August* preceding, as appeared by a letter received from him of that date, and that deponent verily believed him to be still alive. (aa)

By a late rule of all the courts, (bb) "no judgment can be signed upon any

(l) 1 Chit. Rep. 743.

(a) 1 Chit. Rep. 744.

(b) *Id.* 743, (b). 4 Taunt. 132.

(c) 1 Chit. Rep. 743, 4.

(d) 2 Bos. & Pul. 85.

(e) 1 Str. 1. Barnes, 58. 1 Price, 308. 1 Chit. Rep. 743, (b). *Caffin & another v. Idle*, M. 3 Geo. IV. K. B.

(ff) Barnes, 42.

(g) *Per Cur.* II. 41 Geo. III. K. B. 1 Chit. Rep. 617, (a).

(h) 4 Maule & Sel. 174. 1 Chit. Rep. 314, 617, (a).

(i) 1 Chit. Rep. 314.

(k) *Id. ibid.*

(ll) *Per Heath*, J. T. 33 Geo. III. C. P. Imp. C. P. 7 Ed. 451.

(m) R. T. 59 Geo. III. C. P. 1 Brod. & Bing. 385. 3 Moore, 606. 2 Chit. Rep. 380, 81.

(n) 4 Moore, 2.

(o) Barnes, 54, 256. Cas. Pr. C. P. 145. Willes, 66, S. C. 9 Moore, 389. 2 Bing. 204, S. C.

(aa) 2 Dowl. & Ryl. 12; and see 9 Moore, 389. 2 Bing. 204, S. C.

(bb) R. M. 42 Geo. III. 2 East, 136, K. B. R. M. 43 Geo. III. 3 Bos. & Pul. 310, C. P. R. M. 43 Geo. III. in *Seac.* Man. Ex. Append. 224, 5. 8 Price, 505.

warrant, authorizing an attorney to confess judgment, without such warrant being delivered to, and filed by the clerk of the dockets, or master in the Exchequer; who is ordered to file the warrants, in the order in which they are received." And, by the statute 3 Geo. IV. c. 39, § 1, (the provisions of which are extended to assignees of insolvent debtors, by the statutes 5 Geo. IV. c. 61, § 16, & 7 Geo. IV. c. 57, § 33,) "if the holder shall think fit, every warrant of attorney to confess judgment in any personal action, or a true copy thereof, and of the attestation thereof, and the defeazance and indorsements thereon, in case such warrant of attorney shall be given to confess judgment in his majesty's court of King's Bench at *Westminster*, or a true copy thereof, in case such warrant of attorney shall be given to confess judgment in any other court, shall, within *twenty-one* days after the execution of such warrant of attorney, be filed, together with an affidavit of the time of the execution thereof, with the clerk of the dockets and judgments in the said court of King's Bench: And if, at any time after the expiration of twenty-one days next after the execution of such warrant of attorney, a commission of bankrupt shall be issued against the person who shall have given such warrant of attorney, under which he shall be duly found and declared a bankrupt, then and in such case, unless such warrant of attorney, or a copy thereof, shall have been filed as aforesaid, within the said space of twenty-one days from the execution thereof, or unless judgment shall have been signed, or execution issued, on such warrant of attorney, within the same period, such warrant of attorney, and the judgment and execution thereon, shall be deemed fraudulent and void against the assignees under such commission; and such assignees shall be entitled to recover back and receive, for the use of the creditors of such bankrupts at large, all and every the moneys levied, or effects seized, under and by virtue of such judgment and execution.^(c) And if such warrant of attorney shall be given subject to any defeazance or condition, such defeazance or condition shall be written on the same paper or parchment on which such warrant of attorney shall be written, before the time when the same, or a copy thereof respectively, shall be filed; otherwise such warrant of attorney shall be null and void, to all intents and purposes.^(d) By the above statute,^(e) the officer of the court is required to keep a book, containing an alphabetical list and particulars of each warrant of attorney, and *cognovit actionem*, given by any defendant: And the judges are authorized to order a *memorandum* of satisfaction to be written upon such warrant of attorney, *cognovit actionem*, or copy *thereof respec- [*556] tively, as aforesaid, if it shall appear that the debt for which such warrant of attorney, or *cognovit actionem*, is given as a security, shall have been satisfied or discharged.^(a) But the fourth section of the statute 3 Geo. IV. c. 39, which requires the defeazance to a warrant of attorney to be written on the paper or parchment on which the instrument itself is written, applies only to such warrants of attorney, &c. as fall within the former sections of the act, viz. warrants of attorney which, in the event of not being filed within twenty-one days after execution, are void against the assignees of a bankrupt; and consequently a warrant of attorney subject to a defeazance, not written on the same paper or parch-

(c) § 2. The provisions of this clause, however, are not repealed by stat. 6 Geo. IV. c. 16, § 81, which is confined to executions *bonâ fide* issued. 1 Moody & M. 8.

(d) § 4. *Ante*, 545, 6.

(e) § 5.

(a) § 8.

ment, is not void against the assignee of an insolvent debtor. 6 Barn & Cres. 446 per *Ld. Tenterden*, Ch. J. *Bayley* and *Littledale, Js.*; *Holroyd, J. dissente*nt.

The judgment upon a warrant of attorney, being in *debt*, is always final; and signed in like manner as a final judgment by confession or default in an adverse suit, which will be treated of in the next chapter. To prove the time of signing the judgment, however, the day-book kept at the judgment office is not evidence; but an office copy of the judgment ought to be produced, or the docket of the judgment.(b)

In order to *compound* a penal action, an application must be made to the court wherein it is depending, founded upon the statute 18 Eliz. c. 5, § 3,(cc) by which it is enacted, that “no common informer or plaintiff shall or may compound or agree with any person or persons that shall offend, or that shall be surmised to offend, against any penal statute, for an offence committed, or pretended to be committed, but after answer made in court, to the information or suit in that behalf exhibited or prosecuted; nor after answer, but by the order or consent of the court in which the same information or suit shall be depending; upon pain of standing on the pillory, being disabled to sue on a penal statute, and forfeiting *ten* pounds, half to the king and half to the party grieved:” And, by a previous statute,(dd) “actions popular prosecuted by collusion, shall be no bar to those which are prosecuted with good faith; and the defendant, being lawfully condemned or attainted of covin or collusion, shall suffer imprisonment for *two* years.” But these statutes extend only to *common* informers, and not to cases where the penalty is given to the party *grieved*.(e) And, in the Common Pleas, a notice of action required by a penal statute, was held to be no commencement of the suit, so as to subject the plaintiff or his agent to an attachment, for attempting to compound an offence, previous to the suing out of the writ.(f)

The application for leave to compound a penal action must be made to the court in *banc*, and not at *nisi prius*, on the trial of the cause:(g) and it is made by consent,(h) upon an affidavit, setting forth the nature of the action, the state of the cause, the agreement of the parties, and that no more than a certain sum is given or taken,(i) &c., which application should regularly be made in an early stage of the cause; but under favourable circumstances, it may be made after verdict:(k) And in one [*557] case, where the *defendant was in execution, the court of King’s Bench, on an affidavit of his poverty, gave the plaintiff leave to compound with him.(a) But, in the Common Pleas, where part of the penalty goes to the king, the consent of the crown must be obtained, before the motion can be granted for leave to compound a penal action, whether

(b) 5 Esp. Rep. 177; and see 2 New Rep. C. P. 474. 1 Moore & P. 236.

(cc) Made perpetual by 27 Eliz. c. 10.

(dd) 4 Hen. VII. c. 20.

(e) 1 Salk. 30; and see the statute 18 Eliz. c. 5, § 6. 2 Hawk. P. C. 279.

(f) 2 Blac. Rep. 781.

(g) 1 Chit. Rep. 381.

(h) Barnes, 118. Pr. Reg. 226, S. C.

(i) R.—2 Jac. I. § 5, C. P. And for the form of the affidavit, see Append. Chap. XXI. § 9, and for the form of the rule thereon, *id.* § 10.

(k) *Per Cur.* H. 22 Geo. III. K. B. 5 Durnf. & East, 93. 1 Bos. & Pul. 18. 1 Chit. Rep. 381.

(a) 1 Str. 167.

the verdict has passed for the plaintiff or not.(b) Upon the application being made, it is in the discretion of the courts to give or withhold their leave to compound;(c) and it was refused by the court of King's Bench, in a case where an action was brought on the statute 25 Geo. II. c. 36, for keeping a disorderly house.(d) So, where part of the penalty was given to the poor, the court would not give the parties leave to compound a penal action, on the statute 13 Geo. II. c. 19, although the overseers, at a vestry, had agreed to compound it, without receiving any part of the penalty.(ee) On a *bona fide* composition,(ff) though not on a collusive one,(ff) the plaintiff may be allowed a reasonable sum for his costs. And, in compounding a penal action on the post-horse act, which gives costs to the prosecutor, the court of Common Pleas allowed him to receive the deficient duties, not amounting to 40s. and full costs of suit, though exceeding together the 40s. paid to the crown.(gg) But where no costs are given to the plaintiff, as in an action on the statute of usury, the crown is entitled to a moiety of the sum agreed to be paid to the plaintiff for his costs; for whatever the defendant may pay under the name of costs, is considered in fact as an addition to the penalty.(hh)

When leave is given to compound a *qui tam* action, it is a general rule, that the king's half of the composition shall be paid into the hands of the master of the crown office in the King's Bench,(ii) or one of the prothonotaries in the Common Pleas,(k) for the use of his majesty; which is now usually done before the rule is drawn up. And where the defendant in a *qui tam* action obtained a rule to stay proceedings, on paying a sum agreed upon between him and the plaintiff, the court of King's Bench considered it as an undertaking by him to pay that sum; and for the non-payment of it, granted an attachment:(l) But for preventing any doubt in future, an order was made, that "every rule to be drawn up for compounding any *qui tam* action do express, that the defendant doth undertake to pay the sum for which the court has given him leave to compound such action."(m) So, in the Common Pleas, where a defendant, in a penal action, obtains a rule to stay proceedings on payment of part of the penalties, the court will grant an attachment against him for non-payment:(n) And in *that court it is a rule, on compounding information on penal [*558] statutes, that "if the defendant, after composition made with the informer, do not voluntarily come in to answer unto the king for his fine, to be taxed and assessed by the justices of this court for his majesty's use, then a *capias ad satisfaciendum finem* shall be awarded against him, to compel him thereunto; whereupon the fine, being set and assessed, shall be presently paid in: and satisfaction being thereupon made, and entered by the prothonotary upon the roll of the said information, shall be for ever a full and final discharge of the defendant for the same offence."(o) The

(b) 1 Taunt. 163, 5 Taunt. 268. For the proceedings on informations on penal statutes, and the manner of compounding them, in the Common Pleas, see R.—2 Jac. I. § 5, R. M. 12 Jac. I. R. H. 20 Jac. I. C. P.

(c) 1 Wils. 79, 130.

(d) *Bellis v. Beale*, M. 38 Geo. III. K. B., and see 2 Blac. Rep. 1157.

(ee) 2 Smith R. 195.

(ff) 2 Blac. Rep. 1157.

(gg) 1 Bos. & Pul. 51.

(hh) 2 Taunt. 213.

(ii) R. M. 57 Geo. III. K. B. 4 Bur. 1929; and see 2 Blac. Rep. 1154.

(k) 2 Blac. Rep. 1154, 1157.

(l) 5 Durnf. & East, 257.

(m) R. E. 33 Geo. III. K. B.

(n) 7 Taunt. 43. 2 Marsh. 358, S. C.

(o) R. M. 12 Jac. I. C. P.

plaintiff, in compounding a penal action by consent, having by mistake abandoned a good cause of action, the court of Common Pleas refused to interfere, and rescind the order made thereon.(b)

[*559]

*CHAPTER XXII.

Of JUDGMENTS by CONFESSION, and DEFAULT; the ASSESSMENT of DAMAGES, by REFERENCE to the MASTER or PROTHONOTARIES, or by WRIT of INQUIRY; and PROCEEDINGS on the STATUTE 8 & 9 W. III. c. 11, § 8.

WHEN the defendant, having no merits, cannot compromise or compound the action, it is usual for him to confess it, or let judgment go by default.

The objects proposed by confessing an action are twofold; first, in an action for damages, to save the expense of executing a writ of inquiry; and secondly, to obtain terms, such as a stay of execution, &c. And the confession,(aa) or, as it is usually called from the entry of it, a *cognovit actionem*, is either before or after plea pleaded; in the latter case, the plea being withdrawn, it is called a confession, or *cognovit actionem relicta verificatione*.(bb)

An opinion formerly prevailed, that the confession of an action could not regularly be made *before* declaration, and particularly if the cause of action were not expressed in the process; for if a bill of *Middlesex* or *latitat*, &c. were sued out in a plea of *trespass*, the confession of that action it was supposed would be nugatory; and therefore in such case, if the parties compromised before declaration, a warrant of attorney to confess judgment should have been taken, instead of a *cognovit*, as a security for the debt and costs. But it is said to have been the constant practice in the Common Pleas, to take *cognovits* before declaration, and judgments have been entered thereon: which practice was recognized, in a late case, by that court.(c) And, in the Exchequer, the court would not set aside a judgment entered up on a *cognovit*, and order the money levied thereon to be restored, on the ground that no process had been actually served on the defendant, before he signed the *cognovit*, nor was at that time sued out; it appearing that instructions had been then transmitted to the agent of the plaintiff's attorney in *London*, from the country, to issue a *quo minus*, which was afterwards accordingly issued, *tested* of course after the date of the *cognovit*.(d) In general, however, the confession is made *after* declaration, and before plea; and written on the declaration, or back of the inquiry, or on plain paper, thus; "I confess this action, or (if in [*560] *debt*,) the *debt in this cause, and that the plaintiff hath sustained damages to such an amount, besides his costs and charges, to be taxed by the master," in the King's Bench, or "prothonotaries," in the Common Pleas: then follow the terms, if any are agreed on, as that "no judgment shall be entered up, or execution issue, until default shall be made in payment of the debt, or damages, and costs, by a certain day; and that no writ of error shall be brought, or bill in equity filed; but that in case

(b) 5 Taunt. 850.

(aa) Append. Chap. XXII. § 1, 2.

(c) 7 Taunt. 701. 1 Moore, 428, S. C.

(bb) *Id.* § 3.

(d) 8 Price, 513.

default shall be made, the plaintiff shall be at liberty to enter up judgment, and take out execution, for the debt, or damages, and costs, together with sheriff's poundage, and all other incidental expenses." (a) A mere *cognovit* need not be stamped, unless it contain any terms of agreement between the parties. (b) But if given by a prisoner, in custody of a *sheriff's officer*, it seems that an attorney must be present, on behalf of the defendant, to attest the execution of it, in the Common Pleas; (cc) though if it be given by a prisoner in custody of the *marshal*, it is otherwise: (dd) And in the King's Bench, we have seen, (e) a *cognovit* given by a defendant in custody on *mesne* process is valid, although no attorney be present on the part of the defendant, unless it be shown that some undue advantage was taken of him. When the confession is after plea pleaded, the defendant's attorney, or his clerk, ought to come in person before the master to withdraw it, in the King's Bench; (f) but this is unnecessary in the Common Pleas. (g)

Again, the confession is either of the *whole* or *part* of the cause of action. If it be of the whole, and not upon terms, the plaintiff's attorney may immediately sign final judgment, (h) and take out execution thereon; but if it be not of the whole, he can only sign judgment for the part confessed, and the action must proceed for the residue. When a judgment is confessed upon terms, in the King's Bench, it being in effect but a conditional judgment, the court will take notice of it, and see the terms performed: but when the judgment is acknowledged absolutely, and a subsequent agreement made, this does not affect the judgment; and the court will take no notice of it, but put the party to his action on the agreement. (i) It has been said, (j) that the court cannot hold plea of an agreement upon motion: But it is usual in practice, to set aside a judgment entered up, and execution taken out, contrary to the agreement of the parties, at the time of confessing the judgment. (k) And where the plaintiff, on the eve of trial, accepted from the defendant a *cognovit* for a certain sum, payable at a future day, in full discharge of the action, and *the master, [*561] on the taxation, allowed the plaintiff costs previous to the *cognovit*; the court refused to admit the plaintiff's affidavit, stating a verbal agreement that he should have such costs, in case the defendant made default in payment, and that he had made such default, and made the rule for the disallowance of such costs absolute. (aa)

By a late rule of the court of King's Bench, (bb) "no judgment can be signed upon any *cognovit*, without such *cognovit* being first produced to the clerk of the dockets, and, after taxation of the costs, filed with him." And, by the statute 3 Geo. IV. c. 39, § 3, "every *cognovit actionem* given by any defendant in any personal action, in case the action, in which such *cognovit actionem* shall be given, shall be in the said court of King's Bench, or a true copy of such *cognovit actionem*, in case the action wherein

(a) Append. Chap. XXII. § 1.

(b) *Per Cur. M.* 42 Geo. III. K. 2 Bos. & Pul. 150, C. P. 4 East, 188. 1 Car. & P. 532.

(cc) 2 Taunt. 360. *Arnold v. Lowe*, T. 57 Geo. III. C. P. 7 Taunt. 703, (a). *Id.* 701. 1 Moore, 428, S. C., and see 3 Durnf. & East, 616. 1 East, 342, (a). 8 Dowl. & Ryl. 56.

(dd) 3 Durnf. & East, 616. 8 Dowl. & Ryl. 56. *Ante*, 550.

(e) *Ante*, 550.

(f) 1 Ld. Raym. 345. Imp. K. B. 10 Ed. 422.

(g) Imp. C. P. 7 Ed. 439.

(h) Append. Chap. XXII. § 5, &c. 15, &c.

(i) 1 Salk. 400.

(k) 6 Mod. 14; and see 2 Blac. Rep. 943.

(aa) 7 Dowl. & Ryl. 375.

(bb) R. H. 2 & 3 Geo. IV. K. B. 5 Barn. & Ald. 560. 1 Dowl. & Ryl. 471. 2 Chit. Rep. 377.

the same is given shall be in any other court, shall, together with an affidavit of the time of the execution thereof, be filed with the said clerk, in like manner as warrants of attorney, or copies thereof, and affidavits,^(c) within the space of *twenty-one* day after such *cognovit actionem* shall have been executed; otherwise such *cognovit actionem*, and any judgment entered up thereon, and any execution taken out on such judgment, shall be deemed fraudulent and void against the assignees of the person giving such *cognovit actionem*, under a commission of bankrupt issued against him after the expiration of the said space of 21 days, in like manner as warrants of attorney, and judgments and executions thereon, are deemed and taken to be fraudulent and void by that act.^(c) And, if such *cognovit actionem* shall be given subject to any defeazance or condition, such defeazance or condition shall be written on the same paper or parchment on which such *cognovit actionem* shall be written, before the time when the same, or a copy thereof respectively, shall be filed; otherwise such *cognovit actionem* shall be null and void, to all intents and purposes.”^(d) These provisions were extended to the assignees of *insolvent* debtors, by the 5 Geo. IV. c. 61, § 16, and 7 Geo. IV. c. 57, § 33. And, by the latter statute,^(e) “in all cases where any prisoner, who shall petition the court for relief under that act, shall have executed any warrant of attorney to confess judgment, or shall have given any *cognovit actionem*, whether for a valuable consideration or otherwise, no person shall, after the commencement of the imprisonment of such prisoner, avail himself, or herself, of any execution issued upon any judgment obtained upon such warrant of attorney or *cognovit actionem*, either by seizure and sale of the property of such prisoner, or by sale of such property theretofore seized, or any part thereof; but that any person or persons, to whom any sum or sums of money shall be due in respect of any such warrant of attorney or *cognovit actionem*, shall and may be a creditor or creditors for the same, under that act.”

*A bond, upon the face of it, appeared to be conditioned for [*562] the payment of a sum certain, but by an indenture of the same date, declaring the purposes for which the bond was executed, it was agreed that it should be lawful for the obligees to commence an action upon the bond, and proceed to judgment, whenever they should think fit; and upon judgment being obtained to issue execution, and that the judgment should be a security for the payment to the obligees, on demand, of all sums of money which then were or might thereafter become due to them: a judgment having been entered up by virtue of this deed, the obligees issued execution, without assigning breaches or executing a writ of inquiry; and the court held, that the indenture, by virtue of which the judgment was entered up, was in legal effect a *cognovit actionem*, within the meaning of the 3d section of the statute 3 Geo. IV. c. 39; or if not, that it was a contrivance to defeat the provisions of that statute: and the indenture not having been filed with the proper officer, within twenty-one days after its execution, nor judgment entered up within that period, as required by the statute, the court, upon application by the assignees of the obligor, who had become bankrupt, ordered the execution to be withdrawn.^(a)

If a *cognovit* be given by an attorney, it seems that the plaintiff must

(c) *Ante*, 555.

(d) § 5.

(e) § 34.

(a) 5 Barn. & Cres. 650. 8 Dowl. & Ryl. 424, S. C.

first file a *bill* against him, before he signs judgment thereon: (b) and in general, common bail must be filed for the defendant upon a *cognovit*; though, if judgment has been irregularly signed, without filing common bail for the defendant according to the statute, till after the term succeeding that in which the writ was returnable, and after the judgment itself has been entered up, the defendant, we have seen, (c) having given a *cognovit*, is estopped from objecting to the irregularity, if the plaintiff has filed common bail *nunc pro tunc*, before the time of making the objection. We have also seen, (d) in what cases the bail are, or are not discharged, by taking a *cognovit* from the principal. And a certificate, it may be remembered, will discharge a *cognovit*, given after a secret act of bankruptcy, for a debt previously due, with interest and costs. (e)

Judgment by *default*, which is an implied confession of the action, is either by *non sum informatus* (f) where the defendant's attorney, having appeared, says that he is not informed of any answer to be given to the action; or by *nil dicit*, (g) where the defendant himself appears, but says nothing in bar or preclusion thereof: [A] And the latter judgment, which is the more usual, is either for want of any plea at all; or for want of an issuable plea, after a judge's order for time, on the terms of pleading issuably; or when the defendant pleads a plea not adapted to the nature of *the action, or which may be considered as a nul- [*563] lity, or is false and vexatious, or not pleaded in due time, or proper manner.

On the expiration of the time for pleading, a rule to plead having been given, and a plea demanded, when necessary, the plaintiff's attorney should *search* for a plea, if not delivered to him, with the clerk of the papers, who receives special pleas in the King's Bench, and with the clerk of the judgments, who keeps the general issue book at the King's Bench office, or at

(b) *Walker v. Wolley*, H. 37 Geo. III. K. B. 7 Durnf. & East, 207. (a)

(c) *Ante*, 242.

(d) *Ante*, 295.

(e) 1 Chit. Rep. 16. *Ante*, 210; but see 2 Taunt. 68. 2 Rose, 112, S. C. *semb. contra*.

(f) Append. Chap. XXII. § 25, &c.

(g) Append. Chap. XXII. § 34, &c. 71, &c. 88, 9.

[A] There must be service of the process, and in some states appearance, or there can be no judgment; *Smitherston v. Owens*, Wright, 574. *Law v. Duncan*, 2 Brevard, 263. *Ware v. Todd*, 1 Ala. 199. *Druer v. Spence*, 3 Id. 98. *Hobson v. Emanuel*, 8 Post, 442. *Smith v. Branch Bank*, 5 Ala. 26. *Prentiss v. Mellen*, 1 Smedes & Marsh, 521. *Harris v. Bostio*, 1 How. Miss. 106. *Davis v. Jordan*, 5 Id. 295. *Bozman v. Brower*, 6 Id. 43. *Parris v. Forbes*, 5 Id. 518. *Gilbreath v. Kuy Kendall*, 1 Pike, 50. *Moore v. Watkins*, Id. 268. *Welford v. Howell*, 2 Pike, 1. *Buscom v. Young*, 7 Mis. 1. *January v. Henry*, 3 Munr. 8. *Rany v. The Governor, &c.*, 4 Blackf. 2. *Bliss v. Wilson*, Id. 169. *Klinger v. Brownell*, 5 Id. 332. *Miller v. Bettorf*, 6 Id. 30. *Garrett v. Phelps*, 1 Scam. 331; neither will service upon one in an action against several suffice to take judgment upon against those not served; *Teal v. Russell*, 2 Scam. 319. *Russell v. Hogan*, 1 Id. 552. *Cole v. Wagner*, 2 Pike, 154.

Where the conduct of the plaintiff has been fair, and the proceedings regular, a judgment by default will not be reversed merely to allow a trial upon the merits; *Murat v. Bolton*, 1 Green. 304. But the defendant may avail himself of radical defects; *Farrer v. Bebee*, Geo. Decis., Part 2, p. 125. *Gilbreath v. Kuy Kendall*, 1 Pike, 80; although this should be done at the first opportunity after the defect or irregularity is discovered; *Ryder v. Twiss*, 3 Scam. 4.

A judgment by default may be set aside on motion, affidavit of merits and payment of costs, if the opportunity of trial be not thereby lost; *Porter v. Johnson*, 2 How. Miss. 136. *Erore v. Folsom*, 4 Id. 282. *Miller v. Alexander*, Coxe, 400.

the prothonotaries' office in the Common Pleas; and if no plea be delivered, or found at either of those offices, the plaintiff's attorney may sign judgment, as for want of a plea: And judgment may be signed in like manner, if the defendant do not rejoin,(a) plead to a new assignment, or join in demurrer, when necessary; or, in the King's Bench, if he do not return the paper or demurrer book in due time. If the defendant plead a false plea of judgment recovered,(b) or other plea that is not issuable,(c) after a judge's order for time to plead, on the terms of pleading issuably, the plaintiff, we have seen,(c) may consider the plea as a nullity, and sign judgment. So if the defendant, being under an order to plead issuably, plead several pleas, one of which is not issuable, the plaintiff, in the King's Bench, may sign judgment as for want of a plea, although the other pleas are issuable:(d) Where the defendant had obtained an order for staying proceedings, upon payment of debt and costs, which had been taxed, and afterwards abandoned the order, and pleaded a judgment recovered, the court held, that the plaintiff was at liberty to sign judgment, the plea filed being a fraud upon the judge's order.(e) And judgment may be signed in the Common Pleas, if a declaration in *debt* demand *two thousand pounds*, and contain several counts, each of which states a less sum, *e. g. five hundred pounds*, and the defendant being under terms of pleading issuably, plead thereto, that he does not owe the said sum of *five hundred pounds*.(f) But if the defendant, when under an order to plead issuably, put in a plea which, though informal, goes to the substance of the action, the plaintiff cannot sign judgment, as for want of a plea;(g) nor can judgment be signed, if one of several pleas be merely demurrable.(h) And, in the Common Pleas, where a defendant, being under terms to plead issuably, put in an issuable plea, to which the plaintiff replied, and gave notice of trial, and the defendant demurred specially to the replication, whereupon the plaintiff signed judgment; the court held that the judgment was irregular; 4 Bing. 267. *Ante*, 472.

When the defendant pleads a plea not adapted to the nature of the action, as *nil debet* in *assumpsit*,(i) or *non assumpsit* in *debt*,(k) &c., the plaintiff may consider it as a nullity, and sign judgment. But a plea in *assumpsit*, that the defendant did not undertake, (omitting the [*564] words "or *promise,") in manner and form, &c., with a conclusion to the country, is not so unintelligible, as to entitle the plaintiff to sign judgment as for want of a plea.(aa) So, the plea of *nil debet* in an action of *debt* on *judgment*,(bb) or not guilty in an action of *debt* on a penal statute,(cc) is not such a nullity as will warrant the plaintiff in signing judgment; nor can judgment be signed in a *qui tam* action, for entitling the plea with the names of the parties, without the addition of

(a) 5 Durnf. & East, 152.

(b) 1 Blac. Rep. 376. 2 Wils. 117. 3 Wils. 33. 1 Moore, 431. *Ante*, 472.

(c) *Ante*, 472.

(d) 3 Durnf. & East, 305; and see 1 East, 411. Barnes, 314. *Ante*, 472, 3.

(e) 2 Chit. Rep. 292.

(f) 3 Bos. & Pul. 174; but see 1 Dowl. & Ryl. 473.

(g) 5 Durnf. & East, 152; and see 1 Chit. Rep. 355.(a) 1 Dowl. & Ryl. 359.

(h) *King v. Barber*, M. 30 Geo. III. K. B.

(i) Barnes, 257; but see *Cas. temp. Hard.* 179. Lawes on Pleading, 529. 1 Chit. Rep. 716, *in notis.* And see Lawes on Pleading, 527, &c. 5 Mod. 92. 2 Str. 1022. *Cas. temp. Hard.* 173, S. C. 1 Chit. Rep. 715, 16;(a) and the cases there cited, as to the validity of a plea of *not guilty* in *assumpsit*, or *non assumpsit* in an action of *tort*.

(k) *Ante*, 476.

(aa) 3 Dowl. & Ryl. 622.

(bb) 2 Chit. Rep. 239.

(cc) 1 Durnf. & East, 462; and see 3 Bos. & Pul. 111.

qui tam, &c., to the plaintiff's name.(d) So, a plea, in *debt* for 1800*l.* that the defendant does not owe the said sum of 10*l.* above demanded, &c., is, it seems, sufficient, and the amount may be rejected as surplusage.(e) And a misstatement of the defendant's *christian* name, in the commencement of his plea, does not entitle the plaintiff to treat it as a nullity, and sign judgment as for want of a plea.(f)

In the King's Bench, when a plea is clearly absurd on the face of it, as where it attempts to set up as a defence, a judgment recovered in the Exchequer in *Ireland*, before the cause of action accrued, the plaintiff may consider it as a nullity, and sign judgment as for want of a plea, without a previous application to the court:(g) And a plea of set off for money due on a recognizance, and also for money due upon promises, pleaded to an action of *debt* on bond, as if to an action of *assumpsit*, was holden in that court to be a nullity, and that the plaintiff might sign judgment.(h) So, where a sham plea was pleaded, of judgments recovered in the court of *pie-poudre* in *Bartholomew Fair*, in terms obviously denoting fictitious proceedings, the court reprobated the practice; and, considering the plea as a nullity, suffered the plaintiff to sign judgment as for want of a plea, and made the defendant's attorney pay the costs of it, and of the application.(i) And where the defendant first pleaded in abatement, and afterwards, without applying to the court for leave to withdraw that plea, pleaded a judgment recovered, the court held that the plaintiff was at liberty to sign judgment as for want of a plea.(k) So, in the Common Pleas, where the defendant pleaded the statute of additions in abatement, the court held the plea to be a nullity, and gave the plaintiff leave to sign judgment:(l) and Lord *Alvanley*, in delivering the opinion of the court, observed, that perhaps it would have been the more regular mode of proceeding for the plaintiff to have signed judgment as for want of a plea, without any application to the court, and thus have put the defendant to move to have that judgment set aside.(m) In the latter court, if the defendant plead a subtle plea, to ensnare the plaintiff, the court will permit the plaintiff to sign judgment, unless the defendant will amend.(n) But, unless the plea be manifestly absurd on the face of it, or probably a *sham* *plea,(a) the plaintiff in the King's Bench, will not be justified in signing judgment as for want of a plea, without a previous [*565] application to the court;(b) which is also necessary, after the defendant has been ruled to abide by his plea.(c) If the defendant plead in *abatement*, without an affidavit of the truth of the plea,(d*l*) or a plea of *tender* without paying money into court,(e*e*) or if, after craving *oyer* of a deed, he do not set forth the whole of it,(f*f*) the plaintiff, in either of

(d) 7 East, 333.

(e) 1 Dowl. & Ry. 473. 1 Moore & P. 276, but see 3 Bos. & Pul. 174.

(f) 7 Dowl. & Ry. 511.

(g) 1 Chit. Rep. 525, 6, *in notis*, and see 4 Taunt. 668. 1 Dowl. & Ry. 577.

(h) 2 Maule & Sel. 606.

(i) 10 East, 237.

(k) 5 Dowl. & Ry. 623.

(l) 3 Bos. & Pul. 395, and see 7 East, 383. 2 New Rep. C. P. 188. 4 Taunt. 668.

(m) 3 Bos. & Pul. 398.

(n) 3 Taunt. 339.

(a) 6 Maule & Sel. 133.

(b) 1 Chit. Rep. 525, *in notis*.

(c) *Id.* 565, *in notis*. 5 Maule, & Sel. 518, S. C.

(d*l*) Pr. Reg. C. P. 4. Forrest, 144; and see 1 Str. 639. 2 Ld. Raym. 1409, S. C. 2 Moore, 213; but see 1 Str. 638.

(e*e*) 1 Str. 638. Barnes, 252.

(f*f*) 4 Durnf. & East, 370. *Slater v. Horne*, E. 34 Geo. III. K. B. 5 Durnf. & East, 662, 3.

these cases, may sign judgment as for want of a plea. But judgment cannot be signed, in the King's Bench, after a plea in abatement, because the affidavit to verify the truth of it was sworn before the defendant's attorney: (g) And in general, when the matter is doubtful, it is the safest course not to sign judgment, but to take issue on the plea, demur thereto, or move the court to set it aside. (h)

When *sham* pleas, however, are pleaded, calculated to raise issues requiring different modes of trial, as a set off for money due on a recognizance or judgment, the issue upon which is triable by the *record*, and for money due on simple contract, the issue upon which is triable by the *country*, the court of King's Bench, on an affidavit that the pleas are false, will suffer the plaintiff to sign judgment as for want of a plea, and make the defendant, or his attorney, pay the costs occasioned by the pleas, with the costs of the application. (i) And the plaintiff may sign judgment, as for want of a plea, if the plea be palpably a sham plea. (k) So, where a sham plea is such as to make it necessary for the plaintiff's attorney to consult counsel, and thereby cause delay and expense, the court will permit the plaintiff to sign judgment, and make the attorney pay the costs: (l) And, in a similar case, the costs were ordered to be paid by the attorney, though it appeared that he was expressly instructed by the defendant to plead a dilatory plea. (m) But the court of King's Bench will not grant a rule for the plaintiff to sign judgment as for want of a plea, merely on an affidavit that the plea is false, unless it be also shown that it is vexatious, and calculated to create unnecessary delay and expense. (n) And where the defendant, after delaying the plaintiff, and deluding him with promises of payment, pleaded a plea of judgment recovered, the court of Common Pleas refused to set the plea aside, and permit the plaintiff to sign judgment. (o) So where the defendant, in an action against the drawer of a bill of exchange, pleaded the delivery of twenty pipes of port wine in satisfaction; that court refused to allow the plaintiff to sign judgment as for want of a plea, although it was sworn that the plea was altogether false; and intimated that in future such applications would be discharged with costs. 1 Moore & P. 338. 4 Bing. [*566] 512, S. C. To support a motion for leave to sign judgment as for want of a plea, on the ground that improper pleas have been pleaded, there must be an affidavit, in the King's Bench, that they are untrue. (a) But if such pleas have been pleaded under a rule to plead double, it is not necessary first to move to set aside the rule. (a)

When the defendant pleads before he has appeared, (b) or taken the declaration out of the office, (c) or before the bail are perfected in a bailable

(g) 3 Maule & Sel. 154.

(h) *Ante*, 473; but see 4 Taunt. 668. 2 Moore, 213.

(i) 2 Barn. & Ald. 197; and see 1 Chit. Rep. 564, (a).

(k) 6 Maule & Sel. 134.

(l) 2 Barn. & Ald. 199. 5 Barn. & Ald. 750, 751, (a). 1 Dowl. & Ryl. 446, 448, S. C. 2 Chit. Rep. 335.

(m) 1 Chit. Rep. 182; but see 3 Dowl. & Ryl. 233, 4.

(n) 1 Chit. Rep. 524, 5; and see *id.* 355. 1 Dowl. & Ryl. 359. 2 Barn. & Cres. 81. 3 Dowl. & Ryl. 231, S. C. *Per Cur. M.* 4 Geo. IV. C. P.; but see 1 Barn. & Cres. 286. 2 Dowl. & Ryl. 661, S. C. *contra*.

(o) 1 Bing. 380. 8 Moore, 437, S. C.

(a) 2 Barn. & Ald. 777. 1 Chit. Rep. 564, S. C.

(b) 2 Chit. Rep. 8.

(c) 1 Chit. Rep. 735. *Imp. C. P.* 7 Ed. 420. 2 Chit. Rep. 7, (a); but see 1 Bos. & Pul. 341, *semb. contra*. 1 Chit. Rep. 735, (a). 2 Chit. Rep. 7.

cause,(d) the plaintiff may consider the plea as a nullity, and sign judgment. So, if the defendant plead in abatement after a *general* imparlance, or to the jurisdiction of the court after a *special* imparlance, the plaintiff, we have seen,(e) may sign judgment as for want of a plea: And judgment may be signed, when he pleads in abatement, after the expiration of *four* days inclusive from the delivery, or filing and notice of declaration.(f) So, if the defendant plead in abatement to one count, and in bar to others, after the *four* days allowed for pleading in abatement, it seems that the plaintiff may sign judgment.(g) But a judge's summons returnable before judgment signed, though after the time for pleading has expired, operates as a stay of proceedings;(h) therefore, the plaintiff in such case cannot sign judgment, without first attending the summons:(h) And, in general, though a plea be not pleaded in due time, yet if the other party do not take advantage of it immediately, the defendant may deliver his plea at any time before judgment is actually signed against him.(i)

In the King's Bench, when a plea of *solvit ad diem*, which ought to be delivered to the plaintiff's attorney, is entered in the general issue book,(k) or a plea is filed in the office of the clerk of papers, that ought to be delivered to the plaintiff's attorney, (l) the plaintiff may consider it as a nullity, and sign judgment; as he may also, in the Common Pleas, if the general issue be not delivered in *form*,(m) or if a plea be pleaded by an attorney of another court,(n) and judgment may be signed in that court, when a defendant files two pleas at several times on the same day, in order to mislead the plaintiff by the second plea.(o) So, if several pleas be filed, to the whole or part of a declaration, without a rule to plead several *matters being drawn up, or instructions given for it to the clerk [*567] of the rules, they are considered, in the King's Bench, as a nullity, and the plaintiff may sign judgment;(a) though it seems that, in the Common Pleas, the practice is for the defendant to apply to the court, to strike out one of them:(b) And, in both courts, the plaintiff may sign judgment, if the plea, when necessary, be not signed by a counsel.(c) or serjeant.(dd) A judgment by default, we have seen.(ee) is irregular, when the defendant, in an action not bailable, has not been served with a copy of process; or when there has been no declaration regularly delivered, or

(d) *Ante*, 465, 6.

(e) *Ante*, 463, 476.

(f) 1 Durnf. & East, 277, 689.

(g) *Martindale v. Harding*, M. 58 Geo. III. K. B. 1 Chit. Rep. 716, *in notis*.

(h) 1 Chit. Rep. 93. *Ante*, 470.

(i) 1 Durnf. & East, 16. 4 Durnf. & East, 195, 6. 5 Durnf. & East, 35.

(k) 5 Durnf. & East, 661.

(l) 2 Barn. & Ald. 392. 1 Chit. Rep. 211, S. C. *Id.* 225. But the general issue may be filed with the clerk of the judgments. *Id.* 715. And see R. T. 2 Jac. I. *reg.* 1. R. T. 16 Car. II. R. M. 2 W. & M. K. B. as to *delivering* pleas, that ought to be *filed* in the office of the clerk of the papers.

(m) Cas. Pr. C. P. 126. Pr. Reg. 306, S. C. Barnes, 239, S. P. *Gibson v. Houseman*, E. 56 Geo. III. K. B. 1 Chit. Rep. 647, (a).

(n) Barnes, 259. Pr. Reg. 307, S. C. But if the plaintiff take a plea out of the office, and keep it he waives any objection to the plea, on the ground of its having been pleaded by a new attorney without an order to change the attorney, 2 New Rep. C. P. 509; but see Barnes, 252, *semb. contra*.

(o) 3 Taunt. 386.

(a) *Per Buller, J.*, in *Bedford & Gathfield*, H. 26 Geo. III. K. B. *Ante*, 472, 3; 563.

(b) 1 Bos. & Pul. 415.

(c) R. E. 18 Car. II. K. B.; and see 6 Durnf. & East. 496. 2 Chit. Rep. 319.

(dd) Pr. Reg. 282. 3 Bos. & Pul. 171. 3 Taunt. 386. 2 Moore, 220.

(ee) *Ante*, 513.

filed and notice thereof given to the defendant;(*ff*) or when it is signed before the defendant's appearance, or without entering a rule to plead, or demanding a plea, when necessary; or before the time for pleading is expired; or after a plea has been regularly delivered, or filed.(*gg*) So, when the plaintiff declares absolutely, before the defendant has appeared, he cannot sign judgment, after plea, for want of his appearance:(*h*) And a judgment signed contrary to good faith may be set aside.(*i*) But if a defendant accept a declaration, and act as if an appearance had been entered for him, the court will not afterwards permit him to set aside a judgment, on the ground of his not having appeared.(*k*) And an irregular judgment cannot be set aside, after the defendant has given a *cognovit*;(l) or attended and cross-examined the witnesses, on the execution of a writ of inquiry.(*m*)

The plaintiff may *waive* a judgment by default;(n) or, if *irregular*, the defendant may move the court to set it aside. But the motion for this purpose must be made in term time, or notice given of it in vacation, *two* days at least before the day appointed for executing the inquiry.(o) And in the Common Pleas, it is said there can be no motion to set aside a judgment the last day of term, unless it appear that the defendant could not have applied sooner.(p) If the judgment be *regular*, yet when the plaintiff has not lost a trial, the courts on motion will set it aside, upon an affidavit of merits; the defendant undertaking to pay the costs,(q) to plead issuably *instantly*,(*r*) take short notice of trial,(s) and give judgment of the term when necessary, so as to put the plaintiff in the same situation as if *the judgment had [*568] had not been set aside.(a) But the courts will not set aside a *regular* judgment, to give the defendant advantage of a nicety in pleading;(b) or to let him in to plead any matter which does not go to the merits of the cause.(c)[A] So, where a defendant, having a good legal defence, had refused equitable terms of compromise, the court of Common Pleas would not set aside the judgment, and permit him to plead.(d) But the statute of limitations is considered as a plea to the merits;(e) and in the latter court, the defendant has been allowed to plead his bankruptcy,(f) or infancy.(g) In the King's Bench, the affidavit of merits must appear to have been

(ff) 4 Taunt. 818.

(gg) *Id.* 545.

(h) *Per Cur.* M. 44 Geo. III. K. B.

(i) 13 Price, 489.

(k) 1 New Rep. C. P. 309.

(l) 7 Durnf. & East, 206. *Ante*, 242, 562.

(m) 4 Taunt. 545.

(n) T. 23 Car. I. K. B. Cas. Pr. C. P. 124. Pr. Reg. 294. Barnes, 251, S. C.

(o) *Ante*, 513.

(p) Cas. Pr. C. P. 130. *Ante*, 499.

(q) 1 Salk. 402. 2 Salk. 518. Barnes, 242. 1 Chit. Rep. 226, 232.

(r) *Instantly*, it has been said, means within twenty-four hours. *Pryce v. Hodgson*, E. 25 Geo. III. K. B.; and see 1 Taunt. 343. *Sed quare*, by whom this account of hours is to be kept; and whether *instantly*, as applied to the subject-matter, may not more properly be taken to mean, "before the rising of the court," when the act is to be done in court; or "before the shutting of the office on the same night," when the act is to be done there? 6 East, 587, (b).

(s) Barnes, 242. 1 Chit. Rep. 226, 232.

(a) 2 Str. 823, 975. 1 Ken. 343. 1 Bur. 568. 2 Ken. 290, S. C. *Per Cur.* T. 24 Geo. III. K. B.

(b) 2 Str. 1242.

(c) 1 Blac. Rep. 35. *Stafford v. Rowntree*, E. 24 Geo. III. K. B.

(d) 4 Taunt. 885.

(e) 2 Durnf. & East, 390. *Mackenzie v. Higgins*, H. 22 Geo. III. K. B. 1 Bos. & Pul. 228. *Ante*, 471.

(f) 1 Bos. & Pul. 52.

(g) 5 Taunt. 856. 1 Marsh. 391, S. C.

[A] See *ante*, p. 562, note [A].

made by the defendant, or his attorney or agent : (*hh*) And an affidavit, that the defendant is advised and believes he has a good defence to the action, will not satisfy the condition of a rule which requires him to swear to a good defence "on the merits." (*ii*) In general, the affidavit is made by the defendant's attorney : (*kk*) and, in the Common Pleas, if it be made by any other person than the defendant, he must swear either that he is the defendant's attorney, or managing clerk to the defendant's attorney. (*l*) On setting aside a judgment and execution for irregularity, the court of King's Bench will restrain the defendant from bringing an action of *trespass*, unless a strong case for damages be shown. (*m*)

A judgment by default is *interlocutory* or *final*. When the action sounds in damages, as in *assumpsit*, *covenant*, *trover*, *trespass*, &c., the judgment is only interlocutory, [A] "that the plaintiff ought to recover his damages," leaving the amount of them to be afterwards ascertained : (*n*) And the judgment for the plaintiff, in these actions, is also interlocutory, on demurrer, or *nul tiel record*. In *debt*, the judgment is commonly *final* : (*o*) though a writ of inquiry is sometimes necessary, or may be sued out, for assessing them. (*p*) In the King's Bench, the judgment, whether interlocutory or final, is signed on a paper, called a judgment paper, with the clerk of the judgments ; an *incipitur* being first entered on a roll, of the term it is signed : In the Common Pleas, it is signed on a judgment paper, by the prothonotaries ; warrants of attorney being first written on parchment, and filed with the clerk of the warrants. And, on a final judgment in both courts, no rule for judgment being necessary, the plaintiff may in general proceed immediately to tax his costs, and take out execution.

Formerly, it appears, no judgments, either by *non sum informatus* or *nihil dicit*, could have been entered of record in the Common Pleas, without the notice and commandment of the judges ; nor any costs of suit *given upon any of the said judgments, before the costs were [*569] taxed and allowed by some of the judges of this court. Afterwards, the prothonotaries were deputed and appointed by the court, to take order for the entering of all such judgments, before they were entered of record ; and a rule was made, for preventing abuses, that "no clerk or attorney should enter of record any of the said judgment, or set down any costs of suit thereon, before the said costs were rated and allowed by one of the judges of this court, or by the prothonotary in whose office the same should be entered of record, and warrant given by him, under his hand, for the entering of the said judgment : " (*a*) And, by a subsequent rule, "the prothonotaries shall not sign any judgment by confession, either by *non sum informatus* or *nihil dicit*, unless the same be brought to be signed within twenty days after the end of *Trinity*, *Michaelmas*, or *Hilary* term, and at or before the first day of *Trinity* term, in every year ; unless the attorney or clerk do produce before them a warrant or warrants of attorney, bearing date after the end of such term, and then the judgments on such warrants so produced, may be signed at or before the *essoin* day of

(*hh*) 1 Chit. Rep. 97.

(*ii*) 1 Dowl. & Ry. 155 ; but see 13 Price, 260.

(*kk*) *Per Cur.* H. 37 Geo. III. K. B.

(*l*) 3 Taunt. 403.

(*m*) 1 Chit. Rep. 134 ; and see *id.* 238.

(*n*) Append. Chap. XXII. § 34, &c.

(*o*) *Id.* § 71, &c.

(*p*) *Post*, 573.

(*a*) R. E. 11 Jac. I. C. P.

[A] See *Smith v. Vanderherst*, 1 McCord, 328.

the succeeding term in every year, and not after :”(b) But, notwithstanding this rule, judgments are now signed at any time in the vacation.(c) It is also a rule in the Common Pleas, that “no judgment whatever, except final judgments upon *postea*s and writs of inquiry and *non prosses*, shall be signed by any of the prothonotaries of this court, unless the stamp of the clerk of the warrants be first impressed on the paper whereon such judgment is to be signed, whereby it may appear that warrants of attorney are duly filed :”(d) And accordingly, the practice in that court, on signing judgment by default, &c., is to file the warrants of attorney on unstamped parchment, with the clerk of the warrants, who marks the judgment paper, before judgment is signed thereon by the prothonotaries.

In the King’s Bench by *bill*, or in the Common Pleas, judgments by default are entered on a roll of the term of which they are signed ; but, in the King’s Bench by *original*, they are entered of the term of the declaration : and, in the latter court, the entry is the same, whether the judgment be for want of a plea, or for not rejoining, surrebutting, or joining in demurrer, or for not returning the paper book ; but, in the Common Pleas, where the pleadings are supposed to be entered of record as they are pleaded, the judgment roll states the previous proceedings, and the particular default upon which the judgment is given. In the King’s Bench, the entries are made by the plaintiff’s attorney ; in the Common Pleas, by the clerk of the judgments, with whom the writ of inquiry is left for that purpose ;(e) and there is no necessity, in that court, for a subsequent continuance between the parties, after judgment by default, and writ of inquiry awarded :(f) but, in the King’s Bench, it is said to be otherwise.

[*570] *By the late *bankrupt* act,(a) it is provided, that “no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution, to the prejudice of other fair creditors, but shall be paid rateable with such creditors.” On this statute, the court of King’s Bench would not set aside an execution issued upon a judgment obtained by *nil dicit*, and served and levied by seizure upon the property of a bankrupt, before his bankruptcy ; the statute not rendering the execution in such case void, but merely enacting, that the plaintiff in such execution shall be paid rateably with the other creditors.(bb) And where A. having a debt from B. secured by warrant of attorney, entered up judgment by *non sum informatus*, issued a *fieri facias*, and took from the sheriff a bill of sale of the goods seized, and B. having soon afterwards become bankrupt, his assignees took possession of and sold the goods so transferred to A. who brought an action of *trover* for them ; the court held, that he was not a creditor having security for his debt, within the above statute, and that he was entitled to recover, 6 Barn. & Cres. 479.

After *interlocutory* judgment, the amount of the damages sustained by the

(b) R. T. 29 Car. 11 *reg.* 5, C. P.

(c) *Id.* (a).

(d) R. M. 5 Geo. II. C. P. ; and see R. H. 14 & 15 Car. II. *reg.* 2. R. H. 2 & 3 Jac. II. C. P. *Ante*, 96.

(e) R. T. 13 Geo. II. *reg.* 2, C. P.

(f) 11 Co. 6, b. Yelv. 97. 1 Rol. Abr. 486.

(a) 6 Geo. IV. c. 16, § 108.

(bb) 5 Barn. & Cres. 392. 8 Dowl. & Ryl. 159, S. C.

plaintiff is ascertained, either by reference to the master in the King's Bench, or prothonotaries in the Common Pleas, or by writ of inquiry. In general, a writ of inquiry is awarded: but this is a mere inquest of office, to inform the conscience of the court; who, if they please, may themselves assess the damages with the assent of the plaintiff,^(c) or direct them to be assessed by the proper officer. And it is accordingly the practice, in actions upon bills of exchange and promissory notes, instead of executing a writ of inquiry, to apply to the court in *term* time,^(d) on an affidavit^(e) of the nature of the action, &c., for a rule to show cause,^(f) why it should not be referred to the master in the King's Bench, or prothonotaries in the Common Pleas,^(g) to see what is due for principal and interest, and to tax the plaintiff his costs, and why final judgment should not be signed for that sum, without executing a writ of inquiry; upon which the court will make the rule absolute,^(h) on an affidavit of service, unless good cause be shown to the contrary:⁽ⁱ⁾ In *vacation*, a judge on summons, and the signature of counsel, will grant his *fiat*,^(k) for drawing up the rule.^(l) And a similar rule or order may be obtained, in actions on *covenants* for the payment of a sum certain,^(m) as upon a mortgage,⁽ⁿ⁾ or for rent,^(o) or arrears of an annuity,^(a) &c.; or an award.^(b) So, where there was a [*571] demurrer to one count on a bill of exchange, and judgment for the plaintiff, and a plea to other counts on which issue was joined, the court of King's Bench referred it to the master, to see what was due to the plaintiff on the former.^(c) In such case, however, a *nolle prosequi* must be entered on the other counts.^(dd) But this entry need not be made before the reference to the master: It is sufficient, if done at any time before final judgment.^(ee)

In the King's Bench, where interlocutory judgment was signed, and the plaintiff died on a subsequent day in the term, the court granted a rule to compute principal and interest on the bill on which the action was brought:^(ff) and a similar rule was made absolute, on producing a copy of the bill, verified by affidavit of the plaintiff's attorney; the original having been stolen out of his pocket, and no tidings of it obtained.^(gg) In the Exchequer, it was not formerly usual to refer the question of damages to the master, in actions upon bills of exchange, &c.;^(hh) but this

(c) 2 Wms. Saund. 5 Ed. 107, (2). 2 Wils. 372, 374. 3 Wils. 61. 2 Doug. 316. *Watson v. Preston*, E. 25 Geo. III. C. P. 1 H. Blac. 252, 529, 542. 4 Durnf. & East, 275. 7 Durnf. & East, 446, 7. 4 Taunt. 148, 9. 1 Chit. Rep. 621, *n*. And in confirmation of this doctrine, it may be observed, that the courts have the power of setting aside inquisitions for small or excessive damages; and in some cases of increasing them. Say. Dam. 173, &c. and see 1 Rol. Abr. 572. Com. Dig. tit. *Damages*, E. 1, 2.

(d) *Per Cur.* T. 25 Geo. III. K. B.

(e) Append. Chap. XXII. § 30.

(f) *Id.* § 31.

(g) 1 H. Blac. 541.

(h) Append. Chap. XXII. § 32. 1 Chit. Rep. 469, (b).

(i) 4 Durnf. & East, 275; and see 1 H. Blac. 252, 529, 541. 2 Bos. & Pul. 55. And for the form of the judgment upon this rule, see Append. Chap. XXII. § 34, 5, 6. Chap. XXXI. § 7.

(k) Append. Chap. XXII. § 33.

(l) 2 Smith R. 46, 7, *in notis*.

(m) Doug. 316.

(n) 8 Durnf. & East, 326; and see 2 Chit. Rep. 234, 5; 265, (a).

(o) 8 Durnf. & East, 410. 6 Taunt. 356. 13 Price, 53; but see 14 East, 622. 6 Moore, 331.

(a) 2 Chit. Rep. 32.

(b) *Per Cur.*, in *Meggison* & ———, K. B.

(cc) 7 Durnf. & East, 473.

(dd) 2 Smith R. 46, 47, *in notis*.

(ee) *Per Cur.* H. 48 Geo. III. K. B.

(ff) 1 Maule & Sel. 229.

(gg) 3 Maule & Sel. 281; and see 2 Chit. Rep. 233, (a).

(hh) 1 Austr. 249.

practice has since been adopted, and put upon the same footing as in the other courts. *(ii)*

The practice we are now speaking of is confined to cases, where it appears on the declaration, that the action is brought upon bills of exchange or promissory notes, *(kk)* or other actions wherein the *quantum* of damages depends on figures, and may be as well ascertained by the master or prothonotaries, as before a jury: And therefore, where the defendant had suffered judgment by default, in an action of *assumpsit* on a foreign judgment, the court of King's Bench refused to make the rule absolute, for a reference to the master; saying, this was an attempt to carry the rule further than had yet been done; and as there was no instance of the kind, they would not make a precedent for it. *(ll)* In a subsequent case, *(mm)* the court refused to make the rule absolute, in an action upon a bill of exchange for *foreign* money; the value of which is uncertain, and can only be ascertained by a jury: *(n)* and, in another case, *(o)* they would not direct the master to allow *re-exchange*, in an action upon a bill of exchange drawn in *Scotland*, upon and accepted by the defendant in *England*. It should also be observed, that such a rule cannot be had in *assumpsit* for a certain sum, due upon an agreement; *(p)* nor in an action upon a bottomree bond; *(q)* or to ascertain the damages sustained by the plaintiff, in an action of *debt* on a judgment recovered on a bill [*572] of exchange: *(r)* And in *covenant* *on a deed, whereby the plaintiffs covenanted to indemnify the Bank of *England* against advances to L. and B. on bills to the amount of 100,000*l.* and the defendant and others agreed to sub-indemnify the plaintiffs to the same amount, in certain *aliquot* proportions, of which the defendant's proportion was 5000*l.*, and the plaintiffs alleged that they had been obliged to pay the whole 100,000*l.* to the Bank, and demanded of the defendant his proportion of 5000*l.*, in which action the plaintiffs had judgment on demurrer; the court of King's Bench refused to refer it to the master, to compute the principal and interest due on the deed, considering that it was not a mere question of computation of principal and interest, but that it was open to the defendant, before the sheriff's jury, to enter into questions of collateral satisfaction of the plaintiff's demand, from securities and effects of L. and B. the principals, in their hands. *(a)* [A]

The plaintiff, in the King's Bench, may obtain a rule for referring a bill of exchange to the master, on the day on which interlocutory judgment is signed for want of a plea, *(b)* or for not producing the record; *(c)* but where

(ii) 4 Price, 134. Chitty on Bills, 5 Ed. 474.

(kk) 8 Durnf. & East, 648.

(ll) 4 Durnf. & East, 493; and see 1 Maule & Sel. 173. 4 Campb. 380. 1 Stark. Ni. Pri. 219, S. C., by which it appears, that the plaintiff is not entitled to interest on a foreign judgment.

(mm) 5 Durnf. & East, 87.

(n) Cro Eliz. 536. Cro. Jac. 618. 1 Chit. Rep. 621, 627.

(o) 12 East, 420.

(p) Per Cur. H. 37 Geo. III. K. B.

(q) *Palin v. Nicholson*, E. 38 Geo. III. K. B.

(r) 8 Durnf. & East, 395. 2 Chit. Rep. 233.

(a) 14 East, 622; and see 2 Barn. & Cres. 348. 3 Dowl. & Ryl. 613, S. C.

(b) 3 Maule & Sel. 109.

(c) 5 Barn. & Ald. 752. 1 Dowl. & Ryl. 444, S. C.

[A] So a mistake in a writ of inquiry of the formal description of the court, before which it is returned, is cured by the statute of jeofails. *Richardson v. Backus*, 1 Johns. 59. The appearance of the defendant on the execution of the writ cures irregularities in previous proceedings unobjectioned to. *White v. Ranken*, 2 Blackf. 78.

it is signed upon demurrer, it has been the practice not to move for such rule until the following day: (d) And, in that court, the rule absolute for computing principal and interest on a bill of exchange, must be served on the defendant, before final judgment can be signed, as well as the rule *nisi*; (e) and in serving the latter rule, where there are two defendants, the service should be on both; (f) but it is sufficient to serve a copy of the rule, without showing the original. (f) It has also been decided, in the King's Bench, that the plaintiff's attorney is not bound to serve the defendant with notice of computing principal and interest, on a rule or order of reference; (g) or a copy of the master's appointment for that purpose; (h) unless the defendant has obtained and served him with a rule to be present at the taxation; (i) the defendant having notice of the proceeding, by service of the rule *nisi*, so as to be present if he pleases. But, in the Common Pleas, notice must be given to the defendant, of the prothonotary's appointment to compute principal and interest on a bill of exchange; (k) The reason is said to be, that this proceeding of a reference to the prothonotary is substituted for a writ of inquiry; and as it is necessary for the plaintiff to give notice to the defendant of the execution of such writ, so he must give him notice of the prothonotary's appointment to compute principal and interest, in order that he may have an opportunity of bringing forward any facts which may have occurred, to reduce the sum which the plaintiff seeks to *recover. (a) And where judgment has gone by default on a promissory note, no irregularity previous to the judgment can be shown as cause against referring the note to the master or prothonotary. (b)

A writ of inquiry of damages is a *judicial* writ, issuing out of the court where the action is brought; and must be sued out, after *interlocutory* judgment, in all actions wherein damages are recoverable, as in *assumpsit*, *covenant*, *case*, *trespass*, &c., except where they are referred to the master or prothonotaries, on bills of exchange or promissory notes, &c., or are confessed by the defendant. After *final* judgment, a writ of inquiry is in general unnecessary; and the court of King's Bench would not direct such a writ to be executed, at the instance of the defendant, after judgment by default in an action of *debt*. But where an action is brought on a *judgment*, the plaintiff may have a writ of inquiry, after judgment by default, to recover *interest*, by way of damages, for the detention of the debt. (c)

(d) 3 Maule & Sel. 109; and see 3 Smith R. 179.

(e) 1 Chit. Rep. 466, 468.

(f) *Flindt v. Bignell & another*, M. 56 Geo. III. K. B. 1 Chit. Rep. 466, (a).

(g) *Sellers v. Thifton*, H. 54 Geo. III. K. B. Imp. K. B. 10 Ed. 410. The same point was ruled by *Bayley, J.*, in H. 56 Geo. III. K. B. 1 Chit. Rep. 467, *in notis*; and see the cases of *Clark v. Wood*, and *Farmer v. Wood*, E. 56 Geo. III. K. B. *Id.* 466 (a), *accord*.

(h) 1 Chit. Rep. 469, 70; 693.

(i) *Id.* 693.

(a) 4 Taunt. 487.

(b) 4 Taunt. 487.

(c) 1 Bos. & Pul. 369. 2 Chit. Rep. 119.

(d) 7 Durnf. & East, 446; and see 2 Durnf. & East, 78, 9. 8 Durnf. & East, 395. 1 East, 436. 1 Maule & Sel. 171. 1 Chit. Rep. 473, 627. 2 Chit. Rep. 233. 1 Dowl. & Ry. 16. 1 Bing. 368. But the plaintiff is not entitled to interest on a *foreign* judgment; 1 Maule & Sel. 173. 4 Campb. 380. 1 Stark. Ni. Pri. 219, S. C.; but see 1 East, 436, *scuh. contra*. And it seems to be a rule, in other cases, that interest on the judgment is allowed only where the original debt carried interest. 3 Price, 250; and see 8 Moore, 413. 1 Bing. 368, S. C. cited.

And in actions upon bonds, or on any penal sum, for nonperformance of covenants, &c., a writ of inquiry is necessary, for assessing the damages, after judgment for the plaintiff on demurrer, or by confession or *nilhil dicit*, by the statute 8 & 9 W. III. c. 11, § 8. In actions on the statute 2 & 3 Edw. VI. c. 13, for not setting out *tithes*, there must also be a writ of inquiry, after judgment by default, to ascertain the value of the tithes.(d) So, in an action of *debt* for foreign money, a jury must find the value of the money:(d) And it seems, that in *debt* for use and occupation, a writ of inquiry is necessary, after judgment by default, before signing final judgment.(d)

The writ of inquiry is directed to the sheriff of the county where the venue is laid;(e) setting forth the proceedings which have been had in the cause; "and that the plaintiff ought to recover his damages, by occasion of the premises: But because it is unknown what damages he hath sustained by occasion thereof, the sheriff is commanded, that by the oath of twelve honest and lawful men of his county, he diligently inquire the same; and return the inquisition into court."(f) It was formerly doubted, whether a writ of inquiry could be directed to the sheriff of a *Welch*

county;(g) but it is now settled that it may.(h) In an action on [*574] the *case upon two promises, there was a judgment by default as to the first promise, and as to the second, a *nolle prosequi*: A writ of inquiry was taken out, to inquire what damages the plaintiff had sustained, *by occasion of the premises*; and upon the return of this, it was moved to amend the writ, and make it, *by occasion of the not performing of the first promise*: and upon the authority of *Baker v. Campbell*,(a) the writ was amended in this case; the record of the judgment by default being a warrant to amend by.(b) So, if the award of the writ of inquiry on the roll be right, the *teste* of the writ, if wrong, may be amended by it.(c)

The writ of inquiry is engrossed on parchment; and, in the King's Bench, it is sealed only; but, in the Common Pleas, it is signed by the prothonotaries, and afterwards sealed. And it should be returnable on a general return or day certain, according to the nature of the proceedings: if by *original*, on a general return; if by *bill*, on a day certain. But where, in an action by bill against an attorney, the writ of inquiry was returnable on a general return, it was holden not to be error; but only a miscontinuance, and cured by the statutes of jeofails.(dd)

When the jury, upon the trial of an issue, omit to assess the damages, the omission may in some cases be supplied by a writ of inquiry:(ee) As to which it seems, that where the matter omitted to be inquired by the principal jury, is such as goes to the very point of the issue, and upon which, if it had been found by the jury, an *attaint* would have lain against them by the party, if they had given a false verdict, there such matter cannot be supplied by a writ of inquiry; because thereby the party might have

(d) 5 Barn. & Ald. 885. 1 Dowl. & Ryl. 529, S. C.; and see 1 Chit. Rep. 627.

(e) 2 Lil. P. R. 721.

(f) Append. Chap. XXII. § 47, &c.

(g) Doug. 262, 3. Lord Mansfield and Buller, J., thought it might be directed to the sheriff of the next *English* county.

(h) *Williams v. Williams*, T. 26 Geo. III. K. B.

(a) E. 4 Ann. K. B.

(b) 1 Str. 684; and see *Cas. temp. Hardw.* 314.

(c) 4 East, 173; and see 1 Dowl. & Ryl. 266, 271, *per Bayley, J.*

(dd) 2 Str. 947. Say. Rep. 245.

(ee) *Cheyney's case*, 10 Co. 118.

lost his *attaint*, which would not lie upon an inquest of office.(f) Thus, in *detinue*, where the jury omitted to assess the value of the goods, the court refused to supply the omission by a writ of inquiry.(g) And so where the jury who try the issue in *replevin* upon a distress for rent, omit to inquire of the rent in arrear, and value of the goods or cattle distrained, pursuant to the statute 17 Car. II. c. 7, no writ of inquiry can be afterwards awarded, to supply the omission;(h) for, by the words of the statute, these matters are to be inquired of by the *same* jury who try the issue.(i) And in like manner, where no damages are given on trying the traverse of the return to a writ of *mandamus*, this omission cannot be supplied by a writ of inquiry.(k) So, where, in an action for a *libel*, the defendant pleaded the general issue, and *eight* special pleas of justification; and the jury, at the trial, found a verdict for the plaintiff on the general issue, and *two* of *the special pleas, without assessing damages, [*575] and for the defendant on the other pleas; and the court, on motion to enter up judgment for the plaintiff *non obstante veredicto*, decided that the latter pleas were ill, and awarded a writ of inquiry to assess the damages, and final judgment was entered thereon, in the King's Bench;(aa) the court of Exchequer Chamber, on a writ of error, reversed the judgment as to the award of the writ of inquiry, and final judgment thereon, and remitted the record to the court of King's Bench, with a direction for that court to award a *venire de novo*, to try the general issue, and issue joined on the two special pleas on which the finding was for the plaintiff; holding the verdict on these issues to be void, because no damages had been assessed:(b) And a *venire de novo* was awarded, when the jury, in an action of *waste*, had omitted to find the place wasted.(c)

But where the matter omitted to be inquired by the principal jury, doth not go to the point in issue, or necessary consequence thereof, but is merely collateral, as the four usual inquiries on a *quare impedit*,(d) there such matter may be supplied by a writ of inquiry, without any damage to the party; because if the same had been inquired of by the principal jury, it would have been, as to those particulars, no more than an inquest of office, upon which an *attaint* would not lie.(e) So, where the parties being at issue in *assumpsit*, a demurrer was joined upon the evidence, and the jury discharged, without assessing the damages; and afterwards judgment was given for the plaintiff, and a writ of inquiry of damages awarded; the court held, that though the same jury might have assessed the damages conditionally, yet it may as well be done by a writ of inquiry of damages, when the demurrer is determined; and the most usual course is, when there is a demurrer upon evidence, to discharge the jury without further inquiry.(ff) So, in *trespass* or *replevin* against *overseers* of the poor, acting

(f) Carth. 362. 2 Str. 1052. 3 Brod. & Bing. 298. But the writ of *attaint* is now abolished, by the statute 6 Geo. IV. c. 50, § 60.

(g) *Cheyney's case*, 19 Co. 119, b. 1 Sid. 246. T. Raym. 124. 1 Keb. 882. 1 Salk. 206. 1 Sel. Ni. Pri. 6 Ed. 670.

(h) 1 Sid. 380. T. Raym. 170. 1 Vent. 40. 2 Keb. 409. 1 Lev. 255. 2 Str. 1052. Cas. temp. Hardw. 295, S. C. 2 Black. Rep. 763. Gilb. Dist. 165.

(i) 1 Salk. 205, 6. Cas. temp. Hardw. 141, 295.

(k) 2 Str. 1052.

(aa) 3 Barn. & Ald. 702.

(b) 3 Brod. & Bing. 297. 7 Moore, 200, S. C.

(c) 9 Moore, 497. 2 Bing. 262, S. C.

(d) *Cheyney's case*, 10 Co. 118.

(e) Carth. 362.

(ff) Cro. Car. 143.

virtute officii, if the plaintiff be nonsuit, *(g)* or have a verdict against him, *(h)* and the jury are discharged, without inquiring of the treble damages, pursuant to the statute 43 Eliz. c. 2, § 19, the defect may be supplied by a writ of inquiry; because such inquiry is no more than an inquest of office. In such case, as a ground for awarding a writ of inquiry, it is necessary to enter a suggestion upon the roll, that the defendants were overseers of the poor; and that the action was brought against them, for something done by virtue of their office. *(i)* And a writ of inquiry may be sued out, after a writ of second deliverance, on a judgment of nonsuit in *replevin*, for want of a declaration, in the Common Pleas. *(k)* But upon an avowry for rates made on plaintiff's lands, under the statute 50 Geo. III. [*576] c. xlvii, where *the plaintiffs were nonsuited, it was holden that the defendant was not entitled to a writ of inquiry of damages, the act only giving treble costs. *(a)*

The writ of inquiry in ordinary cases may be executed, on due notice, before the sheriff or his deputy; *(bb)* or by leave of the court, under special circumstances, before the chief justice, *(cc)* or a judge of assize, as an assistant to the sheriff: *(dd)* And where the writ of inquiry is executed before the chief justice, or a judge of assize, it is usual to move for the sheriff to return a good jury. *(ee)* The motion for this purpose is a motion of course in the King's Bench, requiring only counsel's signature: *(ff)* In the Common Pleas, it is made in court, and the rule is absolute in the first instance. *(gg)* But an inquisition taken before two under-sheriffs extraordinary, was set aside by the court of Common Pleas; for the high sheriff can appoint no more than one under-sheriff extraordinary, to take an inquest. *(hh)*

The notice of inquiry should be in writing; *(ii)* and if the defendant have appeared, and his attorney be known, it should be delivered to such attorney: *(kk)* But if the defendant have not appeared, *(l)* or his attorney be unknown, *(m)* the notice should be delivered to the defendant himself, or left at his place of abode: And, in a joint action, the notice of inquiry ought to be given to both defendants. *(n)* In *country* causes, if an agent be employed, notice of inquiry, in the King's Bench, should be delivered to the agent in town, who issues the *subpœnas*, and not to the attorney in the country; *(o)* but, in the Common Pleas, it seems that it may be given

(g) 1 RoL. Rep. 272. 2 RoL. Rep. 112. 5 Mod. 76, 7, 118. Carth. 362. 1 Salk. 205. Skin. 595. Comb. 344, S. C.

(h) Cas. temp. Hardw. 138. 2 Str. 1021, S. C. Say. Rep. 214. 3 Wils. 442. 2 Blac. Rep. 921, S. C.

(i) Cas. temp. Hardw. 138. Say. Rep. 214.

(a) 6 Maule & Sel. 128.

(k) 2 Wils. 116.

(bb) 2 Wils. 379.

(cc) 12 Mod. 519. 1 Str. 612. 2 Str. 853. Barnes, 135, 6, 233. 2 Wils. 378. *Aris v. Dickie*, H. 43 Geo. III. K. B. And for the form of the rule, and affidavit of service, see Append. Chap. XXII, § 56, 7.

(dd) 12 Mod. 610. Barnes, 135.

(ee) Append. Chap. XXII, § 55.

(ff) *Ante*, 484.

(hh) 2 Wils. 378; and see Barnes, 413. Pr. 451, S. C.

(ii) R. M. 4 Ann. (c) K. B. Cas. Pr. C. P. 3.

(kk) Say. Rep. 133, K. B. Cas. P. R. C. P. 62. Pr. Reg. 276, 396, 442, S. C. Barnes, 300, 306, S. P.

(l) R. T. 1 Geo. II. K. B. R. M. 1 Geo. II. reg. 1, C. P.

(m) Say. Rep. 133, K. B. Cas. Pr. C. P. 62. Pr. Reg. 276, 396, 442, S. C. Pr. Reg. 126, S. P.

(n) Pr. Reg. 443.

(o) 3 East, 568. In a former case it had been ruled, agreeably to the practice of the Common Pleas, that the notice of inquiry might be given either to the attorney in the country, or to the agent in town. *Bell v. Trevera*, M. 23 Geo. III. K. B.

either to the attorney in the country, or to the agent in town.(p) If the venue be laid in *London* or *Middlesex*, and the defendant live within forty computed(q) miles from *London*, there must in general be *eight* days' notice of inquiry, *exclusive* of the day it is given,(r) and *inclusive* of that on which the inquiry is executed;(r) which notice is also sufficient in country causes:(s) for the statute 14 Geo. II. c. 17, § 4, which requires *ten* days' notice of trial at the assizes, does not extend to notices of inquiry. But where the venue is laid in *London* or *Middlesex*, and the defendant lives above *forty* *computed miles from *London*, there must [*577] be *fourteen* days' notice of inquiry:(a) And *Sunday* is to be accounted a day in these notices, unless it be the day on which the notice is given.(b) In the Exchequer it is a rule,(c) that "*eight* days' notice shall be given of the execution of writs of inquiry, in all cases, except where the venue is laid in *London* or *Middlesex*, and the defendants reside above *forty* miles distant therefrom; and that where the venue is laid in *London* or *Middlesex*, and the defendants reside above *forty* miles distant therefrom, *fourteen* days' notice of the execution of writs of inquiry shall be given:"(c) which notices are required to be entered by the attorneys or side clerks of the office of pleas, in the book of orders kept in such office, and a written notice of such entries left at the seat in the said office, of the attorney or clerk in court concerned for the defendant, or at his chambers or place of residence.(c)

The object of the statute, in requiring *fourteen* days' notice to be given to defendants residing above *forty* miles from town, was to secure to them the full benefit of the notice for *eight* days, part of which time would necessarily be consumed in its reaching them in the country, and in giving them time to communicate upon it with their agents in town; and therefore a defendant, who was residing at an hotel in town, from the time of his arrest till he was served with notice of executing the writ of inquiry, was holden not to be entitled to more than *eight* days' notice in a town cause, though his general residence was above forty miles from town.(d) So, where the defendant was residing in *London*, before and at the commencement of the action, *eight* days' notice of executing a writ of inquiry was deemed sufficient, though the defendant had in the intermediate time permanently removed above forty miles from *London*, inasmuch as he had not given the plaintiff previous notice of such removal.(e) But a defendant who is master of a vessel belonging to a port above forty miles from *London*, and who has no regular residence on shore, is entitled to *fourteen* days' notice of executing a writ of inquiry.(f) In *replevin*, after judgment given on demurrer for the avowant, *fifteen* days' notice of executing the writ of inquiry must be given to the plaintiff, in like manner as where he is nonsuited before issue joined, on the statute 17 Car. 11 c. 7, § 2.(g) *Short* notice of inquiry is *two* days at least:(h) And where a *term's* notice of trial is

(p) Barnes, 305.

(q) 2 Str. 954, 1216.

(r) Sty. P. R. tit. *Notice*, 421. 6 Mod. 146. R. M. 4 Ann.(c) 8 Mod. 21, K. B. R. M. 1654, § 21, C. P.

(s) R. M. 1654, § 21, C. P.

(a) R. M. 4 Ann. (c), K. B. R. M. 1654, § 21, C. P.

(b) R. M. 4 Ann. (c), K. B. 8 Mod. 21.

(c) R. H. 39 Geo. III. in *Seac. Man. Ex. Append.* 224. 8 Price, 503, 4.

(d) 7 East, 624.

(e) 12 East, 427.

(f) 6 Taunt. 450. 2 Marsh. 151, S. C.

(g) 6 Taunt. 57. 1 Marsh. 444, S. C. Append. Chap. XLV. § 78.

(h) Barnes, 301. Pr. Reg. 390, S. C.

required, there must, at the same distance of time, be the like notice of inquiry:(*i*) which notice may it seems be given, in the King's Bench, before the first day in full term ;(*k*) but, in the Common Pleas, it must be given before the essoin day of the fifth, or other subsequent term ;(*l*)

[*578] *and, in the former court, it may be given at once, without any previous notice of a general intention to proceed in the cause.(*a*)

In the King's Bench, when the plaintiff upon any pleading of the defendant, tenders an issue, and the paper book is made up and delivered with notice of trial, and the defendant strikes out the *similiter*, and returns the book with a demurrer, if judgment be given thereon for the plaintiff and a writ of inquiry be necessary to ascertain the damages, the defendant's attorney shall be obliged to accept notice of executing the writ of inquiry, from the time of giving the notice of trial ;(*b*) but the plaintiff in such case ought to give notice of the hour and place of executing the inquiry.(*c*) In the Common Pleas it is a rule, that, "in every cause where the plaintiff concludes to the country, and gives notice of trial upon the back of his pleading, if the defendant do not join issue thereon before the rule is out, the defendant's attorney shall, after judgment obtained, be obliged to accept notice of executing a writ of inquiry, from the time that notice of trial was so given on the back of such pleading :"(*dd*) And it is also a rule in that court, that "where the defendant demurs to the plaintiff's declaration, the defendant's attorney shall be obliged to accept notice of executing the writ of inquiry, on the back of the joinder in demurrer :"(*ee*) And where the defendant pleads such a dilatory plea as the plaintiff is obliged to demur to, his attorney shall accept notice of executing the writ of inquiry, on the back of the demurrer :"(*ff*) So, upon an issue of *nul tiel record*, notice of executing a writ of inquiry, may be given, in the Common Pleas, upon the issue book, as well as upon a joinder in demurrer.(*ff*) In like manner, it is a rule in the Exchequer,(*g*) that "in all cases where the plaintiff concludes to the country, the plaintiff's attorney or clerk in court may give notice of trial, at the time of delivering his replication or other subsequent pleading, in case issue shall be joined thereon, or of executing a writ of inquiry in default of joining issue ; which shall be deemed good notice of trial, from the time of the delivery of such replication, or other subsequent pleading, in case issue shall be joined ; and if the defendant do not join issue on such replication, or other subsequent pleading, and the plaintiff sign judgment for want thereof, the defendant's attorney or clerk in court shall take notice of executing a writ of inquiry, from the time that notice thereof was given as aforesaid : And that in all cases where the defendant demurs to the plaintiff's declaration, replication, or other subsequent pleading, the defendant's attorney or clerk in court shall be obliged to accept notice of executing a writ of inquiry, on the back of the joinder in demurrer ; and in case the defendant pleads a dilatory plea, to which the plaintiff is obliged to demur, the defendant's attorney or clerk in court

[*579] shall be obliged *to accept notice of executing a writ of inquiry, on the back of such demurrer."

(*i*) 2 Str. 1100. Pr. Reg. 444. R. E. 13 Geo. II. *reg.* 2 C. P. R. T. 26 & 27 Geo. II. § 5, *in Scac.* Man. Ex. Append. 211, 212.

(*k*) Imp. K. B. 10 Ed. 412.

(*l*) R. E. 13 Geo. II. C. P.

(*a*) *Smith v. Paul*, M. 46 Geo. III. K. B. 3 *Smith* R. 101, S. C.

(*b*) R. H. 8 Geo. I. K. B.

(*c*) *Id.* (*a*).

(*dd*) R. H. 6 Geo. I. *reg.* 1, C. P.

(*ee*) R. T. 10 Geo. I. C. P.

(*ff*) Pr. Reg. 443.

(*g*) R. T. 26 & 27 Geo. II. § 4, *in Scac.* Man. Ex. Append. 211.

When the inquiry is to be executed before the chief justice, or a judge of assize, the notice should be given for the sittings or assizes generally; *(a)* but otherwise the notice should express the particular time and place of executing it. *(b)* A writ of inquiry may be executed at any time before, or on the day it is returnable; *(c)* but not on a *Sunday*; *(d)* and where the notice was to execute it *by* ten o'clock, the court set it aside for uncertainty. *(e)* So, in the Common Pleas, notice of executing a writ of inquiry between the hours of ten or eleven and two o'clock, has been deemed insufficient; *(f)* but notice of executing an inquiry at eleven o'clock is good, if executed before twelve; *(g)* And, in that court, where notice was given of executing a writ of inquiry on *Tuesday* the fourteenth day of *January* instant, when the fourteenth of *January* fell on a *Thursday*, the court refused to set aside the execution of the writ of inquiry on that ground, rejecting the word *Tuesday* as surplusage. *(h)* So, where notice of executing a writ of inquiry was given for *Wednesday* the *eleventh* of *June* instant when *Wednesday* fell on the *tenth* of *June*, on which day the writ of inquiry was executed, the court refused to set it aside, the defendant not swearing that he was thereby misled. *(i)* The usual way is to give notice that the inquiry will be executed *between* two certain hours, *(k)* as between *ten* and *twelve* o'clock in the forenoon, or between *four* and *six* in the afternoon of a particular day, on or before the return of the writ. On a notice of inquiry so given, however, the party is not tied down to the precise time fixed by the notice; for the sheriff may have prior business, which may last beyond it: Therefore, where notice was given of executing an inquiry, between ten and twelve o'clock, and the irregularity complained of was, that the defendant and his witnesses attended till twelve, and after the hour was elapsed, and they were gone, the writ was executed; the court of King's Bench refused to set aside the inquisition, conceiving it was clearly a trick of the defendant's attorney, to leave the place immediately after the hour was passed. *(l)*

With regard to the *place* of executing an inquiry, it must be executed within the county where the action is laid. In *London*, inquiries are executed at the secondaries' office, No. 28, in *Coleman* street; in *Middlesex*, at the sheriff's office, in *Red Lion* square; and in other counties, at a certain place appointed for that purpose: and the notice should be given accordingly. Any irregularity, however, in the notice of inquiry, or in the **time* and place of executing it, is cured by the appearance of the defendant or his attorney, and making a defence on the execution of the writ. *(m)*

Notice of inquiry may be *continued*, *(n)* or *countermanded*, *(o)* in like manner as notice of trial: but, in the King's Bench, the continuance or countermand of notice of inquiry must be delivered to the agent in town, and not to the attorney in the country. *(p)* A notice of inquiry can be con-

(a) Barnes, 135, 6. Append. Chap. XXII. § 60, 63, 4.

(b) Say. Rep. 181. K. B. Barnes, 297, 299, 300, 301. Pr. Reg. 446, 7, S. C.; and see Append. Chap. XXII. § 57, 8, 9.

(c) 2 Ld. Raym. 1449.

(d) 1 Str. 387.

(e) 2 Str. 1142.

(f) Barnes, 296, 7. Pr. Reg. 445, S. C.

(g) Barnes, 302. Pr. Reg. 446, S. C.

(h) 3 Bos. & Pul. 1.

(i) 1 Chit. Rep. 11; but see *id.* 615.

(k) Say. Rep. 181. Barnes, 296. Pr. Reg. 445, S. C.

(l) Doug. 198.

(m) Barnes, 233, 309, 413. Pr. Reg. 451, S. C.

(n) Append. Chap. XXII. § 63.

(o) *Id.* § 64.

(p) Imp. K. B. 10 Ed. 415.

tinued but once ;(e) and the notice of continuance should be served two days previous to the time appointed for executing the inquiry :(e) but if notice of a writ of inquiry, to be executed at a particular hour and place, be continued, the notice of continuance need not express any hour or place.(f) The notice of countermand ought to be in writing ;(g) and may in this court be given to the attorney in the country, as well as the agent in town :(h) And it seems, that where *eight* days' notice is sufficient for executing an inquiry, *two* days' notice of countermand will serve ; but if *fourteen* days' notice of inquiry be requisite, then there must be *six* days' notice of countermand.(i)

In *London* and *Middlesex*, the writ must be left at the sheriff's office, the day before the time appointed for its execution :(k) and if either party propose to attend by counsel, he should give notice thereof to his adversary ;(l) or he will not be allowed for it in costs. If such notice be not given, the sheriff, if required, will postpone the execution of the inquiry, till the other party has an opportunity of attending by counsel :(m) And, in the King's Bench, it is in all cases in the discretion of the master, on the taxation of costs, to allow or disallow the fee to counsel, as well as the expense of preparing the brief, &c.(n) Previous to the execution of the inquiry, witnesses may be *subpœnaed* on either side :(o) and the execution of it may be *adjourned* by the sheriff, after it is entered upon.(p) If the plaintiff do not proceed to execute the inquiry according to notice, or countermand in time, the defendant, on an affidavit of attendance and necessary expenses, shall have his costs, to be taxed by the master or prothonotaries.(q) The motion for this purpose is a motion of course, in the King's Bench, requiring only counsel's signature : In the Common Pleas, the costs are granted on a side-bar or treasury rule.

Letting judgment go by default is an admission of the cause of action : and therefore, where the action is founded on a contract, the defendant *cannot give in evidence that it was fraudulent.(a) So, in an action on a promissory note or bill of exchange, the note or bill need not be proved, though it must be produced before the jury, in order to see whether any money appears to have been paid upon it.(b) So, where an action was brought on a policy of assurance on a foreign ship, wherein there was a stipulation, that the policy should be deemed sufficient proof of interest, the plaintiff, on the writ of inquiry, was only bound to prove the defendant's subscription to the policy, without giving any evidence of interest.(c) And suffering judgment by default, in an action for

(e) Barnes, 297. 2 Chit. Rep. 220.

(f) 1 Bos. & Pul. 363.

(g) R. M. 4 Ann. (c), K. B. Cas. Pr. C. P. 3.

(h) Cas. Pr. C. P. 48, 9 ; 120. Pr. Reg. 393. Barnes, 298, S. C.

(i) Imp. C. P. 7 Ed. 431.

(k) R. H. 24 Geo. III. K. B. & C. P.

(l) Append. Chap. XXII. § 65.

(m) 5 Price, 641.

(n) *Ullock v. Hemsworth*, T. 6 Geo. IV. K. B.

(o) For the process of *subpœna* on a writ of inquiry, and the *subpœna* ticket, see Append. Chap. XXII. § 66, 7, 8.

(p) 2 Str. 853, 1259.

(q) 1 Str. 317. 2 Str. 728. R. H. 8 Geo. I. (a), K. B. R. T. 13 Geo. II. *reg.* 1 C. P. Previous to which latter rule, it appears that costs were not allowed in the Common Pleas, for not executing a writ of inquiry according to notice. Cas. Pr. C. P. 86. Pr. Reg. 448, S. C.

(a) 1 Str. 612.

(b) 2 Str. 1149. Barnes, 233, 4. 3 Wils. 155. 2 Blac. Rep. 748, S. C. Doug. 316. *Milles v. Lyne*, H. 25 Geo. III. K. B. 3 Durnf. & East, 301. 1 H. Blac. 543. Ry. & Mo. 41.

(c) Doug. 315.

use and occupation, amounts to an admission that the defendant occupied a house under the plaintiff, who need not show that it was his own house; and if the defendant insist that he did not occupy the particular house to which the evidence has been directed, but some other, he must prove the fact. *(d)* On the execution of a writ of inquiry, though it has not been usual, a sheriff's jury ought to give *interest*, in cases where the courts at *Westminster* would allow it. *(e)* And although the jury, on the execution of a writ of inquiry, cannot give interest in an action for work and labour, yet where they have deducted *ten per cent.* on the whole amount of the plaintiff's demand, in conformity with an agreement between the parties, that such deduction should be made for ready money, they may re-allow the plaintiff a proportional part of that deduction, on the balance found to be due to him, and which had remained for a considerable time unpaid. *(f)* If the defendant, in an action for *words* spoken of an attorney, let judgment go by default, and, on the execution of the writ of inquiry, neither plaintiff nor defendant goes into evidence of any kind, the jury may give such moderate damages as they think ought to be paid, for the speaking of an attorney the words laid in the declaration. *(g)*

On the return day of the inquiry, the plaintiff, in the King's Bench, should give a rule for judgment, *(h)* with the clerk of the rules; which expires in four days: *(i)* and, on the expiration of such rule, *(i)* the sheriff, being called upon for his return, will deliver it, with the inquisition, *(k)* to the plaintiff's attorney; who taxes his costs thereon with the master. In the Common Pleas, there is no rule for judgment given on the return of the inquiry, but the plaintiff's attorney waits *four* days after the return day, inclusive of both days; after which, the inquisition being previously obtained from the sheriff, the prothonotaries will tax the costs thereon: *(l)* And, in that court when final judgment is signed upon an inquisition on a writ of inquiry, the inquisition must immediately be left with the *clerk of the judgments, and shall not afterwards be taken out [*582] of the office, without leave of the court. *(aa)*

Pending the rule for judgment, or time allowed in the Common Pleas, the defendant may move to set aside the inquisition, for want of due notice: *(bb)* or on account of an objection to the jury, or mode of returning them, as that some of the jury were debtors taken out of prison for the purpose of attending, *(c)* or that they were returned by the plaintiff's attorney; *(dd)* or for excessive damages. *(ee)* And where the damages are obviously too small, *(ff)* and there has been any contrivance by the defendant, *(gg)* or surprise on the plaintiff, *(hh)* or the sheriff or jury have been

(d) *Davis v. Holdship*, E. 54 Geo. III. K. B. 1 Chit. Rep. 644, 5, *(a)*.

(e) 6 Taunt. 346.

(f) 9 Price, 134.

(g) 1 Car. & P. 477, 8. 3 Barn. & Cres. 427. 5 Dowl. & Ry. 276, S. C.

(h) Append. Chap. XXII. § 70.

(i) 1 Salk. 339.

(k) Append. Chap. XXII. § 69, 86, 7.

(l) Imp. C. P. 7 Ed. 437.

(aa) R. T. 13 Geo. II. *reg.* 2 C. P.

(bb) Sty. P. R. 421. Pr. Reg. 446, 7, 8.

(c) 4 Durnf. & East, 473; but see 2 Str. 1159.

(dd) Cowp. 112. For the qualification of jurors, on inquests, &c., and fining them for non-attendance, see stat. 6 Geo. IV. c. 50, § 52, 3.

(ee) 2 Leon. 214. 3 Leon. 177, S. C. 3 Bur. 1846. 3 Wils. 63; but see 11 East, 23. 1 Chit. Rep. 729. 5 Price, 641.

(ff) 3 Barn. & Cres. 533.

(gg) 2 Salk. 647.

(hh) 1 Str. 515. 2 Str. 1259.

mistaken in point of law, (i) but not otherwise, (k) the plaintiff may, at any time before final judgment signed, (l) move to set aside the inquisition. But the court will not grant a rule for setting aside an inquisition, after judgment by default, in an action for words, on the ground that the under-sheriff directed the jury to consider the poverty of the defendant, in mitigation of damages. (m) On motion to set aside an inquisition, taken on a writ of inquiry before the under-sheriff, for excessive damages, the court would not admit minutes of what passed before the under-sheriff to be read, unless verified by affidavit; and such motion cannot be supported, on the affidavits of the parties themselves, unless corroborated by others. (n) And where the defendant moved to set aside an inquisition for excessive damages, the court of King's Bench imposed the terms of bringing part of the damages into court, before they granted a rule to show cause. (o)

If two defendants in *trespass* suffer judgment by default, and the plaintiff execute writs of inquiry, and take several damages against them separately, it is irregular; and if the plaintiff enter up final judgment for those several damages against the defendants, it is erroneous. But the court of King's Bench will permit the plaintiff to set aside his own proceedings, before final judgment, on payment of costs. (p) And if the plaintiff, on the execution of the writ of inquiry, give no evidence on one or more of the counts in

his declaration, he may afterwards sue for the causes of action [*583] contained in those counts: Thus, where the plaintiff in a former *action declared on a promissory note, and for goods sold, but upon executing a writ of inquiry, after judgment by default, gave no evidence on the count for goods sold, and took his damages for the amount of his promissory note only, the court of King's Bench ruled, that the judgment thereupon was no bar to his recovering, in a subsequent action, for the goods sold. (a)

The want of a writ of inquiry is aided by the statute of jeofails. (b) And where a writ of inquiry had been many years executed, and costs taxed upon it, but no final judgment entered up; there being occasion to prove the debt in Chancery, and the writ of inquiry being lost, a rule was made, in the King's Bench, for a new writ of inquiry and inquisition, according to the sheriff's notes, and that the master should indorse the costs, which by the commitment book appeared to have been taxed. (cc) After an award of a writ of inquiry of damages, if final judgment be given for a certain sum, with the plaintiff's assent, it is no cause of error, although the record contain no entry of an inquisition executed. (d)

(i) 2 Salk. 647. 1 Str. 425. 8 Mod. 196. 2 Str. 1259. 6 Durnf. & East. 608. 1 Chit. Rep. 644, (a). 8 Dowl. & Ryl. 69.

(k) 2 Leon. 214. 3 Leon. 177, S. C. Barnes, 230. Pr. Reg. 450, S. C. 2 Str. 940. 2 Barnard. K. B. 177, S. C. Doug. 509. 2 Durnf. & East. 261.

(l) *M'Culloch v. Willcocks*, M. 37 Geo. III. K. B. 2 Wils. 379, C. P.

(m) 1 Chit. Rep. 644. And as to the evidence, in an action for seducing the plaintiff's daughter, see 3 Campb. 519. 5 Price, 641.

(n) 10 Moore, 106.

(o) 1 Chit. Rep. 729; and see 2 Chit. Rep. 219.

(p) 6 Durnf. & East, 199.

(a) 6 Durnf. & East, 607; and see 1 Chit. Rep. 645, *in notis.* Per Cur. E. 55 Geo. III. K. B.

(b) 2 Str. 878.

(cc) *Id.* 1077.

(d) 4 Taunt. 148.

After *final* judgment, we have seen, *(e)* a writ of inquiry is in general unnecessary. But, by the statute 8 & 9 W. III. c. 11, § 8, it is enacted, that “in all actions upon any bond or bonds, or on any penal sum, for non-performance of any covenants or agreements in any indenture, deed or writing contained, if judgment shall be given for the plaintiff on a demurrer, or by confession or *nihil dicit*, the plaintiff upon the roll may *suggest* as many breaches of the covenants and agreements as he shall think fit; upon which shall issue a writ to the sheriff of that county where the action shall be brought, to summon a jury to appear before the justices or justice of assize or *nisi prius* of that county, to inquire of the truth of every one of those breaches, and to assess the damages that the plaintiff shall have sustained thereby; in which writ it shall be commanded to the said justices or justice of assize or *nisi prius*, that he or they shall make return thereof to the court from whence the same shall issue, at the time in such writ mentioned: And in case the defendant or defendants, after *such judgment* *(f)* entered, and before any execution executed, shall pay into the court where the action shall be brought, to the use of the plaintiff or plaintiffs, or his or their executors or administrators, such damages so to be assessed, by reason of all or any of the breaches of such covenants, together with the costs of suit, a stay of execution of the said judgment shall be entered upon record; or if, by reason of any execution executed, the plaintiff or plaintiffs, or his or their executors or administrators, shall be fully paid or satisfied all **such* damages so to be assessed, together with his or [*584] their costs of suit, and all reasonable charges and expenses for executing the said execution, the body, lands or goods of the defendant shall be thereupon forthwith discharged from the said execution, which shall likewise be entered upon record: But notwithstanding, in each case, such judgment shall remain, continue and be as a further security to answer to the plaintiff or plaintiffs, and his or their executors or administrators, such damages as shall or may be sustained, for further breach of any covenant or covenants in the same indenture deed or writing contained.”

This statute was made in favour of defendants; and it is highly remedial, being calculated to protect them against the payment of more money than is justly due, and to take away the necessity of proceedings in equity, to obtain relief against an unconscientious demand of the whole penalty, in cases where small damages only have accrued: *(a)* and accordingly, it has received a very liberal construction. Where covenants and agreements are contained in the condition of a bond, they are holden to be within the statute, as well as where they are in a different instrument: *(b)* And though it was formerly doubted, *(c)* yet it is now settled, that the statute is *compulsory* on the plaintiff, to proceed in the method it prescribes. *(d)* A bond conditioned for the payment of an *annuity*, *(ee)* or of money by instalments, *(ff)* is holden to be within the statute; or a bond

(c) *Ante*, 573.

(f) The judgment here spoken of, by reference to a former part of the statute, seems to be the common law judgment for the penalty.

(a) 5 Durnf. & East, 636.

(b) 2 Bur. 772. 2 Ken. 492, S. C. 2 Bur. 820. 2 Ken. 530, S. C. 2 Blac. Rep. 843. Doug. 519.

(c) Com. Rep. 376.

(d) 2 Wils. 377. Say. Dam. 67, S. C. Cowp. 357. *Daubeny v. Hogarth*, E. 27 Geo. III. K. B. *Per Cur. H.* 41 Geo. III. K. B. 13 East, 3, *(a)*.

(ee) 2 Bur. 820. 2 Ken. 530, S. C. 5 Durnf. & East, 538, 636. 8 Durnf. & East. 126.

(ff) 6 East, 550. 2 Smith R. 663, S. C.

conditioned to perform an award.(g) And where a bond, upon the face of it, appeared to be conditioned for the payment of a sum certain, but by an indenture of the same date, declaring the purposes for which the bond was executed, it was *agreed* that it should be lawful for the obligees to commence an action upon the bond, and to proceed to judgment, whenever they should think fit; and upon judgment being obtained to issue execution, and that the judgment should be a security for the payment to the obligees, on demand, of all sums of money which then were, or might thereafter become due to them; and judgment having been entered up by virtue of this deed, the obligees issued execution, without assigning breaches or executing a writ of inquiry; the court held, that this was a bond substantially conditioned for the performance of an agreement, within the statute 8 & 9 W. III. c. 11, § 8, and that the obligees ought to have assigned breaches thereon.(h) But the provisions of the statute do not extend to *post obit* bonds,(i) or other bonds conditioned for the payment of money,(k) which are provided for by the statute 4 Ann. c. 16, [*585] § 13; nor to *bail*,(l) or *replevin*(m) bonds; *nor, as it seems, to bonds given to the Lord Chancellor, by the petitioning creditor for a commission of bankrupt, under the statute 6 Geo. IV. c. 16, § 13:(a) And where judgment is entered upon a warrant of attorney, it is not within the statute.(b) It is not necessary for the crown to assign breaches, under the above statute; and if any one breach be proved, the crown is entitled to judgment.(c)

In cases where the statute applies, judgment is signed for the penalty as at common law;(dd) but it can only stand as a security for the damages sustained: and, after signing judgment, the plaintiff must proceed on the statute, by suggesting breaches on the roll;(ee) of which a copy should be given to the defendant,(ff) with notice of inquiry for the sittings or assizes.(gg) A writ of inquiry(hh) is then sued out, and delivered to the sheriff; who summons the jury, and returns the jury process, with a panel of the names of the jurors, and the writ being executed, is returned to the court, with the finding of the jury,(ii) and execution awarded for the damages and costs: But no second judgment is given by the court, on the return of the inquiry.(kk) On the execution of a writ of inquiry on this statute, after judgment on demurrer, the execution of an instrument which the defendant had stated, in setting out the condition of the bond in his plea, need not be proved:(ll) But, in *debt* on bond conditioned for the performance of covenants, if the condition be not set out in the pleadings,

(g) 6 East, 613. 2 Smith R. 666, S. C.

(h) 5 Barn. & Cres. 650. 8 Dowl. & Ryl. 424, S. C.

(i) 2 Campb. 285, n. 2 Barn. & Cres. 82, 89, &c. 3 Dowl. & Ryl. 278, 281, &c. S. C.

(k) 2 Moore, 220.

(l) *Selby and others, assignees, &c. v. Serres*, E. 41 Geo. III. K. B. 2 Bos. & Pul. 446, C. P.

(m) Maule & Sel. 155.

(a) 7 Durnf. & East, 300. 3 East, 22.

(b) 2 Taunt. 195. 3 Taunt. 74. 5 Taunt. 264; and see 16 East, 164.

(c) 1 Younge & J. 171.

(dd) 2 Bur. 825. 2 Ken. 532, 3, S. C. Cowp. 357.

(ee) Append. Chap. XXII. § 75, 6, 7, 8, 9.

(ff) M'Clel. 568.

(gg) Append. Chap. XXII. § 85.

(hh) *Id.* § 80, 81, 2, 3, 4.

(ii) *Id.* § 86, 7.

(kk) 3 Bos. & Pul. 607. 3 Dowl. 1; and see 1 Man. & Ryl. 496, (a).

(ll) 1 Esp. Rep. 157; and see 1 Bos. & Pul. 368.

the plaintiff, on executing a writ of inquiry under the statute 8 & 9 W. III. c. 11, must prove that the bond mentioned in the suggestion, and produced to the jury, is that on which the action was brought.(m)

*CHAPTER XXIII.

[*586]

Of OYER, and COPY of DEEDS, &c. ; INSPECTION, and COPIES of WRITTEN INSTRUMENTS, BOOKS, COURT ROLLS, &c. ; and PARTICULARS of DEMAND, or SET OFF.

HITHERTO we have supposed the action to be rightly brought, and considered what is to be done, when the defendant has no merits. We have seen, that in such case he should compromise or compound the action, confess it, or let judgment go by default. But when the defendant has merits, he should prepare for his defence; and for that purpose may, if circumstances render it necessary, crave *oyer* and copy of deeds, &c., claim inspection and copies of written instruments, books, court rolls, &c., or call for *particulars* of the plaintiff's demand; or he may move the court to change the venue, consolidate actions unnecessarily divided, or strike out superfluous counts; or he may bring money into court.

Oyer of deeds, &c., is demandable by the defendant, or by the plaintiff. If the plaintiff, in his declaration, necessarily make a *profert in curiâ* of any deed, writing, letters of administration, or the like, the defendant may pray *oyer* of the deed, &c. ;(a) and must have a copy thereof delivered to him, if demanded, paying for the same after the rate of four-pence *per* sheet ;(b) And a defendant, who prays *oyer* of a deed, is entitled to a copy of the attestation, and names of the witnesses, as well as of every other part of the deed.(c) So likewise, if the defendant in his plea make a necessary *profert in curiâ* of any deed, &c., the plaintiff may pray *oyer* ;(d) and shall have a copy, at the like rate ;(e) And the party, of whom *oyer* is demanded, is bound to carry the deed, &c., to the adverse party.(f) In an action on a bond, in which articles are referred to, *oyer* of the bond may be demanded, but not of the articles ;(g) though time to plead may be obtained, till the plaintiff give a copy of them, on an affidavit that defendant has no copy.(g)

Formerly, all demands of *oyer* were made in court, where the deed is by intendment of law, when it is pleaded with a *profert in curiâ* ;(h) And therefore, when *oyer* is craved, it is supposed to be of the court, and *not of the party; and the words *ei legitur in hæc verba*, &c., [*587] are the act of the court.(aa) In practice, however, *oyer* is now usu-

(m) 2 Campb. 121. And for a full account of the proceedings under this statute, see 1 Wms. Saund. 5 Ed. 58, *in notis*.

(a) Append. Chap. XXIII. § 1.

(b) 2 Salk. 497, R. T. 5 & 6 Geo. II. (b), K. B.

(c) Willes, 288. Barnes, 363, S. C.

(e) R. T. 5 & 6 Geo. II. (b), K. B. 6 Mod. 122.

(f) 2 Durnf. & East, 40.

(g) *Per Cur.* II. 21 Geo. III. K. B.; and see 1 Wms. Saund. 5 Ed. 9.

(h) 12 Mod. 598. 3 Salk. 119.

(aa) 12 Mod. 598. 3 Salk. 119. 1 Sid. 308; but see 2 Lutw. 1644, *contra*.

(d) Append. Chap. XXIII. § 2.

ally demanded, and granted by the attorneys: (b) [A] And where the defendant is entitled to have oyer of a deed, it cannot be dispensed with by the court;

(b) 6 Mod. 28.

[A] The proper mode of obtaining oyer is by prayer entered on record, to which the opposite party may counterplead, and thereby have decision of the court whether oyer is to be given or not; *Pendleton v. Bank of Kentucky*, 1 Monr. 171. Oyer must be craved and had, to put a record before the court, but oyer of the officer's return to the process is unnecessary; *Commonwealth v. Roby*, 12 Pick. 496. *Guild v. Richardson*, 6 Ib. 364. *Slayton v. Chester*, 4 Mass. 478. So where oyer is craved of the note declared on, and it is spread upon the record, but oyer is not craved of the indorsements, the indorsements make no part of the record, notwithstanding the clerk may have copied the same into another part of the record; *Suggle v. Adams*, 3 A. K. Marsh, 429. *M-Lean v. Oustott*, 3 Pike, 478. But a defendant who craves oyer of a deed is entitled to a copy of the attestation, and to the names of the witnesses; *Smith v. Abworth*, 18 Johns. 445. If he is entitled to oyer, he cannot be compelled to plead without it. But if he elects to answer, it is a waiver of the objection that the names of the witnesses were not given in the oyer, and cannot be a ground of demurrer to the declaration; *Ib.*

In an action on a probate bond, the court will not grant oyer of the original bond, but order a copy to be furnished the defendants; *Thatcher v. Lyman*, 5 Mass. 260. *Judge of Probate v. Merrill*, 6 N. Hamp. 256. Oyer is not demandable of a record, unless it be a deed enrolled, letters of administration, &c.; the recital of a record must be taken advantage of by plea of *nul tiel record*; but, if a record be correctly set out in a *scire facias* issued upon it, and does not show the liability of one of a plurality of defendants, perhaps a several demurrer at his instance should be sustained; *Hall v. State*, 9 Ala. 827. The profer of letters of administration places them in the hands of the court of whom oyer is craved, and not of the party; and, being in possession, the court must be assured, by an inspection of the letters, of the right of the party to sue, and of the jurisdiction of the court granting them; *Brown v. Jones*, 10 Gill & Johns. 334. Where there is no oyer craved of a writing mentioned in a plea, such writing does not constitute a part of the record; and it will be taken to be such a writing as it is described in the plea to be; *Wriston v. Lacey*, 7 J. J. Marsh. 219. Or, where a record is the ground of action, the declaration must refer to it, with a *prout patet per recordum*. Aliter, if it be merely inducement; *Jarman v. Windsor*, 2 Harring. 162. Neither is it necessary to crave oyer of the *capias ad respondendum*; it is a part of the record without it; *Pendleton v. Bank of Kentucky*, 1 Monr. 171. Nor of the writ, it being part of the record, either party may procure a copy; profer of it, therefore, is not necessary; and it is no more necessary for the other party to crave oyer, in order to obtain a copy; *Renner v. Reed*, 3 Pike, 339. And oyer of the writ (if in any case demandable,) cannot be craved after the day on which the cause is first set for trial; *Layman v. Waynick*, 6 Blackf. 189. Craving and obtaining oyer of a bond makes it a part of the declaration; so that on a demurrer the court will give judgment against a plaintiff in whose bond thus produced there is a defect; *Commissioners v. Gaines*, Const. Rep. 459. It is not necessary to make profer of writings not under seal; *Mason v. Buckmaster*, Breeze, 9. All sealed instruments in the power of the party pleading must be pleaded with a profer; *Bender v. Sampson*, 11 Mass. 42. *Powers v. Ware*, 2 Pick. 451; although a plaintiff is not bound to make profer of a deed to the custody of which he has no legal right; *Birney v. Haim*, 2 Litt. 262. In an action of debt upon a bond, where the original is filed with the clerk of the court there to remain and become a public record, as in the case of a trustee's bond given in pursuance of a decree of a court of equity, the plaintiff is not required to make a profer of it, not being, in legal contemplation, in the possession of the original; *Butler v. State*, 5 Gill & Johns. 511. Want of profer of the deed declared on is ground for general demurrer; *Metcalf v. Standeford*, 1 Bibb, 618. But see *Anderson v. Barry*, 2 J. J. Marsh. 265. *Briggs v. Greenlee*, Minor, 123. The covenant of which profer is made is not part of the record, without oyer; *Gist v. Steele*, 1 Bibb, 571. Writing proffered is not part of the record unless oyer is taken; *Adams v. Lacy*, *Ib.* 328. A party is not entitled to oyer where there has been no profer; but, if it has been asked and given, he may make use of it; *Story v. Kimball*, 6 Verm. 541. Oyer of a bond does not include oyer of its condition; nor *é converso*. If oyer is wanted, it should be prayed of each; but the plaintiff may have the whole bond enrolled; *United States v. Sayer*, 1 Gallis. 86. In an action on a judgment, profer of the record is unnecessary; the *prout patet per recordum* is sufficient, even on special demurrer; *Capp v. Gilman*, 2 Blackf. 45. If profer is made of the writing declared on, and oyer is not craved, the writing must be taken as set forth in the declaration; *Pollard v. Foder*, 2 A. K. Marsh. 264. But oyer cannot regularly be craved of a deed, where profer is not made of the same in the previous pleading; *Bettle v. Wilson*, 14 Ohio, 257. Where profer is necessary, the omission must be taken advantage of before verdict; *Francis v. Hazlerig*, 1 A. K. Marsh. 93. If oyer be not taken of a writing declared on, it

nor can he be compelled to plead without it, (c) even though the deed be lost. Oyer cannot be granted of a deed operating under the statute of uses: (d) And where a tenant in a writ of entry pleaded such deed, without a *profert*, and oyer was required to be granted by a judge's order on a given day; the court directed such order to be rescinded; and the demandant having signed judgment for want of oyer, it was also set aside, the order being merely in the nature of an interlocutory proceeding. (d) When the deed is in the hands of a third person, the court will oblige him to give oyer and produce it. (e)

When a deed is shown in court, it remains there, in contemplation of law, all the term in which it is shown; for all the term is considered in law but as one day: and at the end of the term, if the deed be not denied, the law doth adjudge it to be in custody of the party to whom it belongs; but if it be denied, then it shall remain in court till the plea is determined; and if it eventually turn out not to be a good deed, it shall be destroyed. (f) But letters testamentary, or of administration, are not supposed to remain

(c) 2 Lil. P. R. tit. *Oyer*, 266. 2 Keb. 275. 6 Mod. 28. 2 Str. 1186. 1 Wils. 16. S. C. *Totty v. Nesbitt*, T. 24 Geo. III. K. B., and *Mattison v. Atkinson*, E. 27 Geo. III. K. B., cited in 3 Durnf. & East, 153, (n). R. M. 1654, § 15. C. P. Pr. Reg. 277.

(d) 9 Moore, 593.

(e) 2 Str. 1198. *Ante*, 487.

(f) Co. Litt. 231, b. 5 Co. 74, b. 2 Lutw. 1644.

forms no part of the record, though certified in the transcript; *Palmer v. McGinnis*, Hardin, 505. And oyer of a deed set forth in the first count does not make that deed part of the record, so as to apply it to other counts in the declaration; *Hughes v. Moore*, 7 Cranch, 176. And where *profert* is made in the declaration, the actual production of the paper is indispensable; *Moore v. Fenwick*, Gilman, 214. A *profert* is necessary in pleading a deed which is necessary *ex institutione legis*, and the omission of a *profert* in such case is fatal on special demurrer; *Brown v. Copp*, 5 N. Hamp. 223. *Profert* of a specialty is not necessary where it has been pleaded and remains in another court, or in the same court in another action, and where such former *profert* has been averred; *Moore v. Paul*, 2 Bibb, 339. The plaintiff declared upon a constable's bond and made *profert* of the original; on oyer craved he produced a copy, and the defendant demurred for a variance. Held, that the demurrer was sustainable. The fact that, during the argument of the demurrer the original was brought into court, would make no difference; *Jones v. Simmons*, 4 Humph. 314. Want of *profert* cannot be taken advantage of after judgment by default, but only by demurrer; *Tucker v. Real Estate Bank*, 4 Pike, 429. A party who has obtained oyer of specialty may waive the benefit of it if he please; but, if he professedly set it out upon the record, he is bound to recite it truly and entire. If he do not, the court will, on motion, reject such pleadings, and give judgment for want of a plea, unless leave is obtained to proceed more correctly; *Rudisill v. Sill*, 4 Blackf. 282. If a party partially states a deed, the defendant may crave oyer of the deed and demur; *Hobson v. McArthur*, 3 McLean, 241.

Where a party is bound to give oyer of a deed, he must produce copies of all indorsements and memoranda upon it, and all papers annexed to it; *Van Rensselaer v. Foucher*, 24 Wend. 316. But a stranger is not bound to give oyer; nor those who become privies by the acts of others, or operation of law; *Ib.* The time to take advantage of an insufficient compliance with the demand for oyer is at the trial, and not by motion to produce the papers that are wanted; *Brooks v. Brooks*, 1 Halst. 404. And a party can demand oyer of a bond only once in the same suit; *Taylor v. Bank of Kentucky*, 2 J. J. Marsh. 564. Oyer need not to be given of an instrument that is lost; *Paddock v. Higgins*, 2 Root, 482. *Respublica v. Coates*, 1 Yeates, 2. But see *Metcalf v. Standeford*, 1 Bibb, 618. Nor need it be given on an instrument alleged in the declaration to be lost; *Paddock v. Higgins*, 2 Root, 316. *Kelley v. Riggs*, *Ib.* 126. But it is no excuse upon oyer to say that the writing is lost, unless the plea contains also a good excuse for not having it; *Branch v. Riley*, 1 *Ib.* 541. In Kentucky, the defendant has a right to oyer of any writing declared on; *Anderson v. Barry*, 2 J. J. Marsh. 265. Under the statute, in Illinois, it is necessary for the party to have oyer of writings not under seal, on which suit is brought, as he is bound to deny their execution under oath; *Mason v. Buckmaster*, Breese, 9. And although oyer at common law is only demandable of specialties, the statute of this state has extended the rule, and it there applies to any writings, *Giles v. Shaw*, Breese, 169. It has also been held, that, in order to make a note a part of the record, so as to enable the court to notice it for any purpose, the defendant should crave oyer; *Sims v. Hugsby*, Breese, Ap. 27.

in court all the term; for the party may have occasion to produce them elsewhere. *(g)* Hence it is, that oyer of a deed cannot in strictness be demanded, but during the same term it is pleaded: *(h)* And as a general imparlance is always to a subsequent term, it follows that oyer of a deed cannot be demanded after such imparlance. *(i)* A different doctrine is indeed laid down in one case, *(k)* which must be understood of a *special* imparlance, to another day in the same term.

Though oyer is not in strictness demandable of a *record*, *(l)* yet if a judgment or other matter of record in the *same* court be pleaded, the party pleading it must give a note in writing of the term and number roll, whereon such judgment or matter of record is entered and filed; or in default thereof, the plea is not to be received: *(m)* And probably on this account, the party was not anciently permitted to plead *nul tiel record* of a judgment or matter of record in the *same* court. *(n)* But where a judgment or matter of record is pleaded in a *different* court, the party, not [*588] being *entitled to an account of the term and number roll, must plead *nul tiel record*. And it seems, that oyer is not demandable of an act of parliament. *(a)*

The defendant was formerly allowed oyer of the original writ, in order to demur or plead in abatement, for any apparent insufficiency or variance. *(bb)* But this indulgence having been abused, and made an instrument of delay, a rule was made, that a defendant be not allowed oyer of an original writ; and that if he demand it, the plaintiff may proceed as if no demand had been made. *(c)*

The demand of oyer is a kind of plea; *(d)* and should regularly be made by a note in writing, *(e)* before the time for pleading is expired. *(f)* If it be not made till after that time, the plaintiff may consider the demand as a nullity, and sign judgment. But though oyer be not in strictness demandable, yet if it be given, the party demanding has a right to make use of it. *(gg)* If the defendant would insist upon his demand of oyer, he should move the court to have it entered upon record: *(hh)* If the plaintiff, on the other hand, would contest the oyer, he may either counterplead it, or strike out the rest of the pleading and demur; *(ii)* upon which the judgment of the court is, either that the defendant have oyer, or that he answer without

(g) 2 Salk. 497. 12 Mod. 598, S. C.

(h) 5 Co. 74, b. 2 Lutw. 1644. 1 Durnf. & East, 149. Steph. Pl. 88.

(i) 1 Keb. 32. 2 Lev. 142. Freem. 400. 3 Keb. 480, 491, S. C. 6 Mod. 28; but see 2 Ld. Raym. 970. *Ante*, 462, 3.

(k) 12 Mod. 99; and see 2 Show. 310.

(l) 1 Ld. Raym. 252, 347, (4 Ed. note a.) Doug. 476, 7. 1 Durnf. & East, 149, 50; but see 1 Ld. Raym. 84.

(m) Keilw. 96, Carth. 454. 1 Ld. Raym. 347, Carth. 517. 1 Ld. Raym. 550. 2 Str. 823. R. T. 5 & 6 Geo. II. *(b)*. K. B.

(n) 5 Hen. VII. 24, *per* Brian. 3 Keb. 76. *(a)* Doug. 476. Godb. 186, *contra*.

(bb) Gilb. C. P. 52. 12 Mod. 35, 189. 2 Lutw. 1644. 6 Mod. 27. 2 Salk. 498. 2 Ld. Raym. 970. R. T. 5 & 6 Geo. II. *(b)*, K. B. 1 Wils. 97. 6 Durnf. & East, 363. Co. Ent. 320. 5 Taunt. 653, *(a)*.

(c) R. T. 19 Geo. III. K. B. Doug. 227, 8. 6 Durnf. & East, 363. Barnes, 340; and see Bro. Abr. tit. *Oyer*, *pl.* 19.

(d) 3 Salk. 119.

(e) N. M. 1 Geo. II. C. P.

(f) Fowler & Dyer, M. 20 Geo. III. K. B. 1 Durnf. & East, 150. Barnes, 268, 326, 7. 2 Bos. & Pul. 379; but see Cas. Pr. C. P. 72, 3, 96. Pr. Reg. 278, 299, S. C. Barnes, 329. 2 Wils. 413; by which it appears, that formerly *oyer* must have been demanded, in the Common Pleas, before the expiration of the rule to plead: and *vide ante*, 469.

(gg) Doug. 476, 7; and see 1 Wms. Saund. 5 Ed. 317, (2). *(hh)* 6 Mod. 28.

(ii) 2 Lev. 142. 2 Salk. 497; and see 2 Ld. Raym. 970. 1 Wms. Saund. 5 Ed. 9, c.

it: *(k)* On the latter judgment, the defendant may bring a writ of error; for to deny oyer where it ought to be granted is error, but not *é converso*. *(l)* [A]

There is no settled time prescribed for the *plaintiff* to give oyer: *(m)* but the defendant shall in all cases have the same time to plead, or as many pleading days after oyer given, as he had at the time of demanding it: *(n)* The time allowed for the *defendant* to give oyer of a deed, &c. to the plaintiff, is *two* days exclusive after it is demanded: *(o)* and if it be not given in that time, the plaintiff may sign judgment, as for want of a plea. *(p)* If given, the plaintiff shall have the same time to reply, after oyer given him by the defendant, as he had at the time of demanding it. *(q)*

*The defendant having demanded oyer of a deed, ought to insert it at the head of his plea; and if he do not, the plaintiff, in the Common Pleas, may insert it there for him, in making up the issue: *(a)* but it is otherwise in the King's Bench, where the defendant may either set forth the oyer in his plea or not, at his election. *(b)* If a plaintiff state the legal effect of a deed, the defendant has a right to see it on oyer; and if the meaning vary from that attributed to it in the declaration, he should, in order to take advantage of the variance, plead *non est factum*, without setting out the deed: If it do not support the breach, he should set it out and demur: *(cc)* and if he set it out, the court must adjudge upon it, as parcel of the record; though it was not strictly demandable at the time of granting it. *(d)* If the defendant, however, set out the deed on oyer, and plead *non est factum*, the only question at the trial of that issue is, whether the deed whereof the tenor is set out, was executed by the defendant or not. *(e)* But the defendant, in the King's Bench, is not bound to set forth the oyer in his plea: *(f)* and if he do not, the plaintiff, if he would avail himself of the deed, must pray it to be inrolled at the head of his replication. *(g)* If the defendant, after craving oyer of a deed, do not set forth the whole of it, the plaintiff, we have seen, *(h)* may sign judgment as for want of a plea; but he cannot demur for that cause: *(i)* or if the defendant, in his plea, set out the deed untruly, the plaintiff by his replication may pray that it be inrolled, and so procure it to be truly set forth: *(kk)* And if there be any variance, however trifling, between the deed and the oyer, it is fatal at the trial, on the plea of *non est factum*. *(ll)* [B]

(k) 2 Lev. 142.

(l) 2 Salk. 497. 6 Mod. 28. 2 Ld. Raym. 970, S. C. 2 Str. 1186. 1 Wils. 16, S. C. 1 Wms. Saund. 5 Ed. 9, c. 2 Wms. Saund. 5 Ed. 46, b. (7).

(m) It seems from the rule of Mich. 1654, § 15, C. P., that it ought to be given, in the Common Pleas, before the end of the next term after it is demanded.

(n) 1 Str. 705, R. T. 5 & 6 Geo. II. *(b)*. K. B. 8 Durnf. & East, 356, 7. Cas. P. R. C. P. 72, 81, 2; 143. Pr. Reg. 28, 300, 301. Barnes, 238, 254, S. C. *Ante*, 468.

(o) Carth. 455. 2 Durnf. & East, 40.

(p) 6 Mod. 122. Cas. Pr. C. P. 95. Pr. Reg. 301. Barnes, 245, S. C.

(q) R. T. 5 & 6 Geo. II. *(b)*, K. B. And see further as to *oyer*, and such points in particular respecting it as relate to pleading, 1 Chit. Pl. 4 Ed. 369, &c. Steph. Pl. 86, &c.

(a) Barnes, 327.

(b) 2 Str. 1241. 1 Wils. 97; and see Steph. Pl. 88, 9.

(cc) 4 Barn. & Cres. 749, 50. 7 Dowl. & Ryl. 257, S. C. *per* Bayley, J.

(d) 3 Salk. 119. Carth. 513. 6 Mod. 27. Doug. 476.

(e) 4 Barn. & Cres. 741; and see 11 East, 633. 5 Taunt. 707.

(f) 2 Str. 1241. 1 Wils. 97; but see Barnes, 327, C. P. *contra*.

(g) 2 Str. 1241. 1 Wils. 97.

(h) *Ante*, 565.

(i) 2 Salk. 602.

(kk) Com. Dig. tit. *Pleader*, P. 1.

(ll) 1 Marsh. 214.

[A] See accord. *State v. Hicks*, 2 Black. 336.

[B] See Troub. & Haly's Pract. p. 362, 3d ed.

In the King's Bench, when the plaintiff is entitled to the inspection of a lease, &c., in the possession of the defendant, but of which *oyer* cannot be demanded, the court will grant a rule for the latter to produce it, and give a copy thereof to the plaintiff, in order that he may declare thereon.^(m) And where the plaintiff, in an action on a deed, has had the same taken from him under a warrant against him for felony, the court, on an affidavit of demand upon and refusal by the magistrate and constable, will direct them to give the plaintiff a copy to declare on, and to produce the deed on the trial, the plaintiff undertaking to pay the expenses.⁽ⁿ⁾ But the court will confine their order for inspection of a deed, to the particular [*590] parts of it which are necessary to support the action.^(o) And they will *not compel a party to allow the inspection of his title deeds, and give a copy thereof, to a person who supposes that such deeds contain a reservation in his favour of manorial rights, unless it appear that the party holds the deeds as trustee for the applicant.^(a) In the Common Pleas, if one part only of an indenture be executed, the court will compel the party having the custody of it to produce it for inspection, upon an action commenced against him by the other party; unless he can show some sufficient reason to the contrary:^(b) And it is not a sufficient reason, that the plaintiff seeks for inspection, for the purpose of discovering some defect in the deed.^(c) So, where the plaintiff made an affidavit, that he sued the defendant, to recover damages for breach of an agreement in not entering into partnership, pursuant to a partnership deed drawn up and executed by the plaintiff, but remaining in the custody of the defendant or his attorney, and that the plaintiff possessed neither a copy nor counterpart of the deed, the court granted a rule, enabling the plaintiff to inspect and take a copy of the deed, although the defendant swore that he had not executed the same.^(dd) But where two parts of an indenture were executed by both parties, each keeping one, and one part was lost, the court of Common Pleas would not compel the other party to produce his part, in order to support an action against him on the instrument:^(e) So, upon an affidavit that no copy or counterpart of a lease, on which the plaintiff had sued, was in his possession or power, and that the attorney who drew the lease and counterpart had absconded; the court refuse to order the defendant, who was in possession of the lease, to permit a copy of it to be taken.^(f) And inspection was refused in that court, to the plaintiff in *replevin*, of a deed to which he was no party, assigning to the avowant the reversion of the demised premises.^(g) In the King's Bench, we have seen,^(h) the plaintiff may have a rule *nisi*, for the defendant to produce a deed before the commissioners of the stamp office, to be stamped; or to the plaintiff's attorney, in order that he may ascertain the names of the witnesses, so as to *subpœna* them. And a rule for the production of a deed to be stamped, has been granted by the court of Common Pleas:⁽ⁱ⁾ though, in a former

(m) *Ante*, 487.

(n) 2 Chit. Rep. 229.

(o) *Id.* 231.

(a) 1 Barn. & Cres. 262. 2 Dowl. & Ry. 386, S. C.

(b) 1 Taunt. 386; and see 1 Moore, 465. 8 Taunt. 131. 2 Moore, 513, (a), S. C.

(c) 4 Taunt. 636.

(dd) 1 Brod. & Bing. 318. 3 Moore, 671, S. C.; and see 7 Barn. & Cres. 204.

(e) 6 Taunt. 302. 1 Marsh. 610, S. C.: and see 2 Younge & J. 4, *accord*.

(f) 4 Bing. 152.

(g) 6 Taunt. 283; and see 1 Chit. Rep. 476. 9 Moore, 778. 3 Bing. 148. 1 Moore & P. 396. 4 Bing. 537, S. C. *Id.* 539, (a). *Post*, 592.

(h) *Ante*, 487.

(i) 4 Taunt. 157; and see 5 Moore, 71.

case, that court refused to make a rule on the plaintiff, in an action on a bond, to allow an officer of the stamp duties to inspect the bond, because the defendant suspected it to be forged.(k)

If the action be founded on a written instrument, not under seal, the defendant is not entitled to demand *oyer*; but the distinction formerly taken was, that where the plaintiff declared upon a writing, the courts, on affidavit that he had no part, would let him have a copy; but where the declaration was on an agreement generally, and the writing but [*591] *evidence, they would not grant it:(a) and accordingly, where an action was brought upon a special agreement contained in a note, and a rule made to show cause why the plaintiff should not give the defendant a copy; upon cause shown, the rule was discharged, because the contract upon which the action was founded was a parol contract, of which the note was only evidence, and therefore the defendant ought not to have a copy.(b) In actions upon policies of assurance, the plaintiff, his attorney or agent, by the statute 19 Geo. II. c. 37, § 6, “shall, within *fifteen* days after being required so to do in writing by the defendant, his attorney or agent, declare in writing what sums he hath assured, or cause to be assured, in the whole, and what sums he hath borrowed at *respondentia* or bottomree for the voyage, or any part of it:” And, in actions of this nature, a judge at chambers will make an order for the assured to produce to the underwriters, upon affidavit, all papers in possession of the former, relative to the matters in issue.(c) But under a judge’s order to produce papers, and give copies of letters, &c. it is sufficient to give extracts of those parts of them which are relevant to the subject.(d) By the statute 53 Geo. III. c. 141, § 5, “the grantor of an annuity is entitled to a copy of every deed, &c. whereby it was granted; and if not delivered within *twenty one* days after notice, a summons may be taken out from a judge of the King’s Bench or Common Pleas, and an order obtained thereon, for the production of such deed, &c. and for suffering the complainant to take copies thereof, and examine the same.” In other cases, the general rule is, that a plaintiff shall not be obliged to furnish evidence against himself.(e) And the court of King’s Bench would not compel the plaintiff to deliver to the defendant a copy of an agreement, in order to enable the latter to plead in abatement, that the agreement was signed jointly by himself and others.(f) But where the action is founded on a written instrument, as a bill of exchange or promissory note,(g) special agreement, or undertaking in writing to pay the debt of a third person,(h) &c. if a special ground be laid, as that the demand is of long standing, and the defendant has no copy of the instrument, or that there is reason to suspect its being forged, &c. the court on motion, or a judge on summons, will make an order for the delivery of a copy of it to the defendant or his attorney, and that all proceedings in the action be in the meantime stayed. In a late case, however, the court of Common Pleas would not compel the defendant to produce bills of exchange on which the action was brought, and permit the plaintiff to take copies of them, upon an affidavit, which was contradicted by the defendant, that the bills had

(k) 1 Bos. & Pul. 271.

(b) 1 Salk. 215.

(d) 1 Taunt. 167.

(e) 1 Chit. Rep. 476. 9 Moore, 778. Post, 592.

(f) 2 Dowl. & Ry. 419.

(h) *Barry v. Alexander*, M. 25 Geo. III. K. B.

(a) 2 Keb. 430. 1 Sid. 386.

(c) 1 Camp. 562.

(g) 7 Moore, 559. 1 Bing. 161, S. C.

come into his hands by fraud, and had not been satisfied.(i) And, in an action on a bill of exchange, that court would not compel the [*592] plaintiff to deposit the bill in the hands of the prothonotary, *for the purpose of enabling the defendant to inspect it, in order to see whether or no it was a forgery.(a) When the copy of an agreement is delivered to the defendant, in pursuance of a judge's order for that purpose, the judge, it is said, will in general make it a part of the order, that the defendant shall consent to make no objection to the stamp.(b)

Where the defendant has the custody of a written instrument, which he holds as a *trustee*, the courts will in some instances order him to give an inspection and copy of it to the plaintiff, at his expense, and to produce it for various purposes : Thus, where the defendant was a stake-holder, the court ordered him to give the plaintiff, at his expense, a copy of the articles for *Epsom* races, and to produce the same at the trial.(c) So, where an action is brought by a sailor for his wages, on ship's articles, against the captain in whose custody they are, it seems that under the equity of the statute 2 Geo. II. c. 36, § 8, the defendant, if required, must produce and give a copy of the articles.(d) And where the dispute was between the plaintiff a factor in *Smithfield*, and the defendant a grazier, the court of King's Bench, upon the defendant's motion, made a rule for the plaintiff to show cause, why he should not produce at the trial, the several books wherein he entered the account of beasts sold, and of moneys received, on the defendant's account ; and no cause being shown, the rule was made absolute.(ee) So, in an action against a sworn broker of the city of *London*, for negligence in making a contract, the court will, on motion, compel him to produce his books, in order to enable the plaintiff to inspect and take a copy of the contract ; 7 Barn. & Cres. 204, but see 1 Moore & P. 537, 539,(a) *semb contra*. The rule laid down by Lord *Mansfield* in cases of this nature was, that whenever the defendant would be entitled to a discovery, he should have it here, without going into equity.(ff) And on a motion in *trover*, for inspection of lists of sales, the question being whether the goods were included in those sales, it was said by *Buller, J.* "the proper way is to move for a rule to show cause, why the defendant should not have time to plead till the next term, unless the plaintiff will give the inspection required ; and the reason for granting such time is, that the party may have the thing granted by applying to a court of equity ; and therefore the court will give time, till he can file his bill for that purpose : " and a rule to show cause was granted accordingly.(g)

The courts in general will not oblige a plaintiff to discover the evidence in support of his action, previous to the trial ; and therefore, they will not make a rule upon him to produce his books,(h) &c. : Nor can a rule be had for the inspection of books, &c. of a *private* nature, in the hands of third persons.(ii)[A] So, where a commission of bankrupt had been sued out against

(i) 1 Bing. 161. 7 Moore, 559, S. C.

(a) 1 Bing. 451. 8 Moore, 586, S. C.

(b) 1 Car. & P. 466, *per Park, J.*

(c) Barnes, 439.

(d) Abbott on Shipping, 389. 1 Taunt. 386.

(ee) 2 Str. 1130 ; and see 5 Moore, 71.

(ff) *Barry v. Alexander*, M. 25 Geo. III. K. B.

(g) *Witter v. Cazalets*, M. 29 Geo. III. K. B.

(h) 6 Mod. 264. 1 Chit. Rep. 476. 9 Moore, 778 ; but see 4 Bur. 2489.

(ii) 1 Ld. Raym. 705. 2 Ld. Raym. 927. 1 Barnard. K. B. 466. Barnes, 236. *Cas. temp. Hardw.* 130. 2 Blac. Rep. 850.

[A] "The production of private writings, in which another person has an interest, may be

the plaintiff and superseded, as being founded on a concerted act of bankruptcy, and a second commission was issued, and the plaintiff brought *trespass* against the messenger to try its validity; the court of Common Pleas would not order the bankrupt's books to be produced to the *assignees under the second commission, on an application by the [*593] defendant; as such application should have been made to the Lord Chancellor in the first instance. (a) So, in an action for goods sold and delivered, the court of King's Bench would not compel a defendant to allow an inspection of the goods, to enable the plaintiff to give evidence of their identity, &c. (b) And in an action for freight and demurrage, by ship owners against the charterer, the court of Common Pleas would not grant the latter an inspection of the log-book kept during the voyage. 1 Moore & P. 396. 4 Bing. 537, S. C., but see *id.* 539, (a) 2 Younge & J. 4. But it is a general rule, that a party has a right to inspect and take copies of such books &c. as are of a *public* nature, wherein he has an interest; [A] so as they

(a) 7 Moore, 400.

(b) 6 Dowl. & Ry. 388.

had either by a bill of discovery, in proper cases, or, in trials at law, by a writ of *subpoena duces tecum*, directed to the person who has them in his possession. The courts of Common Law may also make an order for the inspection of writings in the possession of one party to a suit, in favour of the other. The extent of this power, and the nature of the order, whether it should be peremptory, or in the shape of a rule to enlarge the time to plead, unless the writing is produced, does not seem to be very clearly agreed: and in the United States, the courts have been unwilling to exercise the power, except where it is given by statute. It seems, however, to be agreed, that where the action is *ex contractu*, and there is but one instrument between the parties, which is in the possession or power of the defendant, to which the plaintiff is either an actual party, or a party in interest, and of which he has been refused an inspection, upon request, and the production of which is necessary to enable him to declare against the defendant, the court, or a judge at chambers, may grant him a rule on the defendant to produce the document, or give him a copy for that purpose. Such order may also be obtained by the defendant, on a special case, such as, if there is reason to suspect that the document is forged, and the defendant wishes that it may be seen by himself and his witnesses. But in all such cases, the application should be supported by the affidavit of the party, particularly stating the circumstances.

"When the instrument or writing is in the hands or power of the adverse party, there are, in general, no means at law of compelling them to produce it; but the practice in such cases is, to give him or his attorney a regular notice to produce the original. Not that, on proof of such notice, he is compellable to give evidence against himself, but to lay a foundation for the introduction of secondary evidence of the contents of the document or writing, by showing that the party has done all in his power to produce the original." 1 Greenl. on Evid., § 559, 560.

[A] "In regard to the inspection of public documents, it has been admitted, from a very early period, that the inspection and exemplification of the records of the King's Courts is the common right of the subject. This right was extended, by an ancient statute, 46 Ed. 3, in the preface to 3 Coke's Rep. p. iv., to cases where the subject was concerned against the king. The exercise of this right does not appear to have been restrained, until the reign of Charles II., when in consequence of the frequency of actions for malicious prosecutions, which could not be supported without a copy of the record, the judges made an order for the regulation of the sessions at the Old Bailey, prohibiting the granting of any copy of an indictment for felony, without a special order, upon motion in open court, at the general gaol delivery. This order, it is to be observed, relates only to indictments for felony. In cases of misdemeanor the right to a copy has never been questioned. But in the United States no regulation of this kind is known to have been expressly made; and any limitation of the right to a copy of a judicial record or paper, when applied for by any person having an interest in it, would probably be deemed repugnant to the genius of American Institutions.

"Where the writs or other papers in a cause are officially in the custody of an officer of the court, he may be compelled by a rule of court, to allow an inspection of them, even though it be to furnish evidence in a civil action against himself. Thus, a rule was granted against the marshal of the King's Bench prison, in an action against him for an escape of one arrested upon *mesne process*, to permit the plaintiff's attorney to inspect the writ by which he was committed to his custody.

be material to the suit, and the party in possession be not obliged to furnish evidence against himself in a criminal prosecution ;(c) and if they are not evidence of themselves, the courts will order them to be produced at the trial ;(d) otherwise a copy is sufficient. And they will never make a rule to produce the original, unless it be necessary to inspect it, on account of an erasure or new entry.(e)

The books of the *Quarter Sessions* have been considered as public books, which every one has a right to inspect.(f) And every man has a right to inspect the proceedings to which he is himself a party ;(gg) for he has an interest in such proceedings. So, in an action for a malicious prosecution, where it was necessary, in order to support the action, that the plaintiff should be put in possession of the contents of examinations before justices, and of the warrant on which he was apprehended, the court granted a rule that they might be inspected, and copies taken, and the originals produced on the trial.(h) But upon an indictment for felony, it is not usual to grant a copy of the record of acquittal, where there is any the least probable cause for the prosecution.(i) And a *mandamus* will not lie, to compel a magistrate to produce depositions taken before him on a charge of felony, for the purpose of founding an indictment for perjury against the deponents : the magistrate must be *subpenaed* to produce the depositions, which may be read in evidence before the grand jury.(k)

Parish books, and the books of the *Custom house*, *Post office*, *Bank*, *South Sea house*, *East India company*, &c., are to some purposes considered as public books ; and persons who have an interest therein, have a right to inspect them :(l) And a rule of an inhabitant of a parish [*594] to *inspect the parish books, so far as they apply to the question in dispute, may be absolute in the first instance.(a) So, the books of the commissioners of the *lottery*, and their numerical lists, are of a public

(c) 1 Blac. Rep. 44; and see Peak. Evid. 5 Ed. 89, &c. 1 Phil. Evid. 4 Ed. 422, &c. as to the inspection of public writings in general.

(d) 1 Str. 126. 12 Vin. Abr. 104, pl. 68, S. C. Barnes, 468. 2 Durnf. & East, 234.

(e) 1 Str. 307. Say. Rep. 76.

(f) 1 Wils. 297. *Rex v. Berking*, cited in 1 Wils. 240. 1 Blac. Rep. 39, S. C. 1 Chit. Rep. 477, (a); but see *id.* 479, where the general right of every man to inspect the books of the Quarter Sessions was doubted by *Abbott*, Ch. J.

(gg) 1 Str. 126. 12 Vin. Abr. 104, pl. 68, S. C. Cas. temp. Hardw. 128. 2 Str. 1242. Barnes, 236. 1 Chit. Rep. 476, (a); but see 1 Ld. Raym. 252. Carth. 421, S. C. Gilb. Cas. K. B. 134. (*Dr. West's case*.) 2 Str. 1005. 1 Wils. 240. 1 Blac. Rep. 41, S. C., cited Say. Rep. 250.

(h) Barnes, 463, 9.

(i) 1 Ld. Raym. 253. Carth. 421, S. C. 3 Blac. Com. 126. 1 Chit. Cr. L. 89. Ry. & Mo. 66. 1 Car. & P. 241, S. C.; but see 2 Str. 1122. 1 Blac. Rep. 385. Leach's Cr. L. 25.

(k) 1 Chit. Rep. 627.

(l) 2 Ld. Raym. 851. 7 Mod. 129, S. C. 1 Str. 304. 1 Barnard. K. B. 455. 2 Str. 954. Barnes, 236.

(a) 2 Chit. Rep. 290.

"In regard to the records of inferior tribunals, the right of inspection is more limited. As all persons have not necessarily an interest in them, it is not necessary that they should be open to the inspection of all, without distinction. The party, therefore, who wishes to inspect the proceedings of any of those courts, should first apply to that court, showing that he has some interest in the document, and that he requires it for a proper purpose. If it should be refused, the Court of Chancery, upon affidavit of the fact, may at any time send, by a writ of *certiorari*, either for the record itself, or an exemplification. The King's Bench in England, and the Supreme Courts of Common Law in America, have the same power by *mandamus*; and this whether an action be pending or not." 1 Greenl. on Evid. § 471, 472, 473.

nature; and are kept by the commissioners in trust for the ticket holders, who are entitled to an inspection of them by rule of court.(b) But access is not allowed to parish books,(c) &c., for the trial of questions of a *private* nature, or in *collateral* actions, brought by or against persons who have no interest therein. And though the *East India* company are compellable to produce their public books,(d) yet they are not obliged to produce their books of letters,(e) &c.; nor their private books, relating to the appointment of their servants.(f)

The *Court rolls* and books of a manor are of a public nature; the tenants have an interest therein, and the lord, who has the custody of them, is considered merely as a trustee:(g) Hence it is of course, in the King's Bench, to grant leave to inspect the court rolls, &c., of a manor, on the application of a tenant of the manor, who has been refused that permission by the lord.(hh) And one who has a *primâ facie* title to a copyhold, is entitled to inspect the court rolls, and take copies of them, so far as relates to the copyhold claimed, though no cause be depending for it at the time.(ii) So, where a copyhold tenant was forbidden by the lord to cut underwood upon the copyhold, without the lord's license, the court granted a *mandamus* for the lord to permit the tenant to inspect the court rolls, so far as related to the cutting of underwood, after application to and refusal by the lord; although there was not any suit depending.(kk) But this privilege is confined to the tenants of the manor: for the lord or tenants of a different manor, having no interest in the court rolls, &c., cannot claim the inspection of them.(l) And even though the party applying be a tenant of the manor, the court will not grant a *mandamus* to inspect court rolls, for the purpose of supporting an indictment against the lord, for not repairing a road within the manor.(m) In the King's Bench, if the rule be moved for on behalf of a *copyhold* tenant, it is absolute in the first instance:(n) but otherwise it is only a rule *nisi*:(o) In the Common Pleas, it is always a rule to show cause:(p) and the court expect an affidavit to show that the person, on whose behalf the motion is made, is a tenant of the manor, and has applied to the lord or his steward, for an inspection and copies of the *court rolls, which have been denied.(q) A *freehold* tenant of [*595] a manor has no right to inspect the court rolls, unless there be some cause depending, in which his right may be involved.(bb) But a *mandamus* was granted to the steward of a manor, to allow inspection of

(b) *Schinotti v. Bumstead and others*, II. 36 Geo. III. K. B.

(c) As to *parish* books, see 5 Mod. 395. 1 Ld. Raym. 337, S. C. 12 Vin. Abr. 147, *pt.* 11. 1 Barnard. 100. 1 Wils. 240. 2 Chit. Rep. 288. 4 Barn. & Ald. 301; but see 1 Blac. Rep. 27. And as to *Custom* house books, &c., see 1 Ld. Raym. 705. 2 Str. 1005. 1 Wils. 240. Say. Rep. 250. 1 Blac. Rep. 40, S. C.; but see Barnes, 235. Com. Rep. 555, S. C.

(d) 7 Mod. 129. 2 Ld. Raym. 851, S. C.

(e) 1 Str. 646.

(f) 2 Str. 717.

(g) 1 Ld. Raym. 253. 2 Str. 955, 1005.

(hh) 3 Durnf. & East, 141; and see Barnes, 236.

(i) 2 Blac. Rep. 1061, *accord.*

(ii) 10 East, 235.

(kk) 4 Maule & Sel. 162.

(l) 12 Vin. Abr. 146. Bunb. 269. 2 Str. 1005. *Talbot v. Villebois*, M. 23 Geo. III. K. B. 3 Durnf. & East, 142.

(m) 5 Barn. & Ald. 902. 1 Dowl. & Ryf. 559, S. C.; and see 3 Durnf. & East, 142.

(n) 3 Durnf. & East, 141.

(o) 7 Durnf. & East, 746; and see 5 Dowl. & Ryf. 484.

(p) 2 Blac. Rep. 1061. *Ante*, 486, (a).

(q) Barnes, 236; and see 3 Wils. 399. 2 Blac. Rep. 1061.

(bb) 7 Durnf. & East, 746; and see 1 Wils. 104, where a *freeholder* was refused a rule to inspect the rolls of the manor, in a case between himself and the lord, touching a *copyhold*: but see Barnes, 237. 2 Blac. Rep. 1030, *semb. contr.*; and see 2 Ves. 620. 13 East. 10. Phil. Evid. 4 Ed. 429, 30.

the court rolls to two freehold tenants, litigating a right of common in the manor, although the cause was not at issue.(c)

So, the books of a *Corporation* are in nature of public books;(d) and every member of the corporation, having an interest therein, has a right to inspect and take copies of them, for any matter that concerns himself, though it be in a dispute with others.(e) And, in an action for the breach of a bye law, restraining persons from exercising trades within the limits of a corporate city, unless they become freemen, the court will compel the corporation to allow the defendant to inspect the bye law in the corporation books.(f) But, pending an action by a corporation for tolls, the courts will not grant leave to inspect the corporation books or muniments, on the application of the defendant, a stranger to the corporation:(g) And the inspection, when granted, is confined to the subject-matter in dispute.(h) These rules of inspection, in cases of copyholds, corporations, &c. are never granted, but only where *civil* rights are depending;(i) for it is a constant and invariable rule, that in *criminal* cases, the party shall never be obliged to furnish evidence against himself.(k) Informations however, in nature of *quo warranto*, are now considered in the light of *civil* proceedings; and therefore, when they are exhibited at the relation of a member of a corporation, the court will grant a rule for the inspection of such of the corporation books as relate to the subject-matter in dispute:(l) But in an action against a corporation, upon a right of toll, the court refused a rule to inspect the public books, records, and writings of the corporation; because no issue was joined, so that it could not appear whether such inspection would be necessary.(m)

The motion for a rule to inspect and take copies of books, &c. when an action is depending, is founded on an *affidavit*, stating the cir-
[*596] cumstances *under which the inspection is claimed, and that an application has been made in the proper quarter, for permission to make the inspection, which has been refused.(a) And when a motion for an information, in nature of a *quo warranto*, is depending, the court will grant a rule absolute in the first instance:(b) but when no action is depending, the proper mode of proceeding is by moving for a rule to show cause, why a *mandamus* should not issue, commanding the officer who has the custody of the books, to permit the party applying to inspect and take copies of the necessary entries.(cc) The affidavit, upon which this motion is founded, ought to state clearly the right under which the inspection is claimed, and that the inspection has been refused.(dd) And when the

(c) 5 Dowl. & Ry. 484.

(d) 2 Str. 954, 5.

(e) *Id.* 1223. Barnes, 235. Com. Rep. 555, S. C.

(f) 3 Barn. & Cres. 162.

(g) 8 Durnf. & East, 590; and see 5 Mod. 395. 1 Ld. Raym. 337, S. C. 2 Str. 1203. Barnes, 238. 3 Wils. 398. 2 Blac. Rep. 877, S. C. 1 Chit. Rep. 476, (a), *accord.* 1 Durnf. & East, 689. 3 Durnf. & East, 303. 1 H. Blac. 211, *contra.*

(h) 1 Barnard. 455. 2 Str. 1005, 1223. 1 Wils. 239. 1 Blac. Rep. 40, S. C. 3 Durnf. & East, 303; and see 2 Chit. Rep. 231, 290; but see 3 Durnf. & East, 579.

(i) 1 Wils. 240.

(k) 1 Ld. Raym. 705. 2 Ld. Raym. 927. 2 Str. 1210. 1 Wils. 239. 1 Blac. Rep. 37, S. C. *Id.* 351, S. P. 4 Bur. 2489. 1 Durnf. & East, 689. 3 Durnf. & East, 142.

(l) 2 Chit. Rep. 366, (a); and see 3 Durnf. & East, 142, 579. 4 Taunt. 162.

(m) 2 Blac. Rep. 877. 3 Wils. 398, S. C. 1 Ld. Raym. 253. Carth. 421, S. C.

(a) Barnes, 236. Phil. Evid. 4 Ed. 433.

(b) 2 Chit. Rep. 366; and see 3 Durnf. & East, 141. Phil. Evid. 4 Ed. 433.

(cc) 4 Maule & Sel. 162; and see Mr. Nolan's edition of *Strange*, p. 1223, *in notis.* 3 Durnf. & East, 142. 10 East. 235. 2 Chit. Rep. 366, (a). Phil. Evid. 4 Ed. 434.

(dd) Barnes, 236. Phil. Evid. 4 Ed. 434.

motion is for a writ of *mandamus* to inspect, grounded upon affidavits, the rule is only a rule *nisi*.(e) If a rule be made to show cause, why an information should not be filed, in nature of a *quo warranto*, the court of King's Bench will make a rule for the prosecutor to inspect and take copies of books and records, as soon as the rule to show cause is granted :(f) but if a rule be made to show cause, why a *mandamus* should not be awarded, the court will not make a rule for the prosecutor to inspect and take copies of books and records, until the rule be made absolute, and a return made to the *mandamus*.(g)

When the declaration does not disclose the particulars of the plaintiff's demand, as in actions of *assumpsit*, or *debt* for goods sold, or work and labour, &c. the defendant's attorney or agent may take out a summons before a judge, for the plaintiff's attorney or agent, to show cause, why he should not deliver to the defendant's attorney or agent, the *particulars* in writing of the plaintiff's demand, for which the action is brought, and why all proceedings should not in the mean time be stayed.(h)[A] This sum-

(e) Phil. Evid. 4 Ed. 433.

(f) Cas. temp. Hardw. 245. Say. Rep. 145. 3 Durnf. & East, 141. 2 Chit. Rep. 366; but see 3 Durnf. & East, 581.

(g) Say. Rep. 145; and see 1 Ld. Raym. 253, *accord*.

(h) 3 Bur. 1390. Imp. C. P. 7 Ed. 185, 6; and see Append. Chap. XXIII. § 3.

[A] "A bill of particulars is a mere creature of the court, and is no part of the record. *Blunt v. Cooke*, 4 Man. & Gran. 458. The object of it is to give the defendant more specific and precise information as to the nature and extent of the demand made upon him by the plaintiff, than is announced by the declaration, in a mode unincumbered by the technical formalities of pleading. 3 Starkie on Ev. 1055. It ought to be as certain, and convey as much information as a special declaration. *Gilpin v. Howell*, 5 Barr. 53. Thus it has been held, that if a bill of particulars state the plaintiff's demand to be for goods sold and delivered to the defendant, no evidence can be received, of goods sold by the defendant as plaintiff's agent. *Holland v. Hopkins*, 2 Bos. & Pul. 243. Hence, Mr. Chitty recommends the practitioner to describe the claim in the particulars in every possible shape that could be admissible under the counts in the declaration. 3 Chitty, Gen. Pr. 616. Yet this and other elementary writers seem to consider, that like every other matter in pais, the bill of particulars may be used against the party who has furnished it; and there are reported cases which sustain this view. *Ibid*. 617; 3 Starkie on Ev. 1058. *Colson v. Selby*, 1 Esp. N. P. C. 452. *Rymer v. Cook*, Moody & Malkin, 86. In the case of *Harrington v. MacMorris*, 5 Taunt. 228, however, it was decided that the plaintiff cannot use one plea of a defendant as evidence of the fact which the defendant denies in another plea. Nor can he use a notice of set-off for evidence of the debt on the issue of *non assumpsit*, because the statute gives the notice of set-off in the nature and place of a plea; nor can he use a particular of set-off for that purpose, because it is incorporated with the notice of set-off. See also *Miller v. Johnson*, 2 Esp. N. P. C. 602. *Short v. Edwards*, 1 Esp. N. P. C. 374. So it has been held in other cases, that one count of a declaration cannot be called in as proof by the defendant to contradict or affect the evidence in respect to another. Cowen & Hills' notes to Phillips on Evid. 331, and the cases there cited. Upon these grounds, and considering the bill of particulars as a part of the pleadings, a very respectable court in New York has denied any effect to them as evidence. *Brittingham v. Stephens*, 1 Hall, 379; Cowen & Hills' notes to Phillips on Evid. 361, and cases there referred to. We think this is the sounder, and practically the more just and convenient doctrine. In providing that defendant shall be furnished with a previous knowledge of the nature of the claim which he must prepare to meet on the trial, we must take care that the plaintiff be not trammelled by the mere forms of the proceedings, so that substantial justice may in all cases, so far as possible, be attained." *Hartell v. Seybert*, District Court, Philadelphia Co., March 25th, 1848, per Sharswood, P. J.

Where the particulars of the plaintiff's demand are not disclosed in the declaration, the defendant may call on him to exhibit them. And the plaintiff may call on the defendant for the particulars of his set-off, if they are not specified in the plea or the notice. *Mercer v. Sayre*, 8 Johns. 248. And it may be demanded by the defendant before appearance. *Roosevelt v. Gardiner*, 2 Cow. 463. And a defendant may refuse to plead until it is filed.

mons may be taken out, and an order obtained thereon, in the King's Bench, before the defendant has appeared.⁽ⁱ⁾ And, in the Common Pleas, though the practice was formerly otherwise,^(k) it is ordered by a late rule,^(l) that

(i) 1 Chit. Rep. 724, 5, (a).

(l) R. T. 2 Geo. IV. C. P. 6 Moore, 211.

(k) 1 Bos. & Pul. 378.

Davis v. Hunt, 2 Bailey, 416. In South Carolina, if the plaintiff have only a count for money had and received, he must file a statement of particulars, or otherwise give the defendant notice of the nature of his demand, or the court will dismiss the action. *Smyth v. Leche*, 1 Rep. Con. Ct. 240. *Barton v. Dunlap*, 2 *Id.* 140. An order for the plaintiff to furnish a bill of particulars is not granted, in New York, without an affidavit showing the necessity of such an order. *Willis v. Bailey*, 19 Johns. 268. And the order for such bill should direct the plaintiff to deliver one at a given day, or then show cause why he has not. If no cause is shown, the order becomes absolute, and the defendant may move for a *non pros.* unless a bill is delivered. *Brewster v. Sacket*, 1 Cow. 571. *Fleuret v. Durand*, 14 Johns. 329. Or, when the order becomes absolute, the defendant may move for a rule, that the bill be furnished within a certain time, and costs of the motion be paid by the plaintiff, or that judgment of *non pros.* be entered. *May v. Richardson*, 4 Cow. 56.

After regular notice of a motion for a *non pros.* in such case, if the plaintiff furnish a bill, it is a sufficient answer to the application, provided the costs are paid up to that time; otherwise not. *Symonds v. Craw*, 5 Cow. 279. A plaintiff may be *non prossed* as to the general counts, for not furnishing a bill, and be allowed to proceed on his special count. *Id.* And though an order for a bill, staying proceedings absolutely till it is delivered, is irregular, and may be vacated, *Hazard v. Henry*, 2 Cow. 587; yet it stays proceedings in the mean-time. *Roosevelt v. Gardiner*, 2 Cow. 463. Yet an order *nisi* for a bill is not a stay of proceedings unless a stay is directed by it. *Vermont Academy v. Landon*, 2 Wend. 620. It may be made at any time before trial; but when applied for by the defendant, after issue joined, a good excuse for the delay is required, and he must satisfy the court that his object is not further delay. *Andrew v. Cleveland*, 3 Wend. 437.

Under the Virginia statute, an account filed in an action of *indebitatus assumpsit*, which gives notice of the character of the claim, is sufficient, though made up of various items of which no notice is given. *Moore v. Mauro*, 4 Rand. 488. A bill need not be as special as a count on a special contract; it is sufficiently definite if it apprise the other side of the evidence that is to be offered, so that he cannot mistake as to his preparation to resist the claim. *Smith v. Hicks*, 5 Wend. 51. *Chesapeake, &c. Canal Co. v. Knapp*, 9 Pet. 541. The bill is not a part of the record; and, where evidence is given which supports the declaration, it is not a cause for non-suit that it does not agree with the bill. *Davis v. Hunt*, 2 Bailey, 412. If a bill is unsatisfactory and defective, the party to whom it is delivered may obtain an order for further particulars. *Goodrich v. James*, 1 Wend. 289. A bill is amendable like a declaration. *Babcock v. Thompson*, 3 Pick. 449. *Tillen v. Hutchinson*, 3 Green. 178. *Feidler v. Collier*, 13 Geo. 496; but not without leave of the court. *Wager v. Chew*, 3 Harris, 323. Even one irregularly filed may be amended. *Ade v. Floyd*, 3 Pike, 248.

In Kentucky, whenever a declaration is so general as not to apprise the defendant of the nature and extent of the demand, he is entitled to a bill of particulars, to which the plaintiff will be restricted in his proof. *Brown v. Calvert*, 4 Dana, 219. A bill of particulars may be called for at any time; it is not regarded as an appearance to the declaration, or as confined in its objects to a defence on the merits. *Watkins v. Brown*, 5 Pike, 197. Where a bill of particulars is delivered with the declaration, and the plaintiff is subsequently served with an order for a bill, he may disregard it and enter the defendant's default for not pleading *aliter*, where the order is for further particulars. *Payne v. Smith*, 19 Wend. 122. After a peremptory order that a plaintiff furnish a bill of particulars, if an evasive bill be delivered, the defendant may move for judgment of *non pros.*; but if the bill appear to have been made in good faith, though not satisfactory, a better bill should be applied for. *Purdy v. Warden*, 18 Wend. 671. If the character of the claim sufficiently appear from the declaration, a bill of particulars is not necessary. *Nevitt v. Rabe*, 5 How. Miss. 653. And the only effect of a bill of particulars is, to restrict the proofs and limit the recovery or set-off to the matters set forth in it. *Starkweather v. Kittle*, 17 Wend. 20. A copy of a promissory note, attached to a declaration containing the common counts, will not authorize the plaintiff to disregard an order for a bill of particulars. *Reynolds v. Woods*, 22 Wend. 642. *Garret v. Teller*, 22 Wend. 643. In South Carolina, where, in an action of *assumpsit*, the declaration contained only a count for money had and received, the omission to file with it a bill of particulars was held a cause of special demurrer. *Cregier v. Smyth*, 1 Speers, 298. In Illinois, where there is a special count on a promissory note, a copy of which is filed with the declaration, a bill of particulars is not necessary in order to give the note in evidence under the common counts. *The People v. Pearson*, 1 Scam. 458; S. C., 1

"in future, defendants, on being served with process or arrested, will be allowed to obtain orders for the particulars of the plaintiff's demand, without waiting till appearance entered or bail put in, or declaration filed and delivered; and that in this respect, the practice of this court will be made conformable to that of the court of King's Bench." The summons for particulars, however, is usually taken out after appearance and *declaration, and before plea; and unless good cause be shown [*597] to the contrary, the judge will make an order, (a) agreeably to the summons; which operates, when drawn up and served, as a stay of proceedings, till the particulars are delivered. (b) But a judge's order for the delivery of a bill of particulars, does not stay proceedings, unless it be drawn up, and served upon the plaintiff's attorney. (c) And it is a rule in the King's Bench, (d) that "no order be made in any action depending in this court, to compel a delivery of particulars of the plaintiff's demand, unless the defendant or defendants, in the event of pleading, do by such order undertake to plead issuably, or unless the plaintiff's attorney or agent shall, by special indorsement on the summons, consent to waive the same." It is also usual in that court, on granting an order for particulars, which is considered as a matter of favour, to require from the defendant some admission; as of the signature of a note, &c.

In *assumpsit* for non-performance of a contract for the sale of a house, with counts to recover back the deposit, the plaintiff having in his first count alleged that the defendant, who was to make a good title, had delivered an abstract which was insufficient, defective and objectionable, the court of Common Pleas obliged the plaintiff to give a particular of all objections to the abstract, arising upon matters of fact; but said he was not bound to state in his particulars, any objections in point of law. (e) So, if an action be brought on a bond conditioned for the performance of covenants, or to indemnify, &c. the defendant may call for a particular of the breaches for which the action is brought: And where a general form of declaring is given by act of parliament, as upon the statute 9 Ann. c. 14, or upon the 25 Geo. II. c. 36, it seems reasonable that the plaintiff, if required, should give an account of the particulars of his demand, in order to enable the defendant to prepare for his defence. But whenever the particulars of the demand are disclosed in the declaration, as in *special assumpsits*, *covenant*, or *debt* on articles of agreement, &c. or in actions on matters of record, an order for such particulars does not seem to be requisite.

In actions for *wrongs*, the injury complained of is in general stated

(a) Append. Chap. XXIII. § 4. And for the forms of bills of particulars in different cases see *id.* § 6, &c.

(b) *Ante*, 469.

(d) R. II. 59 Geo. III. K. B.

(e) 3 Bos. & Pul. 246; and see 1 Campb. 293.

(c) 1 Chit. Rep. 647.

Scam. 473. And a bill of particulars, recognized by the parties as regular, although not called for by the defendant, may be given to the jury to take out with them. *McCreary v. Hood*, 5 Blackf. 316. *Stowits v. Bank of Troy*, 21 Wend. 186.

In an action under the statute of New York, by the representatives of a person killed by the alleged negligence of the defendant, a bill of particulars of the damage cannot be required. *Murphy v. Kipp*, 1 Duer, (N. Y.) 659. It is too late to object, at the trial, to a bill of particulars, which has been served on the attorney of the defendant, that it is not sworn to according to the statute. If the defendant was not satisfied with it, he should have returned it, or moved the court for a further or amended bill. *Dennison v. Smith*, 1 Cal. 437.

in the declaration; and therefore, in such actions, it is not usual to make an order for the particulars: but circumstances may occur which render it necessary. And in an action against the marshal for an escape, he is entitled to a particular of the cause of action, for which the plaintiff sues. (f) [1]

Under a judge's order for particulars, the plaintiff, or his attorney or agent, should deliver a particular account in writing of the *items* of the demand, and when and in what manner it arose: [A] And where there has been an account current, and payments have been made for which the [*598] party means to give credit, the particular ought to contain as well those *matters for which he means to give credit, as those for which the action is brought. (a) But it is sufficient to refer in a bill of

(f) 7 Dowl. & Ryl. 774.

(a) 1 Esp. Rep. 280. 2 Campb. 410. In the latter case, an attorney having delivered a particular, containing only the debtor side of the account, was made to take a verdict for

[1] In order to obtain particulars in an action of *trespass, trover*, or on the *case*, it seems to be necessary to produce an *affidavit*, denying the defendant's knowledge of what the plaintiff is proceeding for. *Snelling v. Chennels*, 5 Dowl. Rep. 80. 12 Leg. Obs. 75, S. C. And the court will not compel a plaintiff, suing for the breach of an agreement, and assigning by way of special damage, that he has incurred certain expenses, to furnish particulars of such special damage. *Retallick v. Hawkes*, 1 Meeson & W. 573. So, in an action on the case against an attorney for negligence, in assigning leasehold property belonging to the plaintiff, *per quod* the plaintiff had to pay damages to the assignee, the court refused to compel the delivery of a particular of the plaintiff's demand. *Stannard v. Ullithorne*, 3 Bing. N. R. 326. 5 Dowl. Rep. 370, S. C.

At the trial, an erroneous date in a bill of particulars, or a mistake therein, which is not calculated to mislead the defendant, will not preclude the plaintiff from recovering his demand. *Millwood v. Walter*, 2 Taunt. 224; and see *Harrison v. Wood*, 8 Bing. 371. *Lam-birth v. Roff*, 1 Moore & S. 597. 8 Bing. 411, S. C. *Bagster v. Robinson*, 2 Moore & S. 160. 9 Bing. 77, S. C. *Spencer v. Bates*, 1 Gale, 108. *Fisher v. Wainwright*, 1 Meeson & W. 480. 1 Tyr. & G. 606. 5 Dowl. Rep. 102. 12 Leg. Obs. 99, 100, S. C. And a printer, who had let out men, presses, and type, for the printing of a newspaper, was allowed to recover, in an action for work and labour, although his particular described the demand to be "for composing and printing a certain newspaper," &c.; the defendants not having, at the trial, availed themselves of the variance between the particular and the evidence. *Bagster v. Robinson*, 2 Moore & S. 160. 9 Bing. 77, S. C. So, though the particulars of the demand vary from the evidence which the plaintiff adduces, yet, if the defendant appears and defends, and is not misled by them, the variance is no ground for nonsuiting the plaintiff. *Green v. Clark*, 2 Dowl. Rep. 18. 6 Leg. Obs. 362, S. C. *Spencer v. Bates*, 1 Gale, 108. But where the plaintiff's bill of particulars stated the cause of action to be for the amount of stakes deposited in the defendant's hands, by the plaintiff and R., and won by the plaintiff of R., the court held that he could not recover the amount of his own stake, on proof that he had re-demanded it from the defendant, before it was paid over. *Davenport v. Davies*, 1 Meeson & W. 570.

A copy of the particulars of the plaintiff's demand, and also a copy of the particulars, if any, of the defendant's set-off, Append. to Tidd, Sup. 1832, p. 113, should by a general rule of all the courts, R. T. 1 W. IV. *reg.* II; 2 Barn. & Ad. 788, 9; 7 Bing. 783; 1 Crompt. & J. 470, 71; 4 Car. & P. 603, be annexed by the plaintiff's attorney to every record, at the time it is entered with the judge's marshal. And when the bill of particulars of the plaintiff's demand is appended to the record, it is not necessary to prove the delivery of it to the defendant. *Macarthy v. Smith*, 8 Bing. 145. 1 Moore & S. 227. 1 Dowl. Rep. 253, S. C. Particulars of demand having been delivered to the defendant's attorney, under a judge's order, another bill of particulars was afterwards annexed to the record by the plaintiff's attorney, pursuant to the above rule, as and for a copy of the particulars of the demand, but in fact containing *items* not stated in the particulars delivered to the defendant; the plaintiff's evidence at the trial was confined to the *items* exclusively set forth in the particular annexed to the record; the defendant not being prepared to prove the delivery of the particulars to his attorney, under the judge's order, did not apply for a nonsuit; and the court, under the circumstances, granted a new trial without costs, but refused to enter a nonsuit. *Morgan v. Harris*, 2 Tyr. Rep. 385. 2 Crompt. & J. 461. 1 Dowl. Rep. 570, S. C.

[A] Time is material. *Quin v. Astor*, 2 Wend. R. 577.

particulars, to an account already delivered, without restating it : (b) and in general, if the plaintiff's particular convey the requisite information to the defendant, however inaccurately it be drawn up, it is sufficient. (c) And if a bill of particulars state the transaction upon which the plaintiff's claim arises, it need not specify the technical description of the right which results to the plaintiff out of that transaction. (d) After the delivery of a bill of particulars, the defendant, in the King's Bench, has the same time to plead, as he had when the summons for it was returnable. (e) And in the Common Pleas, we have seen, (f) the plaintiff cannot sign judgment for want of a plea till the expiration of twenty-four hours after the delivery of a bill of particulars, though the time for pleading be expired, and a demand of plea given, more than twenty-four hours before that time. In the Exchequer, the defendant cannot obtain an order for the particulars of the plaintiff's demand, without an affidavit, (g) that he is unacquainted with them; but he is entitled to receive such particulars from the plaintiff, although he may have had a statement of them before the action was brought. (h) And where a plaintiff refused to deliver a particular of his demand, in obedience to a judge's order, the court of King's Bench refused to allow the defendant to sign a judgment of *non pros*. (i)

As the defendant is allowed to call for the particulars of the plaintiff's demand, so when the defendant pleads or gives notice of *set off*, for goods sold, &c. the plaintiff may take out a summons for the particulars: upon which the judge will make an order, which should be regularly drawn up and served, (k) for the defendant to deliver them in a certain time, or in default thereof, that he be precluded from giving evidence at the trial, in support of his set-off. (l) But the plaintiff cannot make any objection to such particulars, at the trial of the cause, which, if made earlier, the defendant or the court might have rectified. (m)

If the particulars delivered under a judge's order be not sufficiently explicit, the party to whom they are delivered may take out a summons, and obtain an order, for *further* particulars; and if, on the other hand, *they are incorrect, or not sufficiently comprehensive, the party [*599 delivering may have a summons and order to *amend* them. But it is a rule in the King's Bench, (a) that "no summons for further particulars of the plaintiff's demand, defendant's set off, or other particular, be granted in an action depending in this court, unless the last previous order for particulars be first drawn up, and such order produced at the time of applying for any such summons." And in the Common Pleas, where the declaration was delivered at the same time as a bill of particulars which was insufficient, and another order was afterwards obtained for better particu-

the balance due to him, without costs. *Sed quære*, as to the necessity of including payments by the defendant, in the particulars of the plaintiff's demand; the practice not being conformable to the cases?

(b) *Peake's Cas. Ni. Pri.* 3 Ed. 229.

(c) 1 *Campb.* 69, *in notis*.

(d) 4 *Taunt.* 189; and see *Peake's Cas. Ni. Pri.* 3 Ed. 229, (a).

(e) 13 *East*, 598; and see 5 *Barn. & Cres.* 769; but see 4 *Barn. & Cres.* 970. 7 *Dowl. & Ry.* 458, *S. C.* 5 *Barn. & Cres.* 770, (b).

(f) *Ante*, 469.

(g) *Append. Chap. XXIII.* § 5.

(h) *Wightw.* 78.

(i) 7 *Dowl. & Ry.* 125. 7 *Barn. & Cres.* 485.

(k) *R. H.* 59 *Geo. III. K. B.* *Ante*, 471.

(l) For the form of particulars of set-off, see *Append. Chap. XXIII.* § 10. And for the effect of such particulars, see 8 *Price*, 213. See also stat. 5 *Geo. IV.* c. 106, § 8, for granting rules in vacation, in the courts of Great Sessions in Wales, for a particular of the plaintiff's demand, and defendant's set-off, &c. *Ante*, 486, 7, (n).

(m) *Holt*, *Ni. Pri.* 352.

(a) *R. H.* 59 *Geo. III. K. B.* *Ante*, 471.

lars, the court held, that as the defendant's attorney had not returned the declaration, with the insufficient particulars, he had waived the irregularity.(b) An amendment was allowed, in the latter court, after the plaintiff had been nonsuited for a defect in the bill of particulars, and a new trial granted on payment of costs.(c) And the plaintiff, in the Exchequer, is not entitled to be paid the costs of the first trial, previous to and as the terms of the amendment; but the court will order them to abide the event of the cause.(d) But where a particular was delivered under a judge's order, and the plaintiff delivered a second particular, without an order, containing merely an echo of the counts in the declaration, that court would not allow him to give evidence of any claim contained in the second particular, which was not included in the first.(e)

At the trial, the particulars of the plaintiff's demand, or of the defendant's set-off, if delivered, are considered as incorporated with the declaration, plea, or notice; and on production of the order, and proof of their delivery, the parties are not allowed to give any evidence out of them.(f) Therefore, where the particular of the plaintiff's demand was a promissory note only, and on being produced it appeared to be improperly stamped, so that it could not be given in evidence, the plaintiff, though he might otherwise have gone into the consideration of the note, was held to be precluded therefrom by his particular.(g) But an erroneous date to a bill of particulars, which is not calculated to mislead the defendant, will not preclude the plaintiff from recovering his demand.(h) So, where the plaintiff declared in *debt* for rent, without showing in what parish the lands were situate, and delivered a particular of his demand, describing them in a wrong parish, the court held that the plaintiff might recover; it not appearing that any mis-representation was intended, or that the defendant held more than one parcel of land of the plaintiff, so as to be misled by it:(i) So, where the plaintiff declared on three bills of exchange, in three several counts, but, according to his particular, only sought to recover on the bill set forth in the first count; and the defence was, that the defendants were not [*600] partners when the latter bill was drawn, and the plaintiff tendered in *evidence the other two bills, for the purpose of establishing the fact of partnership; which evidence was rejected, on the ground that these bills were not included in the particular; the court of Common Pleas granted a new trial.(a) So, in *ejectment* to recover premises forfeited for non-payment of rent, a difference between the amount of rent proved to be due, and the amount demanded in the lessor of the plaintiff's particular, is not material.(bb) And although the plaintiff, after delivering a particular of his demand, cannot at the trial himself give evidence out of it, yet if the defendant's evidence show that there were other *items* which he might have included in his demand, he is entitled to recover all that appears to be due to him.(cc) An *item*, however, of the plaintiff's demand, appearing on the face of the defendant's set off, given in under a judge's order, is not such

(b) 2 Moore, 90; and see *Id.* 655. 8 Taunt. 592, S. C. *Ante*, 514.

(c) 2 Bos. & Pul. 245.

(e) 1 Taunt. 353.

(f) Peake's Cas. Ni. Pri. 3 Ed. 229. 1 Esp. Rep. 195. 3 Esp. Rep. 168. 2 Bos. & Pul. 243, S. C. 1 Sel. Pr. 2 Ed. 329, 30.

(g) 4 Esp. Rep. 7.

(h) 2 Taunt. 224.

(i) 3 Maule & Sel. 380.

(a) 5 Moore, 567. 2 Brod. & Bing. 682, S. C.

(bb) 10 Moore, 252. 3 Bing. 3, S. C.

(cc) 1 Campb. 68.

an admission as supersedes the necessity of the plaintiff's proving it.(d) In an action of *assumpsit* brought by the assignees of a bankrupt, the defendant called for the particulars of the plaintiff's demand, which were given him, and then pleaded in abatement, that the promises were made by himself and another person jointly: issue being joined on this plea, it appeared in evidence at the trial, that the particulars chiefly related to transactions between the bankrupt and the defendant, jointly with the person mentioned in the plea; and though there were some *items* which concerned the defendant only, yet as these were not distinguished from the rest, the chief justice would not suffer them to be given in evidence, and nonsuited the plaintiff: The Court of King's Bench was afterwards moved, but refused to set aside the nonsuit.(e)

*CHAPTER XXIV.

[*601]

Of CHANGING *the* VENUE, CONSOLIDATING ACTIONS, and STRIKING OUT COUNTS.

THE law having settled the distinction between *local* and *transitory* actions, it seems that towards the reign of *Richard* the second, it was greatly abused; (a) for a litigious plaintiff would frequently lay his action in a foreign county, at a great distance from where the cause of it arose, and by that means oblige the defendant to come with his witnesses into that county. To remedy which, it was ordained by statute, (b) "to the intent that writs of *debt* and *account*, and all other such actions, be from henceforth taken in their counties, and directed to the sheriffs of the counties where the contracts of the same actions did arise; that if from henceforth, in pleas upon the same writs, it shall be declared that the contract thereof was made in another county than is contained in the original writ, that then the same writ shall be utterly abated." The design of this statute was to compel the suing out of all writs arising upon contract, in the very county where the contract was made, (c) agreeably to the law of *Henry* the first: (d) *Unusquisque per pares suos judicandus est, et ejusdem provincie; peregrina vero judicia modis omnibus submovemus.* (e) But as the statute only prescribes, that the count shall agree with the writ, in the place where the contract was made, it did not effectually prevent the mischief: (f) And therefore a statute of *Henry* the fourth (g) directs all attorneys to be sworn, that they will make no suit in a foreign county; and there is an old rule of court, (h) which makes it highly penal for attorneys to transgress this statute.

Soon after the statute of *Henry* the fourth, a practice began of pleading in abatement of the writ, the impropriety of its venue, even before the

(d) 2 Esp. Rep. 602. 5 Taunt. 228. 1 Marsh. 33. S. C.

(e) *Colson & others, assignees, &c., v. Selby*, E. 36 Geo. III. K. B. 1 Esp. Rep. 452, S. C.

(a) Gilb. C. P. 89.

(b) 6 R. H. c. 2.

(c) 2 Blac. Rep. 1032.

(d) Leg. Hen. I. c. 31.

(e) Gilb. C. P. 89, *in notis*.

(f) 2 Black. Rep. 1032.

(g) 4 Hen. IV. c. 18.

(h) R. M. 1654, § 5, K. B. R. M. 1654, § 8, C. P.; and see R. M. 15 Elic. § 15, C. P.

plaintiff had declared. At first, in the reign of *Henry* the fifth, they examined the plaintiff upon oath, as to the truth of his venue: But soon after they began to allow the defendant to traverse the venue, and try the traverse by the country.⁽ⁱ⁾ This practice being subject to much delay, the judges introduced the present method of changing the venue upon motion, on the equity of the above statute;^(k) which Lord *Holt* says,^(l) [*602] *began in the time of *James* the first: And accordingly we find, that among the fees of the Court of King's Bench, as found by a jury under the King's commission in 1630, one is, "for every rule to alter a *visne*."^(aa) The form of the rule and affidavit are also stated by *Styles*,^(bb) as established in 23 *Car. I.*^(cc)

But whenever the practice began, it is now settled, that in *transitory* actions, the venue may be changed upon motion, either by the plaintiff or defendant; And, in an action against several defendants, it may it seems be changed at the instance of some of them only.^(d) The plaintiff shall not *directly* alter his venue, after the essoin day of the next term after appearance; though he would pay costs, or give an imparlance:^(e) Yet he may in effect do it, by moving to amend;^(f) and that, after the defendant has changed the venue,^(g) or pleaded,^(h) and even after two terms have elapsed from the delivery of the declaration.⁽ⁱⁱ⁾ An amendment was allowed in the King's Bench, in an action for a penalty under the bribery act, by altering the venue from the county at large to an interior jurisdiction, after the time limited for commencing a new action; the particularity of the declaration making it appear probable to the court, that the plaintiff was proceeding on the same fact for which the action was originally brought, when laid by mistake in the wrong county, though there was no affidavit that it was the same:^(kk) And in another case, such amendment was allowed though it appeared that there were distinct causes of action in the two different counties, upon an affidavit that the plaintiff proceeded on a mistake, in supposing that both causes of action could be proved in the county where the election was holden.^(ll) But, in the Common Pleas, where the defendant had put off the trial at the assizes, on the absence of a witness, the court refused to let the plaintiff amend, by changing the venue to *Middlesex*.^(m) And that court will not amend a declaration, by changing the venue, unless the plaintiff show substantial ground for it: Therefore, where the plaintiff moved to amend, by changing the venue from *Bedfordshire* to *Middlesex*, on the ground that the action depended on a question of law, as to the construction of an inclosure act, and would therefore be tried better and more expeditiously in town; the court, on the affidavit of the defendant, that the cause

(i) *Rastal*, tit. Debt, 184, (b). *Fitz. Abr.* tit. Brief, 18.

(k) 1 *Wms. Saund.* 5 Ed. 73, 4, (2).

(l) 2 *Salk.* 670.

(aa) *Trye's jus. fil.* 231.

(bb) *Sty. Pr.* (Ed. 1707,) 631.

(cc) The case of *Lord Gerrard v. Floyd*, (East, 16 *Car. 2.*) 1 *Sid.* 185, is said to be the first case in the books, on the subject of changing the venue; but that case mentions the *common* affidavit, and *common* rule for changing the venue, which shows that the practice was then well known and established: and see 2 *Blac. Rep.* 1033.

(d) *Cas. Pr. C. P.* 133. *Pr. Reg.* 430, S. C. 4 *Maule & Sel.* 233; but see 5 *Taunt.* 87, 631. 2 *Chit. Rep.* 417, 18.

(e) *Sty. P. R.* 625, R. M. 10 *Geo. II. reg. 2*, (c), K. B.

(f) 2 *Str.* 1162.

(g) 2 *Barnard. K. B.* 153. 2 *Str.* 1202.

(h) 1 *Wils.* 173; and see *Barnes*, 12, 488.

(ii) *Say. Rep.* 150, 294. 1 *Ken.* 368, S. C. 2 *Bur.* 1098.

(kk) 4 *East*, 433.

(ll) 4 *East*, 435.

(m) 2 *New Rep. C. P.* 58.

of action arose in *Bedfordshire*, discharged the rule.(n) So, where an attorney has waived his privilege to sue in **Middlesex*, by laying the venue in another county, he cannot avail himself of his privilege by amending, so as to change the venue to *Middlesex*.(a)

The defendant is in general allowed to change the venue in all *transitory* actions, arising in a county different from that where the plaintiff has laid it ;(b) and he may even change it from *London* to *Middlesex*.(c) or *vice versa*.(dd) But the venue cannot be changed in *local* actions : (ee) And in *transitory* actions, where material evidence arises in two counties, the venue may be laid in either : (ff) and if it be laid in a third county, the courts will not change it ; for the defendant in such case cannot make the necessary affidavit, that the cause of action arose in a particular county, and not elsewhere.(g) Thus, where the venue was laid in *London*, and it appeared from the affidavit, that the cause of action arose upon a bridge called *King's* bridge, partly in the county of *Kent*, and partly in the county of the city of *Canterbury*, and not elsewhere, the court refused to change the venue.(h) And for a similar reason, the venue cannot be changed in an action against a carrier,(i) or lighterman,(k) or for an escape,(l) or false return.(m) So, in *scire facias* to repeal a patent,(n) or action for infringing it,(o) the defendant cannot change the venue from *Middlesex*, to any other county ; nor can the venue be changed, in such an action, from one county to another.(p)

When the cause of action arises out of the realm, the courts will not change the venue ; because the action may as well be tried in the county where the venue is laid, as in any other where the cause of action did not arise.(q) So, where the cause of action partly arose in *Derbyshire* and partly in *Ireland*, the court of King's Bench refused to change the venue from *London* to *Derbyshire*, on an affidavit that the cause of action arose in the county of *Derby* and in *Ireland*, and not in *London*, or elsewhere than in the county of *Derby* and in *Ireland*.(r) And as it is necessary, for changing the venue, that the cause of action should be *wholly* confined to a single county, the courts will not change it in an action of *debt* on

(n) 6 Taunt. 408. 2 Marsh. 121, S. C.

(a) 7 Taunt. 146. 2 Marsh. 426, S. C.

(b) R. M. 1654, § 5, K. B. R. M. 1654, § 8, C. P. Barnes, 491.

(c) 2 Str. 857. Barnes, 487. Pr. Reg. 430, S. C.

(dd) 2 Durnf. & East, 275. Cas. Pr. C. P. 41. Pr. Reg. 429, 30. Barnes, 481.

(ee) Say. Rep. 146.

(ff) 7 Co. 2, a. 2 Salk. 669, R. M. 10 Geo. II. reg. 2, (o), K. B. 2 Durnf. & East, 275. 7 Durnf. & East, 583. 7 Moore, 520.

(g) 7 Durnf. & East, 205. 3 Bos. & Pnl. 579. *Rowland v. Knapp*, II. 41 Geo. III. C. P. *Id.* 579, 80. 3 Taunt. 464. 2 Wms. Saund. 5 Ed. 5, (3) ; but see 2 Blac. Rep. 940. 1 New Rep. C. P. 110, 310. 1 Taunt. 259. 6 Taunt. 565, 566. 2 Marsh. 278, S. C. 2 Moore, 64.

(h) 1 Wils. 178.

(i) *Edie v. Glover*, II. 27 Geo. III. K. B. ; but see 4 Taunt. 729.

(k) 2 Salk. 670.

(l) *Id.* 1 Keb. 65. 1 Sid. 87. Barnes, 491. 2 Marsh. 152 ; but see Barnes, 493. 2 Chit. Rep. 418.

(m) 2 Salk. 669. 2 Str. 727. Say. Rep. 54. 1 Wils. 336, S. C.

(nn) 2 Cox, 235.

(o) 6 Durnf. & East, 363. 1 East, 115, (a). 2 Chit. Rep. 418.

(p) *Per Cur.* T. 22 Geo. III. K. B. 7 Dowl. & Ryl. 103, 4.

(q) Say. Rep. 77. Cowp. 176 ; and see 1 H. Blac. 280. 1 Taunt. 259, 60. 2 Taunt. 197. 6 Taunt. 569. 2 Marsh. 280, S. C.

(r) 4 East, 495 ; and see 2 New Rep. C. P. 397. 3 Bing. 429.

[*604] bond *or other speciality, (a) or in *covenant* on a lease, (b) or policy of insurance by deed, (c) or in *assumpsit* or on an award, (d) or charter party of affreightment, (e) unless some special ground be laid : (f) for *debitum et contractus sunt nullius loci*, and bonds and other specialities are *bona notabilia* wherever they happen to be. (gg) And it is now holden in the King's Bench, (hh) agreeably to the practice of the court of Common Pleas, (ii) that the venue cannot be changed, unless upon a special ground, (kk) in an action upon a promissory note, or bill of exchange. And if an action be *bonâ fide* brought on a promissory note, the plaintiff may retain the venue, though the action be for other causes also ; and the court will not restrain the plaintiff from proceeding in the county he has elected, for the other causes. (ll) But the venue may still be changed in an action upon a policy of insurance, not being by deed ; (m) or in any other action, the right of which is founded upon simple contract. (n) And in *covenant* upon a lease, for diverting water from a mill, &c. a *view* being proper to be had, the venue was changed in one case, to the county where the premises lay ; though most of the plaintiff's witnesses resided in the county where the venue was laid : (o) But, from a subsequent case it seems, that the granting of a view is not alone a sufficient reason for changing the venue, in an action of *covenant*. (p)

The venue may be changed in an action for criminal conversation, on the usual affidavit, that the whole cause of action, if any, arose in the county to which it is changed ; for the whole cause of action is the trespass committed on the plaintiff's wife. (q) So, the venue may be changed in an action for an assault. (r) And the court of Common Pleas will change it in a *penal* action, on the usual affidavit as well as in any other. (s) In an action on the case, for overturning the plaintiff in a stage coach, the venue may be changed into the county where the accident happened. (t) And it is no reason against changing the venue, that if changed, the cause is likely to [*605] *be tried by persons interested in the question, if they are likely to have as strong an interest on one side as on the other. (aa) But, in an action *forscandalum magnatum*, the courts will never change the venue ; (bb) because a scandal raised of a peer of the realm is not confined to

(a) 1 Keb. 65. 1 Sid. 87. Sty. P. R. 631. 2 Str. 878. Andr. 66, R. M. 10 Geo. II. (c), K. B. Gilb. K. B. 339. Gilb. C. P. 90. *Balcin v. Kent*, E. 20 Geo. III. K. B. Barnes, 491. (b) 2 Chit. Rep. 419, 20. (c) 1 McClell. & Y. 212.

(d) 2 Bos. & Pul. 355. 3 Barn. & Cres. 9. 4 Dowl. & Ryl. 635, S. C.

(e) 7 Taunt. 306. 1 Moore, 54, S. C. ; but see 4 Bing. 39.

(f) *Pole v. Horobin*, M. 22 Geo. III. K. B., cited in 1 Durnf. & East, 782, (a). 1 Durnf. & East, 781 ; and see 1 Bos. & Pul. 425. 8 East, 268.

(gg) 1 Durnf. & East, 571.

(hh) Andr. 66, *per Chapple*, J. R. M. 10 Geo. II. (c), K. B. *Precious v. Bennett*, E. 25 Geo. III. K. B. ; but see the opinion of the other justice, in Andr. 66. 1 Wils. 41. Say. Rep. 7, *contra*.

(ii) Cas. Pr. C. P. 119. Pr. Reg. 417, 18. Barnes, 480, 483, 485, 487, 491, 492. 2 Blac. Rep. 993. 1 Bos. & Pul. 20. 2 Bos. & Pul. 355.

(kk) *Per Cur.* T. 25 Geo. III. K. B. 2 Chit. Rep. 418, 19. *Id.* (a).

(ll) 5 Taunt. 576. 2 Dowl. & Ryl. 164 ; but see 7 Price, 564, *semb. contra*.

(m) Andr. 66. 2 Str. 1180. Say. Rep. 7. 2 Durnf. & East, 275. 7 Durnf. & East. 205 ; but see 1 McClell. & Y. 212.

(n) Say. Rep. 7.

(o) 8 East, 268 ; but see 2 Chit. Rep. 419, 20.

(p) 2 Chit. Rep. 419, 20.

(q) 10 East, 32 ; and see 2 Chit. Rep. 417 ; 7 Moore, 62.

(r) 2 Chit. Rep. 417.

(s) 5 Taunt. 754. 1 Marsh. 320, S. C. ; but see 1 Sid. 287, *semb. contra*.

(t) 4 Taunt. 729.

(aa) 5 Taunt. 605.

(bb) 1 Lev. 56. 2 Salk. 688. Carth. 400, S. C. 2 Str. 807. Barnes, 482. Cas. Pr. C. P. 132. Pr. Reg. 417. S. C. Gilb. C. P. 90.

any particular county, but reflects on him through the whole kingdom; and he is a person of so great notoriety, that there is no necessity for obliging him to try his cause in the neighbourhood. So, in an action for a libel, published in a newspaper in one county, and circulated in other counties,(c) or contained in a letter, written by the defendant in one county, and directed into another,(d) the court of King's Bench will not change the venue; because the defendant cannot make the common affidavit, that the cause of action arose in a single county, and not elsewhere: But the court will change the venue into a county in which the libel was both written and published:(e) And the distinction seems to be, between a libel which is dispersed through several counties, and a letter which is written in one county and not opened in another; on the former, the venue cannot be changed, on the latter it may.(f)

Though the courts in general will not change the venue, when it is laid in the proper county, yet they will change it even then, upon a special ground:(g) Thus, in *debt* on bond, where the venue was laid in *London*, and the plaintiff's and defendant's witnesses lived in *Lincolnshire*, the court of King's Bench changed it into the latter county.(h) So, where the cause of action arose in another county than that in which the venue is laid by the plaintiff, and the justice of the case requires the trial to be had there, all the witnesses residing at a great distance from the county where the venue is laid, the courts, on the application of the defendant, will change the venue, on his agreeing to admit a particular fact, which in point of form exists in the original county.(i) But in an action by an attorney for an escape, it is not a sufficient ground for deviating from the general rule not to change the venue in such case, that the witnesses on both sides reside in the county to which the venue is wished to be changed.(k)

When a fair and impartial trial cannot be had in the county where the venue is laid, the courts, on an affidavit of the circumstances, will change it, in *transitory* actions;(l) or, in *local* actions, will give leave to enter a *suggestion on the roll, with a *nient dedire*, in order to [*606] have the trial in an adjoining county:(a) And the parties by consent may change the venue in local actions,(b) or have them tried out of their proper county, such consent being entered by suggestion on the roll.(cc) On the other hand, though the courts will in general change the venue, where it is not laid in the proper county, yet if an impartial or satisfactory trial cannot be had there, they will not change it; as in an action for words spoken of a justice of the peace, by a candidate upon the hustings, at a

(c) *Hoskins v. Ridgway*, H. 23 Geo. III. K. B. 1 Durnf. & East, 571.

(d) 1 Durnf. & East, 647. 1 Brod. & Bing. 299.

(e) 3 Durnf. & East, 306. *Aris v. Taylor*, T. 35 Geo. III. K. B.; and see 1 Moore & P. 188.

(f) 3 Durnf. & East, 652.

(g) 2 Chit. Rep. 418, 19.

(h) 1 Durnf. & East, 781; and see 1 Bos. & Pul. 20, 425. 1 Chit. Rep. 334; but see 1 Wils. 162. 1 Durnf. & East, 782, *in notis*. 2 Marsh. 152. 5 Price, 612. 7 Moore, 82, 520. 3 Barn. & Cress. 552.

(i) 3 East, 329. *Edie v. Glover*, H. 27 Geo. III. K. B.; and see 2 Chit. Rep. 418, 19. 3 Bos. & Pul. 581. 8 Taunt. 635.

(k) 2 Marsh. 152; and see 2 Chit. Rep. 418, 19.

(l) 2 Str. 874. 3 Bur. 1564. 1 Blac. Rep. 480, S. C.; but see 1 Barnard, K. B. 283. *Foley v. Lord Peterborough*, H. 25 Geo. III. K. B.

(a) 10 Mod. 198. 1 Str. 235. 3 Bur. 1334. 1 Durnf. & East, 363.

(b) 1 Wils. 298. *Groves v. Durall*, H. 38 Geo. III. K. B.

(cc) *Fonnerau v. Fonnerau*, in K. B. *per Cur.*

county election.(d) And, in order to avoid delay, the courts will not change the venue, except by consent, or upon an affidavit of merits,(e) into the city of *Bristol* or *Norwich*, where there are no Lent assizes, in *Michaelmas* or *Hilary* term;(f) nor into *Hull*, *Canterbury*, &c. where the justices of *nisi prius* seldom come;(g) nor into the city of *Worcester* or *Gloucester*, out of the county at large, because the assizes for the city and county at large are holden at the same place.(h) But the venue may be changed, as a matter of course, into the city of *Bristol*,(i) &c. previous to the summer assizes.

So, when the venue is not laid in the proper county, the *privilege* of the plaintiff will in some cases prevent the courts from changing it. Thus, in an action brought by a serjeant,(kk) barrister,(ll) attorney,(m) or other officer of the court,(n) if the venue be laid in *Middlesex*, the plaintiff, suing as a privileged person, has a right to retain it there, on account of the supposed necessity of his attendance on the court: But if the venue be laid in any other county, as in *London*;(o) or the plaintiff, though privileged, sue as a common person, by *original* or otherwise,(p) or *en auter droit*, as executor or administrator, or jointly with his wife or other persons,(q) he has no such privilege: and the court will not suffer him to use his privilege, so as to oppress a defendant.(r) When a serjeant, barrister, attorney, or [*607] other *officer of the court is *defendant*, he has no privilege whatever respecting the venue.(a)

It was formerly doubted, whether the venue could be changed, without consent, into *Wales*,(b) or the next adjoining *English* county;(c) and the objection in the latter case was, that the defendant could not make the common affidavit, which is never dispensed with, that the cause of action arose in that particular county and not elsewhere.(dd) But now, since the *latitat* is holden to run into *Wales*, it has become the common practice to change the venue directly from an *English* to a *Welch* county:(ee) and this is so much a matter of course, that the rule for changing it is absolute in

(d) Cowp. 510; and see 2 Salk. 670. 4 Burr. 2447.

(e) 1 Chit. Rep. 14.

(f) Cas. Pr. C. P. 129. Barnes, 481, S. C. Pr. Reg. 428. 2 Str. 1180, 1216. 1 Wils. 138. *Per Cur.* M. 37 Geo. III. K. B.; and see 3 Blac. Com. 294. 5 Price, 613. But see 1 Chit. Rep. 334, where, in an action on a bond, the venue was changed from *London* to *Northumberland*, in *Easter* term, on an affidavit stating that all the defendant's witnesses lived there, on the terms of withdrawing the plea of *non est factum*.

(g) R. M. 1654, § 9. K. B. R. M. 1654, § 12, C. P. Barnes, 489, 90.

(h) Barnes, 490.

(i) *Stanley v. Preston*, T. 24 Geo. III. K. B. *Tucker v. Morgan* E. 35 Geo. III. K. B.

(kk) Pr. Reg. 420.

(ll) 2 Show. 176, 242. 1 Mod. 64. Sty. Rep. 460. 2 Salk. 668, 670, 671. 2 Ld. Raym. 1556. 2 Str. 822. 1 Wils. 159. 1 Blac. Rep. 19 S. C.

(m) 2 Salk. 668. Say. Rep. 153, 180. Barnes, 479. Pr. Reg. 418, S. C. Barnes, 487, 493. 2 Blac. Rep. 1065. 2 Marsh. 152. *Ante*, 80, 320.

(n) 2 Salk. 670. 2 Ld. Raym. 1253.

(o) 2 Salk. 668. 7 Taunt. 146. 2 Marsh. 426, S. C.

(p) Cas. P. R. C. P. 132, 145. Pr. Reg. 419, 20. Barnes, 479, 484, S. C.

(q) R. M. 10 Geo. II. reg. 2, (c), K. B.

(r) *Tomlinson v. Harrison*, M. 16 Geo. III. K. B.

(a) Carth. 126. 1 Show. 148. 4 Bur. 2027. *Sparke v. Stokes*, one, &c. H. 24 Geo. III. K. B. 3 Durnf & East, 573. Barnes, 482. Pr. Reg. 419. Cas. Pr. C. P. 134, S. C.; but see 2 Salk. 668. 1 Str. 619. 2 Str. 1049, *contra*.

(b) Say. Rep. 48. Doug. 262, 3. *Jones v. Thomas*, T. 22 Geo. III. K. B. cited in Doug. 263, n.

(c) 2 Str. 1258. 1 Wils. 138, S. C.

(dd) 4 Bur. 2452.

(ee) 2 Str. 1270. 1 Wils. 222. 4 Bur. 2450. 2 Blac. Rep. 962 6 East, 355.

the first instance, on the usual affidavit.(f) So, the venue has been frequently changed into the counties *palatine*; because the courts can send down the record there by *mittimus*:(g) and, in one instance, it was changed into the next adjoining county.(h) But where the venue is changed into a county palatine, the courts will require an undertaking from the defendant, not to assign for error the want of an original.(i) And, in the Common Pleas, it is considered as a matter of favour to change the venue to a county palatine; and therefore, where it would be attended with inconvenience to the plaintiff, that court will not grant the indulgence.(k) So, they will not permit one only of several defendants to change the venue to a county palatine; because they have in that case no authority to bind the other defendants, to the terms of not assigning for error the want of an original:(l) And where one of several defendants had suffered judgment by default in *Middlesex*, the court would not, on the application of another defendant, change the venue to a county palatine.(m) So, where the venue was laid in a county palatine, and after a writ of inquiry executed, and final judgment signed, a writ of error was brought, and error assigned for want of an original, the court would not amend the declaration by changing the venue:(n) And where, in an action by *original* against four defendants, the venue was changed into a county palatine, on the application of three of them, who appeared separately by one attorney, and undertook not to assign the want of an original for error, the court of King's Bench required *a similar undertaking from [*608] the *fourth*, who had appeared by a different attorney.(a) Where the cause of action arises in *Berwick*, and the venue is laid elsewhere, it is not settled, whether it can be changed into *Northumberland*, as being the next adjoining county:(b) But it seems that the courts, upon a proper suggestion, will order the cause to be tried there.(c)

In the King's Bench, the motion for a rule for the defendant to change the venue is in general a motion of course, requiring only counsel's signature; and must formerly have been made within *eight* days after the declaration delivered,(d) which was the time allowed by the rules of the court, for pleading:(e) And accordingly it is said,(f) that if a declaration be delivered so early in term, that the defendant has *eight* days in that term, he cannot move to change the venue the next term. But it is now settled, that where the defendant has not obtained an order for time to plead, he may move to change the venue, at any time before plea pleaded:(g) and he is even allowed to change it, after an order for time to plead, though upon the terms of pleading issuably:(hh) but not after an order for time to

(f) 6 East, 355. *Powell v. Wilkins*, H. 37 Geo. III. K. B. *Anon.* H. 37 Geo. III. K. B. *contra*.

(g) 2 Ld. Raym. 1418. 1 Wils. 222. 7 Durnf. & East, 735; but see 2 Str. 807. *Cas. Pr. C. P.* 91, 129. *Pr. Reg.* 428. 9 Barnes, 478, 481, 488, *contra*.

(h) 12 Mod. 313; and see *Pr. Reg.* 428.

(i) 1 Sel. Pr. 2 Ed. 251. *Marsden v. Bell*, H. 28 Geo. III. C. P. *Imp. C. P.* 7 Ed. 218, 220. 1 Taunt. 120. 13 Price, 52, S. P. *Ante*, 105. *Append. Chap. XXIV. § 4*.

(k) 1 Taunt. 432. (l) 5 Taunt. 87; and see 2 Chit. Rep. 417, 18. *Ante*, 602.

(m) 5 Taunt. 631; and see 2 Chit. Rep. 417, 18; but see 4 Maule & Sel. 233. *Cas. P. R. C. P.* 133. *Pr. Reg.* 430, S. C.

(n) 7 Taunt. 466. 1 Moore, 186, S. C.; and see 6 Moore, 567.

(a) 4 Maule & Sel. 233. (b) 2 Blac. Rep. 1036, 1068; and see 2 Ken. 519.

(c) 2 Bur. 859. (d) 2 Salk. 668.

(e) *Id.* 2 Str. 1192. (f) 1 Str. 211; and see R. M. 1654, § 5, K. B.

(gg) R. M. 1654, § 5, K. B. *Gilb. K. B.* 339.

(hh) Say. Rep. 207. *Sazby v. Lys*, M. 26 Geo. III. K. B. *Hudson v. Needham*, T. 27 Geo III. K. B.

plead, where the terms are to plead issuably, and take short notice of trial, at the first or other sittings within term, in *London* or *Middlesex*; because a trial would by that means be lost.(i) And, for the same reason, a defendant under terms of taking short notice of trial for the sittings in *Middlesex*, after a non-issuable term, cannot move to change the venue into the country, upon the common affidavit. 1 Man. & Ryl. 142. And the venue cannot in general be changed, at the instance of the defendant, after plea pleaded; even though he afterwards have leave to withdraw his plea, and plead it *de novo*, with a notice of set-off.(k) In the Common Pleas, the motion is for a rule to show cause; and may be made, as in the King's Bench, at any time before plea pleaded,(l) notwithstanding the defendant may have previously applied for and obtained further time to plead,(m) unless he be under terms of taking short notice of trial in *London* or *Middlesex*;(n) or for the adjourned sittings after term in *London*.(o) But the motion cannot in general be made after the defendant has pleaded in abatement,(p) or in bar;(q) though if he plead pending a rule *nisi* for changing the venue, this will not prevent the court from making it absolute;(r) and being for a rule *to show cause, the motion cannot regularly be made on the last day of term, unless the declaration was delivered so late in the term, that the defendant had not an opportunity of making it sooner.(a) In the Exchequer, the court will not change the venue in any case where a trial has been had:(b) And in that court, the defendant cannot change the venue, after having obtained an order for time to plead, "on all the usual terms;" it being considered as one of these terms, that the defendant shall not afterwards move to change the venue:(c) Therefore, when the order is intended to be without prejudice to a change of venue, it should be so expressed in the summons.(c) And the court will not order the venue to be changed, after an order for time to plead, although the defendant proposes to give judgment of the term.(c)

In order to change the venue, when not laid in the proper county, the defendant, in all the courts, must make a positive affidavit, that "*the plaintiff's cause of action, (if any,) arose in the county of A. and not in the county of B. (where the venue is laid,) or elsewhere out of the county of A.*"(d) An affidavit was necessary, because the motion to change the venue succeeded and was equivalent to a plea in abatement;(e) and the form of the affidavit, which was settled so long ago as the reign of King *Charles* the

(i) Cowp. 511. 7 Durnf. & East, 698; but see 1 Wils. 245, *contra*.

(k) *Palmer & Turner*, H. 26 Geo. III. K. B. 3 Bos. & Pul. 13, (b).

(l) R. M. 1654, § 8, C. P.

(m) Willes, 318. Barnes, 489. R. M. 16 Geo. II. C. P. Before the making of this rule, the defendant, in the Common Pleas, could not have moved to change the venue, after taking out a summons, or obtaining an order, for further time to plead. Cas. Pr. C. P. 126. Barnes, 478, 481, 483, 485, 6 Pr. Reg. 424, 5, 6. S. C.; and see Cas. Pr. C. P. 159. Pr. Reg. 425. Barnes, 487, S. C. 2 Bos. & Pul. 320.

(n) Barnes, 478. 2 Bos. & Pul. 320. 3 Bos. & Pul. 12.

(o) Barnes, 493. 1 Bing. 186. 7 Moore, 598, S. C.

(p) 4 Bing. 18.

(q) Cas. Pr. C. P. 33, 112. Pr. Reg. 423, S. C. *Pallister v. Willan*, T. 33 Geo. III. C. P. Imp. C. P. 7 Ed. 222, 3. 2 Moore, 64. 8 Taunt. 169, S. C.

(r) Cas. Pr. C. P. 136. Pr. Reg. 423, S. C. Barnes, 492. 3 Bos. & Pul. 12. 1 Taunt. 58.

(a) Barnes, 480, 486, 489. Pr. Reg. 426, 7. *Ante*, 498, 9.

(b) 1 Price, 146.

(c) 3 Price, 3. 2 McClell. & Y. 106.

(d) Sty. P. R. 631. R. M. 10 Geo. II. reg. 2, (c), K. B. *Fleetwood v. Cross*, H. 26 Geo. III. K. B. 3 Durnf. & East, 495, and see Append. Chap. XXIV. § 1; and for the rule thereon, see *id.* § 2.

(e) 2 Blac. Rep. 1033.

second, (f) has been ever most religiously adhered to. (g) Upon this affidavit, the clerk of the rules will draw up a rule for changing the venue in the King's Bench, which is absolute in the first instance. (h) But inconvenience having arisen from the venue having been improperly changed, without advertg to the cause of action, a rule was made in that court, that in future, all rules for changing the venue in any action, should be drawn up "upon reading the declaration," (i) &c. : and accordingly, the court will not change the venue, unless the affidavit state what the cause of action is, or it appear by producing the declaration, that it is of such a nature as to enable the defendant to change it. (k) In the Common Pleas, the rule for changing the venue is a rule to show cause; (l) which is drawn up by the secondaries, on the usual affidavit, that "the cause of action arose in the county to which it is sought to be changed, and not elsewhere," (m) and on inspecting the declaration. (n) If the defendant, in either *court, [*610] have occasion to change the venue in *vacation*, he may obtain a judge's order for that purpose, on producing a motion paper, signed by a counsel or serjeant, with the usual affidavit, and a copy of the declaration.

Yet, as it would be hard to conclude the plaintiff, by the single affidavit of the defendant, he is at liberty to aver, that the cause of action arose in the county where the venue is laid, and go to trial thereon at the same time that the merits are tried, by undertaking to give material evidence, arising in that county. This practice is equivalent to joining issue, that the cause of action arose in the first county : and if the plaintiff fail in proving it, he must be nonsuited at the trial ; which has in this case the same effect, as quashing the writ by a judgment on a plea in abatement, viz. *quod defendens eat sine die*, and the plaintiff must begin again. (a)

In the King's Bench, when the rule to change the venue is absolute in the first instance, the only way by which the plaintiff can bring it back, is by a separate motion : And when the venue has been irregularly changed, as where the affidavit is defective, (b) &c. the motion is for a rule *nisi*, which the court will make absolute, on an affidavit of service, unless good cause be shown to the contrary. But when the venue has been regularly changed, the motion is a motion of course, requiring only counsel's signature ; and the court will require an undertaking to give material evidence in the county in which the venue was originally laid. (c) It was formerly holden, in the King's Bench, that the plaintiff must move to discharge the rule for changing the venue, before replication ; (d) and therefore that he came too late after issue was joined, and delivered to the defendant's agent. (e) But now as the plaintiff may alter his venue, by moving to amend, (f) so, for avoiding

(f) 1 Sid. 185, 442.

(g) Say. Rep. 77. 4 Bur. 2452. 3 Durnf. & East, 495. Barnes, 477, 8, 9. Pr. Reg. 421, 2, S. C.

(h) 1 Chit. Rep. 691, (a). Append. Chap. XXIV. § 2.

(i) R. T. 49 Geo. III. K. B. 11 East, 273. 1 Marsh. 243. 1 Chit. Rep. 57, (a).

(k) 1 Chit. Rep. 57, 334.

(l) Append. Chap. XXIV. § 5 ; and for the rule absolute thereon, see *id.* § 6.

(m) 2 Marsh. 278, 9. 6 Taunt. 567, S. C. 1 Chit. Rep. 378.

(n) Append. Chap. XXIV. § 5. 1 Chit. Rep. 57, (a).

(a) 2 Blac. Rep. 1033 ; and see Gilb. C. P. Chap. VII. 1 Wms. Saund. 5 Ed. 74, (2).

(b) *Fleetwood v. Cross*, 11, 26 Geo. III. K. B. 3 Durnf. & East, 495.

(c) 2 Salk. 669. 6 Taunt. 567. 2 Marsh. 273, S. C. 1 Chit. Rep. 378. Append. Chap. XXIV. § 4.

(d) 2 Str. 858.

(e) ——— v. *Boddington & others*, M. 20 Geo. III. K. B.

(f) *Ante*, 692.

circuitry, he may move to discharge the rule for changing the venue, on undertaking to give material evidence in the county where it is laid, at any time before the cause is tried: and it was accordingly discharged in one case, after the cause had been twice taken down for trial.(g) If the venue be changed from A. to B., on the usual affidavit, that the cause of action arose wholly in B. when in fact a part of it arose in another county, it was holden in one case,(h) that the venue might be brought back to A. as a matter of course. But in a subsequent case(i) it was determined, that though the venue be changed by the defendant upon a false affidavit, yet the plaintiff cannot bring it back to the county where it was first laid, without the usual undertaking to give material evidence in that county: and of course, if the venue be laid in a county where no part of the cause of action arose,

it cannot be brought back into that county; nor will the court, [*611] in such case, change it into the *county where the cause of action arose.(aa) So, where the venue had been changed by the defendant from *London* to *Staffordshire*, on the usual affidavit, that the cause of action arose in the latter county, and not elsewhere, the court of King's Bench would not bring it back to *London*, on an affidavit that the cause of action arose partly in *Staffordshire* and partly in *Worcestershire*, and that a material witness resided in *London*, and on the plaintiff's undertaking to give material evidence in one or other of those counties; particularly as no special facts were stated, to show that the defendant's affidavit was not correct.(bb) And mere hardship and delay in being obliged to try a cause at *Lancaster*, when all the plaintiff's witnesses reside in *London*, is no ground for bringing back the venue to the latter place, unless the defendant was under terms to take short notice of trial in *London*, and had undertaken not to assign for error the want of an original writ.(cc)

In the Common Pleas, the rule for changing the venue being only a rule *nisi*, the court, on showing cause, will either make it absolute or discharge it, according to circumstances.(d) On a motion to change the venue from *London* to *Worcester* on the usual affidavit, an affidavit stating that the action was brought for the seduction of the plaintiff's daughter, and that she was so ill it was not expected she would live till the assizes, was holden, in that court, to be an answer to the application.(e) And it was determined in one case,(f) that an application to change the venue from A. to B. in an action for goods sold and delivered, upon an affidavit that the cause of action arose at B. and not elsewhere, might be successfully answered, by an affidavit that the goods were sold at C., without an undertaking by the plaintiff, to give material evidence in A. So, where it appeared that the action was brought on a charter-party of affreightment,(gg) or that the cause of action principally arose in *Ireland*,(hh) or partly in a foreign country,(ii) the court discharged a rule for changing the venue. But the circumstances of an

(g) Cowp. 409.

(h) 7 Durnf. & East, 205.

(i) 6 East, 433. 2 Smith R. 447, S. C.; and see 1 Wils. 162. 10 East, 32.

(aa) *Mussey v. Anderton*, H. 43 Geo. III. K. B. 1 Chit. Rep. 691, (a).

(bb) 2 Barn. & Ald. 618. 1 Chit. Rep. 377, S. C.

(cc) 1 Chit. Rep. 691.

(d) 2 Marsh. 278, 9. 6 Taunt. 567, S. C. 1 Chit. Rep. 378. Append. Chap. XXIV. § 5, 6, 7.

(e) 7 Moore, 62.

(f) 3 Bos. & Pul. 579; and see 3 Taunt. 464; but it should be observed, that these decisions seem to have been since overruled.

(gg) 7 Taunt. 306. 1 Moore, 54, S. C. *Ante*, 604.

(hh) 2 New Rep. C. P. 397; and see 4 East, 495.

(ii) 2 Taunt. 197. *Ante*, 603; and see 3 Bing. 429.

action's being brought on a writing, is not a ground for rejecting an application to change the venue, unless the declaration disclose the existence of the writing.*(k)* And in general, where there has been no irregularity, the court will not try the matter upon affidavits; but if there be a positive affidavit that the cause of action arose in a different county from that where the venue is laid, they will require an undertaking from the plaintiff to give material evidence in the latter county, if the *whole cause [*612] of action is supposed to have arisen there;*(a)* but if it arose in several counties, the court will retain the venue, on the plaintiff's undertaking, in the alternative, to give material evidence in some of them:*(b)* And when the whole cause of action arises abroad, the court will discharge the rule for changing the venue, without any undertaking by the plaintiff to give material evidence in this country.*(c)* In the Exchequer, as in the Common Pleas, the rule to change the venue is a rule to show cause:*(dd)* And it is the practice in the former court, as in the King's Bench, not to discharge the rule for changing the venue, without an undertaking to give material evidence in the county in which it was originally laid;*(ee)* it not being sufficient, as in the Common Pleas, when the cause of action is supposed to have arisen in several counties, to undertake to give material evidence in some of them.*(ee)*

Originally it was required, that the plaintiff should give *no* evidence at the trial, but what arose in the county wherein the venue was retained:*(ff)* and if he gave no such evidence, he must have been nonsuited of course. But when it was laid down (more liberally,) in *Swaine's* case,*(gg)* that the plaintiff might lay his venue in any county, wherein part of the cause of action arose, he was then bound only to give *some* evidence, (*dare aliquam evidentiam*,) and not the whole, in the county where the venue was laid,*(hh)* or, in the Common Pleas, when it arose in several counties, in some of them;*(i)* which continues to be the rule at this day. The evidence however must be material: and therefore it is not sufficient merely to prove, that the witnesses to the contract reside in the county where the venue is laid:*(kk)* And the undertaking to give material evidence, does not apply to *collateral* issues, but must be confined to matters stated in the declaration.*(l)* In the King's Bench, when the venue has been changed, in an action brought by the assignee of a bankrupt, the plaintiff's undertaking, upon bringing it back to *Middlesex*, is satisfied by the production of the commission of bankruptcy tested at *Westminster*.*(m)* And in an action for an escape, the issuing of the writ, under which the party was taken, is deemed material evidence;*(n)* or the patent, in an action for infringing it.*(n)* So, where

(k) 4 Bing. 39.

(a) 1 H. Blac. 216; and see 1 New Rep. C. P. 110, 310.

(b) 1 Taunt. 259. 6 Taunt. 565, 6. 2 Marsh. 278, S. C. 7 Taunt. 178. 2 Marsh. 494, S. C., but differently reported. 2 Moore, 64. 8 Taunt. 169, S. C. 3 Bing. 429; and see 1 Chit. Rep. 377, *(a)*.

(c) 6 Taunt. 569. 2 Marsh. 280, S. C.; and see 1 H. Blac. 280. 1 Taunt. 259, 60. 4 East, 495. 2 New Rep. C. P. 397. 2 Taunt. 197. *Ante*, 603.

(dd) 5 Price, 359, 612.

(ee) 6 Price, 336; but see 5 Price, 359, *scmb. contra.* *(ff)* 1 Keb. 859. 1 Sid. 442.

(gg) 1 Sid. 405.

(hh) 2 Salk. 669. 12 Mod. 515.

(i) 1 Taunt. 259. 6 Taunt. 565, 6. 2 Marsh. 278, S. C. 2 Moore, 64. 8 Taunt. 169, S. C.

(kk) 2 Blac. Rep. 1031.

(l) 1 Taunt. 518.

(m) 2 Maule & Sel. 36; but see 2 Salk. 669. 1 New Rep. C. P. 310.

(n) 2 Chit. Rep. 418.

a rule to change the venue from *Middlesex* to *London* was discharged, on the plaintiff's undertaking to give material evidence in *Middlesex*, the court held that the undertaking was complied with, by proving a rule [*613] of court, obtained by the defendant in *Middlesex*, *for paying money into court; although that rule was obtained after the rule for changing the venue was discharged.(a) So, where a rule to change the venue from A. to B. had been discharged, on the plaintiff's undertaking to give material evidence in C., proof of the delivery of the goods for which the action was brought, to a carrier in C., to be delivered to the defendant in B., was holden, in the Common Pleas, to be a sufficient compliance with the undertaking:(b) And, in that court, if the plaintiff retain the venue, on the usual undertaking to give material evidence within the county, yet if the plea and issue joined be such as to render that evidence irrelevant, the performance of the undertaking is it seems dispensed with: Thus, if the local evidence be the trading of a bankrupt, or a petitioning creditor's debt within a county, yet, if the defendant do not give notice of his intention to dispute the commission, under 6 Geo. IV. c. 16, § 90, so that the mere production of the commission and proceedings under it proves the trading and petitioning creditor's debt, the undertaking it seems need not be further complied with.(c) But it is no answer to an application, in the latter court, to change the venue from *London* to *Essex*, on the usual affidavit, in an action commenced by the assignees of a bankrupt, that the commission was issued, and bankruptcy declared in *Middlesex*, and the assignees chosen in *London*:(d) For though it was admitted, that if the cause of action arise in two different counties, the defendant has no right to change the venue, yet it was said, that the *cause* of action, and the *right* to bring the action, are two different things: A cause of action may arise in the life-time of a testator; but the right to bring the action by the executors must accrue after his death.(e)

When the venue is laid in the proper county, but there is a special ground for changing it into another, as where, in an action on a specialty, the witnesses reside in a distant county,(f) or a fair and impartial trial cannot be had in that where the venue is laid,(f) the defendant should move the court, on an affidavit of the circumstances, for a rule to show cause, why the action should not be laid in the county where the witnesses reside, or in the adjoining county to that in which the cause of action arose. The *affidavit* for this purpose should state the nature of the cause of action, and of the defence thereto;(g) and that all the witnesses reside in a distant county, or the grounds upon which the fair and impartial trial cannot be had in that where the venue is laid: And the court will not entertain a motion to change the venue, in an action on a specialty, before issue joined; for till then, they cannot know whether the defendant intends to set up any defence to the action, or what is the question in-

(a) 2 Durnf. & East, 275; and see 1 II. Blac. 280. 6 Durnf. & East, 363. 6 Taunt. 566. 2 Marsh. 494.

(b) 2 Marsh. 494. 7 Taunt. 178, S. C., but differently reported.

(c) 3 Taunt. 86.

(d) 1 New Rep. C. P. 310. *Lapworth, assignee v. Wilkes*, M. 46 Geo. III. K. B. S. P.; and see 10 East, 32, *accord*.

(e) *Per Heath, J.*, 1 New Rep. C. P. 310; and see 2 Salk. 669. 3 Bing. 429.

(f) *Ante*, 605, 6.

(g) 7 Moore, 82.

tended *to be tried, or the witnesses it will be necessary to examine on the trial of the cause. (a) [A]

(a) 3 Barn. & Cres. 552. 5 Dowl. & Ryf. 441, S. C.

[A] MODE OF CHANGING THE VENUE.

Reasonable notice must be given to the adverse party of a motion for a change of venue. What is reasonable notice, will depend upon the circumstances of each particular case, and must necessarily be left to the legal discretion of the judge or court to which the application is made. *Berry v. Wilkinson*, 1 Scam. 164. And this notice must state the time when, and the place where, the application will be made, and the action in relation to which it is made. *Ryburn v. Pryer*, 5 Eng. 417. The application is made in the form of a petition, with accompanying affidavits; and where the application for a change of venue shows a proper cause, it is the duty of the court to change it to the nearest county not made objectionable by the petition and affidavits, without other evidence. *Cass v. The State*, 2 Greene, (Iowa,) 353. *Powers v. Browder*, 13 Mis. 154. In all cases, special cause should be shown for changing a venue. *State Bank v. Hedenberg*, 1 Harr. 352. A motion to change the venue will not always be granted on account of the mere preponderance in the number of witnesses. *Wallace v. Bond*, 4 Hill, 536. *Porter v. Mann*, 4 Hill, 549. But where a motion is made for a change of venue, it will not be refused on an affidavit stating the number of witnesses to exceed the number on the opposite side, provided a motion to change is based on a special affidavit. *Benedict v. Hibbard*, 5 Hill, 509. Where, however, upon a showing made by a defendant for a change of venue, it appeared that the showing of the plaintiff was as strong as that of the defendant against the county to which the change was desired; and the court, after the first trial term, granted such change of venue, the appellate court granted process to restrain the last court from exercising jurisdiction, and returned the case to its original court. *Innerarity v. Hutcheon*, 3 Stew. & Port. 9. It is no answer to a motion to change the venue, that thereby the plaintiff will lose a trial or term, where the defendant is not chargeable with laches. *Garlock v. Dunkle*, 22 Wend. 615. *Starr v. Francis*, 22 Ib. 633. Or that the cause is at issue upon demurrer only. *Thurber v. Brown*, 2 Hill, 382. In New Jersey, it has been held, the venue of transitory actions may be changed after plea pleaded, if it appears that the defendant would otherwise be exposed to unnecessary difficulty, or the fair administration of justice would be interrupted. *Bell v. Morris Canal and Banking Co.*, 3 Green, 63. In transitory actions, a venue is laid to show where the trial is to take place. It is a legal fiction devised for the furtherance of justice, and cannot be traversed. *McKenna v. Fisk*, 1 How. U. S. 241, S. C. 17 Pet. 245. But trespass *quare clausum* being a local action, the venue must be laid in the county in which the *locus in quo* is situated at the time the trespass is alleged to have been committed. And if that part of the county is set-off to a different county, after the trespass and before the suit is instituted, the venue must be laid in the old county. *Champion v. Doughty*, 3 Harr. 3. Where a venue is laid in the margin, or in the commencement of the declaration, that is to be held as the venue for all other matters where no venue is laid. *Benton v. Brown*, 1 Mis. 393. So, too, a venue laid in the body of the declaration is sufficient, although none is found in the margin. *Dwight v. Wing*, 2 McLean, 580. *Rucker v. McNeely*, 4 Blackf. 179. It has been held in Arkansas, that it is sufficient to state the venue in the margin of the declaration, without stating it in the body. *Pollen v. Chase*, 4 Pike, 210.

Where there is a motion for change of venue, it is a safe and judicious practice to require the plea to be entered before the motion is awarded. *Gardner v. The People*, 3 Scam. 83. And after the defendant pleads, he cannot object to the order made. *Burnham v. Hatfield*, 5 Blackf. 21. In Mississippi, a change of venue must be by order of a court entered of record, and a mere statement on the record, by the clerk, that the venue has been changed, is not sufficient. *Saunders v. Morse*, 3 How. Miss. 101. And the order, it seems, must be unconditional; thus it has been held, that where a party prayed a change of venue, the court granted it, on condition that the party should pay the costs attending the same, and cause a transcript of the record, and the papers in the cause, to be filed in the court of the county to which the change of venue was ordered, within fifteen days before the first day of the next term; upon his neglecting to comply with the terms, the opposite party made affidavit of the fact, and the cause was ordered to be reinstated upon the docket, and the cause then proceeded to trial and judgment: *Held*, that the court had no authority to impose on the party the performance of those acts, as conditions precedent, and that the change was consummated by the order of the court, and that the party could fully disregard the conditions. *Bellingall v. Duncan*, 2 Gil. 591.

WHEN THE VENUE WILL BE CHANGED.

The court will order the venue changed, even when laid in the proper county, if it appears that a fair trial cannot be had there. *Murray v. New Jersey Railroad Co.*, 3 Zab. 63. The

If two actions are depending at one time, by the same plaintiff against the same defendant, for causes which may be joined, and particularly if the

necessity of changing the venue, in any case, in order to secure an impartial trial, is not to depend on the suggestion, or even the belief, of the defendant, but upon facts shown to the court, or admitted, sufficient to satisfy the court that the change is necessary to procure an impartial trial. *The State v. Burris*, 4 Harring. 582. *Murray v. Railroad*, *supra*. And it is held, in Ohio, that the venue should not be changed on the affidavit of the party alone, but only upon clear and satisfactory proof that fair and impartial justice probably cannot be obtained in the county where the suit was commenced. *Bank of Cleveland v. Ward*, 11 Ohio, 128. So, in Virginia, an application by a defendant for a change of venue, on the ground of general prejudices existing against him in the town where the cause is to be tried, should be supported by the affidavits of disinterested individuals. *Boswell v. Flockheart*, 8 Leigh, 364. Where the defendant procured a change of venue, on the ground that the judge was interested, and the case, on the plaintiff's motion, was stricken from the docket by the court to which the change of venue had been ordered; the Supreme Court, on error by the defendant, remanded the case to the original court, at the costs of the plaintiff in error. *Rogers v. Watrous*, 8 Texas, 62. Where a party filed his petition, verified by affidavit, in which he swore that he entertained serious and well grounded fears, that he would not receive a fair and impartial trial in the court, on account of the prejudices which he believed existed in the mind of the judge against him; it was held, that the defendant had brought himself within the provisions of the statute, and that he was entitled to a change of venue. *McGoon v. Little*, 2 Gil. 42. Venue may in all cases be changed by consent of parties, where the court has jurisdiction of the subject-matter of the suit. *Davidson v. Wheeler*, 1 Morris, 238. *The People v. Scates*, 3 Scam. 354. Thus an order for a change of venue, reciting that, by consent of parties, it is agreed that the cause shall go to either of two counties at the election of the plaintiff, is incomplete, until the plaintiff has made his election, and the court has acted upon it, by ordering the papers sent to the clerk of the court of the county chosen. *Ex parte Remson*, 23 Ala. 23.

It does not lie in the mouth of the party who has obtained a change of venue, to object to a trial in the court to which he has caused the case to be removed, if enough appears to give that court jurisdiction. *McBain v. Enloe*, 13 Ill. 76. And all objections to the jurisdiction arising out of a defective certificate of proceedings, in cases of change of venue, will be considered as waived, if the parties proceed to trial without having taken exception. *Hitt v. Allen*, 13 Ill. 592. The statute requisition that all parties shall join in an application for change of venue, extends only to such of them as have a trial pending; defendants in default, need not join in the application; the whole cause will be removed and final judgment will be rendered for or against all, in the court to which the cause is taken. *Ib.* A change of venue removes the whole cause; and the court to which the same is transferred, after a default by one of the parties, and a plea by another, may, when the issue is found against the plea, or a decision is made against it, properly render a judgment against both of the defendants. *Wight v. Meridith*, 4 Scam. 360. The court to which the venue is changed, in order to proceed and determine the cause, must have before it the pleadings of the parties, and all other papers filed during the progress of the cause in the court from which it is removed, as well as the action of that court prior to the change of the venue. *Wight v. Kirkpatrick*, 4 Scam. 339. An order for changing the venue of a cause, and directing the clerk to transmit a transcript of the record to the Circuit Court of the county to which the venue is changed, impliedly prohibits him from sending the original papers, and is void, as the court cannot take jurisdiction unless the original papers are filed with its clerk. *Walker v. Snowden*, 1 Swan, (Tenn.) 193. And where the venue of an action is ordered to be changed, the original petition and order should not be transmitted to the court to which the change is made, but a transcript only. *Ryburn v. Pryor*, 5 Eng. 417. Where a change of venue takes place, the clerk should certify and transmit a transcript of the proceedings previously had in the cause, as the same appear from the record, together with all the original papers which have been filed in and belong to the case. *White v. Kirkpatrick*, 4 Scam. 339. If the papers are transmitted without the requisite certificate of their being the original papers in the cause, the court, upon motion, will grant the party leave to withdraw them, together with the transcript. *Wight v. Kirkpatrick*, *Ib.* Where the papers in a cause have not been transmitted by the clerk to the court to which the venue is taken, it is the duty of the court, at the instance of either party, to grant a rule on the clerk, to certify and transmit the papers, and continue the cause until the order has been complied with. *Ib.* If a motion is made to dismiss a cause, wherein a venue has been changed, because the original papers have not been transmitted with the record of the proceedings, the cause will be dismissed, unless a cross motion be interposed, for a rule upon the clerk to certify and transmit the papers; in which case the court will continue the cause until the order is complied with. *Ib.* Where a party gives notice for a change of venue, and files his petition, sworn to, in which he sets forth that the facts therein stated came to his

defendant be holden to bail in both, the courts will compel the plaintiff to consolidate the actions; and, on account of the vexation, to pay the costs of the application.(b) But the court refused to consolidate two actions brought on two bonds, although they were precisely similar to each other.(c) And where three actions were successively brought by the same plaintiff against the same defendant, upon three notes of hand, which became due at different times, the court of King's Bench refused to consolidate them.(d) So, where three actions were brought for bribery, at an election for members of parliament, and in each action there were counts for forty different penalties, for distinct acts of bribery, that court would not consolidate, on account of the difficulty of doing justice between the parties, if so many distinct acts of bribery were to be discussed in one action.(e) And the courts will not consolidate actions against different

(b) 2 Durnf. & East, 639. *Anon.* E. 55 Geo. III. K. B. 1 Chit. Rep. 709, (a); but see 2 Str. 1178, *semb. contra.* 9 Price, 393.

(c) *Royal Exchange Company v. —*, H. 55 Geo. III. K. B. 1 Chit. Rep. 709. (a).

(d) *Mussenden & O'Hara*, M. 25 Geo. III. K. B.; and see *Forrest*, 30 accord. 9 Price, 393.

(e) 1 Smith R. 423.

knowledge for the first time, on that day, and brings himself within the provisions of the statute, a change of venue must be granted. *Barrows v. The People*, 11 Ill. 121. And a party who has obtained a change of venue, taken several steps in the cause, consented to a continuance, and at a subsequent term submitted the cause for trial without objection, cannot obtain an order of dismissal, for the reason that the original papers in the cause had not been transmitted by the clerk from the county where the suit was commenced; application for a rule upon the clerk of the court, to send the original papers, should be made at the first term after obtaining a change of venue. *Granger v. Warrington*, 3 Gil. 299. *Wight v. Kirkpatrick*, 4 Seam. 340. Upon a change of venue, the witnesses, unless re-summoned, are not required to attend the court of the county to which the venue has been changed; and if this be not done, their failure to appear at the final trial is no reason why the costs of their attendance at the court from which the cause was removed should not be allowed them. *Hodges v. Nance*, 1 Swan. (Tenn.) 57.

WHEN IT WILL BE REFUSED.

A change of venue will be refused, unless the party applying for it has complied with the statute. *Lewin v. Dille*, 17 Mis. (2 Bennett.) 64. And in some States but one application can be made. Thus, in Tennessee, Act of 1819, c. 43, § 1, gives to the plaintiff and defendant each a right to change the venue once only. *Gasaway v. Smith*, 3 Humph. 154. And the general rule is, that a party cannot repeat an application for change of venue without very special cause. *Millison v. Holmes*, 1 Smith, 55.

By statute, in Texas, the cases of executors, administrators, guardians, and trustees, are made exceptions to the general rule in reference to the venue of actions. They must be sued in the county where the estate is administered, no matter what may be the subject-matter in controversy. *Neill v. Owen*, 3 Texas, 145. When a defendant, immediately after a decision made against him, on his objection to proceeding with the trial, moves for a change of venue, on the ground of prejudice in the judge, without giving previous notice of such application, and when the jury is about to be sworn, the change will properly be refused. *Perry v. Roberts*, 17 Mis. (2 Bennett.) 36. Entertainement of a prejudice, and the use of harsh and violent terms, derogatory to the character of a party to a suit, on the part of the judge before whom the suit is to be tried, is not cause for change of venue under Rev. Stat. of Indiana, 1843, p. 950, § 9. *Millison v. Holmes*, 1 Carter, (Ind.) 45. In Indiana, prejudice in the president judge is not one of the statutory causes for a change of venue. *Morris v. Graves*, 2 Carter, (Ind.) 354. Where a petition for a change of venue alleged for a cause that the judge entertained towards the plaintiff a violent prejudice, incapacitating him to do the plaintiff justice, and that the judge repeatedly, as the plaintiff had been informed and believed, spoke of the plaintiff in harsh and violent terms, derogatory to the plaintiff's character for fairness and honesty, it was held, that the petition did not show sufficient ground for the change of venue. *Ib.* *Millison v. Holmes*, 1 Smith, 55. The application of a person, who is not a party to the suit, for a change of venue, need not be sustained. *Sherry v. Denn*, 8 Blackf. 542. *Vermilva v. Beatty*, 6 Barb. Sup. Ct. 429. And none but the party to the record in the suit can make an application for a change of venue; and then his petition must be verified by affidavit. *Crowell v. Maughs*, 2 Gil. 419.

defendants: Thus, where it was moved—that four several declarations in *trespass*, against four different defendants, might be put into one, on an affidavit that the trespass, if any, was committed by all jointly; the court of King's Bench said, they never went so far as the case of different defendants, but only where the declarations are between the same parties: The plaintiff may have the benefit of the other's evidence, in his action against either; but this would be to deprive him of that benefit.(f) So, the court of King's Bench will not consolidate several informations in nature of *quo warranto*, against several persons, for distinct offices; for there must be an information against each, to enable each to disclaim.(gg)

In actions upon a policy of assurance, against several underwriters, the court of King's Bench, by consent of the plaintiff, will make a rule, on the application of the defendants, which is called the *Consolidation* rule,(h) for staying the proceedings in all the actions except one, upon the defendant's undertaking to be bound by the verdict in that action, and to pay the amount of their several subscriptions and costs, in case a verdict shall be given therein for the plaintiff. This rule, though attempted before without success,(i) was introduced by Lord *Mansfield* into general use,

in the court of King's Bench, to avoid the expense and delay [*615] arising from the trial of a multiplicity of actions upon the same question;(a) and if the plaintiff will not give his consent, the courts have the power of granting imparlances in all the actions but one, till the plaintiff has an opportunity of proceeding to trial in that action.(b) On the other hand, if the plaintiff consent to the rule, the courts will make the defendants submit to reasonable terms; such as admitting the policy, producing and giving copies of books and papers, and undertaking not to file a bill in equity, or bring a writ of error.(c) In the Common Pleas, there is no rule of court, but a judge's order is obtained, for consolidating actions.(d)

The court will not allow a consolidation rule to be opened, on the ground that fresh evidence has been discovered, since it was entered into:(e) But it has been set aside, for the absence of a material witness, on bringing money into court.(ff) And though the defendants undertake to be bound by a verdict in one action, yet this must be understood to mean such a verdict as the courts think ought to stand, as a final determination of the matter; and therefore where the defendant, after a verdict for the plaintiff in one action, obtained a new trial, the court of King's Bench would not make a rule, previous to the new trial, for the other defendants to pay the money to the plaintiff, pursuant to their undertaking.(g) So, if the court think it reasonable to open a consolidation rule, and try a second cause, they will extend to the second trial, all such terms imposed on the successful party in the first, as are requisite for attaining the justice of the case.(hh) And the consolidation rule relates solely to the verdict: There-

(f) 1 Str. 420; and see Cas. temp. Hardw. 137. 2 Wils. 227.

(gg) 2 Maule & Sel. 75. 2 Chit. Rep. 366, (b).

(h) Append. Chap. XXIV. § 8.

(i) 2 Barnard. K. B. 103.

(a) Park's Insur. Introd.; and see Marshall on Insurance, 1 Ed. p. 602, &c. 8 Price, 575, 6, per Wood, Baron.

(b) *Id. Ibid.* Brown v. Newham & others, E. 25 Geo. III. K. B.

(c) Park's Insur. Introd. Ante, 591.

(d) Append. Chap. XXIV. § 9.

(e) Pullen v. Parry, H. 52 Geo. III. K. B. 1 Chit. Rep. 709, 10, (a); and see 6 Moore, 437.

(ff) Holman v. ———, H. 55 Geo. III. K. B. 1 Chit. Rep. 710, in notis.

(g) 3 Bur. 1477.

(hh) 5 Taunt. 165.

fore, where several causes are consolidated, if a writ of error be issued in the cause tried, and execution taken out for want of bail in error being duly put in, and writs of error be issued in the other causes, and bail duly put in thereon, execution in those causes is thereby stayed.(ii) So, where the defendant having entered into a consolidation rule, the plaintiff obtained a verdict in the cause tried, which was afterwards turned into a special verdict, to enable the defendant to remove it by writ of error to the King's Bench, which was done, and bail put in accordingly; the court of Common Pleas stayed execution in the action against the defendant, till the determination of the writ of error was known, on his giving security to be bound by the judgment of the King's Bench.(k) But where several underwriters to a policy had entered into a consolidation rule, by which they undertook to abide the event of a verdict, and the cause was referred by consent before trial, and the arbitrator awarded the aggregate sum due to the assured from the underwriters at large; the court of Common Pleas would not order it to be referred back to the arbitrator, to *insert the amount of the sum due and payable from each [*616] underwriter individually, without the consent of such underwriters.(a) And, in that court, if a verdict be given in favour of the plaintiff, to the satisfaction of the judge who tried the cause, the plaintiff may proceed to tax his costs on the verdict, and get the defendant's attorney to attend the prothonotaries, who will tax the costs in the other actions: and if the debt and costs are not paid, the court should be moved, on an affidavit of the facts, for leave to enter up judgment, and take out execution, &c.(b) In actions upon a policy of assurance, against several underwriters, where the parties had not entered into a consolidation rule, the attorney for the plaintiff made out a full brief in one cause, but only a short statement in the rest: and the master, on taxation, having allowed for full briefs in all the causes, the court of King's Bench made a rule for him to review his taxation.(c)[A]

As the courts, for the sake of avoiding expense, will consolidate unnecessary actions, so when it appears, on the face of the declaration, that some of the counts are superfluous, they will order them to be expunged: and if there be any vexation, will make the plaintiff pay the costs of the application.(d) Thus, where several counts in a declaration are precisely the same, or, which more frequently happens, there is only a formal difference between them, and the same evidence will support each,(e) as if the plaintiff declare specially and generally, for a matter that may be given in evidence upon a general count, the courts will expunge the superfluous

(ii) 2 New Rep. C. P. 430.

(k) 1 Moore, 79.

(a) 8 Moore, 223.

(b) Imp. C. P. 7 Ed. 711.

(c) *Martineau v. Barnes and others*, H. 23 Geo. III. K. B.

(d) *Per Cur.* T. 56 Geo. III. K. B. 1 Chit. Rep. 449, (a). And for the use of several counts, and when proper to insert them, see Steph. Pl. 279, &c.

(e) *Cas. temp. Hardw.* 129. *Barnes*, 360. 2 Bur. 1188. 1 Blac. Rep. 270. 1 New Rep. C. P. 289. 1 Chit. Pl. 4 Ed. 351. 1 Chit. Rep. 449, (a).

[A] Consult *Brown v. Scott*, 1 Dallas, 145. *Rumsey v. Wyncoop*, 1 Yeates, 5. *Prior v. Kelly*, 4 Yeates, 128. *Groff v. Massen*, 3 S. & R. 262. *Towanda Bank v. Bullard*, 7 Watts & Serg. 434. *Wolverton v. Lacey*, 8 Month. Law Rep. 672.

counts. So, if the declaration contain special counts for work and labour, besides the general counts, the special counts may be struck out on motion, if they appear to be unnecessary: *(f)* and, in the King's Bench, where the plaintiff was an attorney, the rule was made absolute with costs. *(f)* And, if there be any doubt, the court will refer it to the master, to determine whether superfluous counts are introduced vexatiously. *(g)* But where there is a material difference between the counts, the courts will not determine upon affidavits, whether they are well founded in point of fact; for if not, the plaintiff will be sufficiently punished by being deprived of costs, on such of the counts as are found for the defendant: *(h)* Therefore, where the declaration, which was in *debt* for penalties, on the statute 9 Ann. c. 14, consisted of 480 counts, for money won at [*617] play of different *persons, at different times, and a rule *nisi* was granted for limiting the declaration to ten counts, the court of King's Bench, on showing case, discharged the rule with costs. *(aa)* So, where the declaration consisted of 286 counts, upon as many banker's notes for a guinea each, payable to bearer, with the common counts for money lent, and money had and received, the court refused to strike out the counts upon the notes; as it might have put the plaintiff to unnecessary difficulty in proof at the trial, or made it necessary for him to have a writ of inquiry on a judgment by default. *(b)* But in a similar case, the court made a rule by consent, to strike out all the counts but one, the defendant undertaking to permit all the other notes to be given in evidence, either before the master or a jury, under the count upon an account stated. *(c)* And where the counts do not appear on the face of them to be superfluous, the court of King's Bench will not order them to be struck out, merely on the ground that the causes of action are not included in the particulars of the plaintiff's demand. *(d)* In an action on a bill of exchange, the court of Common Pleas refused to strike out, as unnecessary, a count for *interest*; though, besides counts on the bill, the declaration contained the usual money counts. *(e)* So, where there were counts in a declaration for work and labour as an attorney, and for work and labour generally, that court refused to strike out the former counts as unnecessary. *(ff)*

If a declaration contain slanderous or impertinent matter, the court will order it to be expunged: *(gg)* And where a declaration unnecessarily contains indecent language, the court it seems will order it to be referred for scandal and impertinence; and direct the master or prothonotary to tax exemplary costs. *(hh)* So, if a declaration be unnecessarily long, the court will expunge the superfluous matter: as where in an action of *covenant* upon an indenture, the plaintiff recites the whole of it, and not merely such parts as are necessary; *(i)* or where, in an action of *trover*, he sets

(f) 1 Chit. Rep. 449, *(a)*. 2 Chit. Rep. 299. 1 Dowl. & Ry. 171, S. C. 7 Dowl. & Ry. 383.

(g) 1 Dowl. & Ry. 508.

(h) *Turner and others, assignees, v. Kingston*, H. 23 Geo. III. K. B. *Hurd v. Cock*, M. 36 Geo. III. K. B. Imp. K. B. 6 Ed. 754.

(aa) *Cowan v. Berry*, E. 38 Geo. III. K. B.

(b) *Lane v. Smith*, M. 46 Geo. III. K. B. 3 Smith R. 113, S. C.

(c) 3 Barn. & Ald. 272. 1 Chit. Rep. 709, S. C.

(d) 1 Chit. Rep. 448, 9, 50.

(e) 1 Bing. 281. 8 Moore, 243, S. C.

(ff) 9 Moore, 353. 2 Bing. 184, S. C.; and see 9 Moore, 785. 2 Bing. 412, S. C.

(gg) 1 Chit. Rep. 676, and n. *(a)*.

(hh) 2 Wils. 20.

(i) Cowp. 665, 727; and see 2 H. Blac. 123. 1 Campb. 196, *in notis*.

out a long inventory of goods, with frequent and unnecessary repetitions and descriptions. So, in an action against forty-six defendants, the court of Common Pleas ordered the word "*defendants*" to be substituted for the *names* of the defendants, in all the places where they occurred, except the first.^(k) In these cases, when the objection is clear, the courts will order the superfluous counts or matter to be expunged on motion, in the first instance; but otherwise they will refer it to the master,^(l) or prothonotary,^(m) and decide upon his report. In general, however, the court of King's Bench will not refer a declaration to the master, to strike out superfluous *counts; but will, on motion, order them to be struck out, if they appear vexatious.⁽ⁿ⁾ And, in the Common Pleas, the motion may be made, after the defendant has taken the declaration out of the office, and pleaded to the action.^(bb) But an application to strike out unnecessary counts should regularly be made before they are engrossed on record.^(cc)

*CHAPTER XXV.

[*619]

Of BRINGING MONEY into COURT.

THE practice of bringing money into court is said to have been first introduced in the reign of Car. II. at the time when *Kelyng* was chief justice, to avoid the hazard and difficulty of pleading a tender.^(aa) And it is allowed in cases where an action is brought upon contract, for the recovery of a debt,^(b) which is either certain, or capable of being ascertained by mere computation, without leaving any sort of discretion to be exercised by the jury.^(c) In these cases, when the dispute is not whether anything, but how much is due to the plaintiff, the defendant may have leave to bring into court any sum of money he thinks fit; and the courts will make a rule, that unless the plaintiff accept of it, with costs, in discharge of the action, it shall be struck out of the declaration, and paid out of court, to the plaintiff or his attorney,^[A] and the plaintiff, upon the trial, shall not be permitted to give evidence for the sum brought in:^(d) which rule should

^(k) 1 New Rep. C. P. 289.^(l) Cowp. 727. 1 Dowl. & Ry. 508.^(m) 2 Blac. Rep. 906. 1 Chit. Rep. 450. ^(a) 1 Chit. Rep. 450.^(bb) *Law v. Williamson*, II. 31 Geo. III. C. P. Imp. C. P. 7 Ed. 179.^(cc) 2 Bing. 453. 10 Moore, 152, S. C.^(aa) 1 Ld. Raym. 255. 2 Salk. 597. 2 Str. 787. Cas. temp. Hardw. 207. 1 Wms. Saund. 5 Ed. 33, a, (2); but see R. H. 5 Jac. I. K. B.^(b) Com. Dig. tit. *Pleader*, C. 10.^(c) 2 Bur. 1120.^(d) Say. Rep. 196, 7. 2 Bur. 1121. 3 Bur. 1773. Imp. K. B. 10 Ed. 251, R. M. 5 Geo. III. in *Seac. Man. Ex. Append.* 217, 18; and see *Append. Chap. XXV.* § 1, 2, 3.

[A] After a defendant has brought into court, on the common rule, as much money as he thinks proper, and the plaintiff has refused to receive it in satisfaction, the defendant is entitled to have the same considered as a payment made on the day on which it was brought in; he is answerable for further damages only; for he then stands on the same ground as if, on tendering money before the action, the plaintiff had refused to receive it, but had commenced his action, in which the tender was pleaded. *Boyden v. Moore*, 5 Mass. 365. And if the defendant pays money into court, the plaintiff goes on to trial, and a verdict is rendered against him, he neither pays nor receives costs for the time previous to the payment into court. *Williams v. Ingersoll*, 12 Pick. 345.

be accompanied with the general issue, or other plea, to the residue of the demand.(e)

Thus, in *assumpsit*,(f) or *covenant*,(g) for the payment of money, the defendant may bring money into court; and in *covenant* to find diet and lodging, or pay ten pounds, the court allowed him to bring in the ten pounds.(h) In *debt* for rent, the defendant may bring money into court in the King's Bench,(i) as well as in the Common Pleas,(k) and Exchequer;(l) although, in the former court, it was refused, in the time of Lord *Hardwicke*;(m) and in a case previous to that time,(n) the court said they never did it in *debt*. But there is a distinction between those actions of *debt*, wherein the plaintiff cannot recover less than the sum demanded, as on a record, specialty, or statute giving a sum certain by way of penalty;(o) and those actions wherein the plaintiff may recover less,

[*620] as in *debt* for rent,(p) *or on simple contract:(aa) In the former, the defendant cannot bring money into court;(bb) though he may move to stay the proceedings, on payment of the whole penalty and costs:(cc) but in the latter, the defendant has been allowed to bring money into court;(dd) because the plaintiff does not recover according to his demand, but according to the verdict of the jury. When an action, however, is brought for several penalties on the game laws, the defendant, we have seen,(ee) may have leave to pay one penalty into court, leaving the plaintiff at liberty to proceed for the rest. And the defendant, by act of parliament, may bring money into court in *debt*, *covenant*, or other action on a policy of assurance,(ff) or in an action for non-residence.(gg)

In an action for *general damages*, upon a contract,(hh) or for a tort,(ii) or trespass,(kk) as a tender cannot be pleaded, so the defendant is not allowed to bring money into court: And it cannot be brought into court, in an action for dilapidations.(ll) But in an action of *assumpsit* against a carrier, for not delivering goods, the defendant having advertised that he would not be answerable for any goods beyond the value of twenty pounds, unless they were entered and paid for accordingly, the court of King's Bench allowed him to bring the twenty pounds into court:(mm) So, money may be brought into court, in an action on the case for navigation calls.(nn) And where, in an action for general damages, the bringing of money into court is irregular, if the plaintiff take it out, he thereby waives the irregu-

(e) Barnes, 339, 350.

(f) 1 Vent. 356. 2 Salk. 596, 7.

(g) 2 Salk. 596. 1 Wils. 75. 2 Bur. 1120. Barnes, 284. 2 Blac. Rep. 837.

(h) 8 Mod. 305.

(i) 2 Salk. 596, 7.

(k) Barnes, 280, 282. Pr. Reg. 257.

(l) Bunb. 124.

(m) Cas. temp. Hardw. 173.

(n) 2 Str. 890.

(o) Cro. Jac. 128, 498, 629. 3 Mod. 41.

(p) 5 Mod. 212.

(aa) 1 H. Blac. 249.

(bb) 2 Str. 890. 1 Barnard. K. B. 420, S. C. Barnes, 285.

(cc) Ante, 541.

(dd) 1 Vent. 356. 2 Salk. 596, 7. 2 Ken. 292.

(ee) Ante, 541.

(ff) Stat. 19 Geo. II. c. 37, § 7. 3 Bur. 1773. 2 Taunt. 317.

(gg) 57 Geo. III. c. 99, § 43.

(hh) 1 Vent. 356. 2 Blac. Rep. 837. 2 Bos. & Pul. 234. 3 Bos. & Pul. 14.

(ii) 2 Str. 787, 906. 2 Barnard. K. B. 4, S. C. 7 Durnf. & East, 335.

(kk) 2 Wils. 115.

(ll) 8 Durnf. & East, 47.

(mm) *Hutton v. Bolton*, E. 22 Geo. III. K. B. 1 H. Blac. 299, in *notis*; *Beardmore v. Boulton*, H. 30 Geo. III. Excheq.; but see 2 Bos. & Pul. 234. And as to the liability of carriers, in consequence of such advertisements, see 1 H. Blac. 298. 2 East, 128. 4 Esp. Rep. 177. 4 East, 371. 5 East, 507. 5 Barn. & Cres. 322. 10 Moore, 247; and for the mode of declaring thereon, see 2 East, 128. 4 Esp. Rep. 177. 6 East, 564.

(nn) 7 Durnf. & East, 36.

larity, and cannot afterwards have a verdict, unless he recover more than the sum brought in.^(a) In an action for freight by a foreigner, there being a cross action against him for unliquidated damages, the court of Common Pleas refused to permit the freight to be paid into court, as a fund liable to payment of the damages when ascertained.^(p) But where a separate commission had been sued out against A., and a joint commission against him and B., and the assignees under the first commission had recovered a verdict in *traver* against C., the court of King's Bench allowed the amount of the verdict to be brought into court, to abide the event of a petition to the Chancellor, to supersede the first commission.^(q)

In an action by an executor or administrator, the plaintiff not being liable to costs, the defendant was not formerly allowed to bring money into court;^(a) but now it is otherwise:^(b) and the effect of the [*621] rule will be, not to make the plaintiff pay, but only to lose his subsequent costs. And, in actions against justices of the peace,^(c) officers of the excise,^(d) or customs,^(e) commissioners of bankrupt,^(f) or officers of the army, navy or marines,^(gg) for anything done in the execution of their offices, "in case the defendants shall have neglected to tender any, or shall have tendered insufficient amends, before the action brought, they may, by leave of the court, at any time before issue joined, pay into court such sum of money as they shall see fit; whereupon such proceedings, orders and judgment shall be had, made and given, in and by such court, as in other actions where the defendant is allowed to pay money into court."^(hh)

There is said to be no precedent, where there are several defendants, for one to pay money into court.⁽ⁱ⁾ Where there are several counts or breaches in the declaration, and as to some of them the defendant may bring money into court, but not as to the others, he may obtain a rule for bringing it in specially, upon some of the counts or breaches only. Thus, where an action of *covenant*^(k) was brought upon a lease, for non-payment of rent, and not repairing, &c., the court of King's Bench made a rule, that upon payment of what should appear to be due for rent, the proceedings as to that should be stayed; and as to the other breaches, that the plaintiff might proceed as he should think fit. So, in *covenant* upon a charter-party,^(l) the defendant was allowed to bring money into court, upon two of the breaches only; viz. for freight and demurrage. But in *debt* for the penalty of a charter-party, the court of Common Pleas discharged the rule for bringing money into court:^(m) and in another case, they refused to permit the defendant to pay

(a) 1 Durnf. & East, 710, and see 1 Campb. 559, *n*.

(p) 3 Taunt. 525.

(q) 1 Barn. & Cres. 257. 2 Dowl. & Ry. 409, S. C.

(a) 2 Salk. 596.

(b) 2 Str. 796.

(c) Stat. 24 Geo. II. c. 44, § 4. And note, this seems to have been the first statute, which allows money to be brought into court, in an action for general damages.

(d) Stat. 23 Geo. III. c. 70, § 33.

(e) Stat. 24 Geo. III. sess. 2, c. 47, § 35, (repealed by 6 Geo. IV. c. 105.) 28 Geo. III. c. 37, § 28. 6 Geo. IV. c. 108, § 96.

(f) Stat. 6 Geo. IV. c. 16, § 43.

(gg) Stat. 6 Geo. IV. c. 108, § 96.

(hh) See also the statutes 13 Geo. III. c. 78, § 79. 13 Geo. III. c. 84, § 81, & 3 Geo. IV. c. 126, § 144, as to bringing money into court, by persons acting under the general *highway* and *turnpike* acts. And as to bringing it in, by persons acting in pursuance of the laws relative to larceny, &c., or malicious injuries to property, see the statutes 7 & 8 Geo. IV. c. 29, § 75, and c. 30, § 41.

(i) 2 Blac. Rep. 1030.

(k) 2 Salk. 569. 1 Wils. 75. Barnes, 284, but see 1 Vent. 356, *contra*; and see Pr. Reg. C. P. 256. 2 Blac. Rep. 837.

(l) 2 Bur. 1120.

(m) Barnes, 285.

money into court on all the counts in the declaration except the last, and to demur to that count.⁽ⁿ⁾ If a defendant bring money into court upon some of the counts, and the plaintiff take it out, the latter is only entitled to the costs of those counts.^(o)

The motion for leave to bring money into court is a motion of course, and should regularly be made before plea pleaded;^(p) but it is frequently ^[*622] made,^(a) and in some cases expressly authorised,^(b) after plea, on obtaining a judge's order for that purpose: and if there has been no delay,^(c) the courts will give the defendant leave to withdraw the general issue, in order to bring money into court, and replead it, on payment of costs: [A] And he has even been allowed to bring it in, after the granting of a new trial.^(d) In the King's Bench, the motion paper being signed by counsel, the money should be paid to the signer of the writs, who acts in this instance as deputy to the master;^(e) and will give a receipt for the money, on being paid 20s. for every 100*l.* and so in proportion for every greater or lesser sum, exceeding 10*l.* and 2s. for every sum under 10*l.* beside 2s. 4*d.* for the receipt.^(f) The rule for bringing in the money is drawn up, in this court, by the clerk of the rules in term time, or within a week after, on the motion paper and receipt being left with him as instructions; but after a week from the end of the term, there must be a judge's order for drawing up the rule, which is granted of course, without a summons. In the Common Pleas, if the sum be under five pounds it may be paid in on a side-bar or treasury rule, which is granted of course by the secondaries; but if it amount to that sum or upwards, a serjeant's hand is necessary for obtaining the rule: and after a week from the end of the term, there must also be a judge's order for drawing it up. The rule in this court being taken to the prothonotaries' office, the clerk there will receive the money, and write a receipt in the margin, on being paid 1*d.* in the pound, and 1s. 4*d.* for the receipt. On a plea of *tender*, with a *proferet in curiâ*, the sum tendered must be paid to the signer of the writs in the King's Bench, or prothonotaries in the Common Pleas, who will give a receipt for it in the margin of the plea; and if not paid, the plaintiff may consider the plea as a nullity, and sign judgment.^(g) If the defendant bring money into

⁽ⁿ⁾ Pr. Reg. 256.

^(o) 4 Durnf. & East, 579. 2 Taunt. 266.

^(p) 1 Ld. Raym. 398. 1 Wils. 157. Barnes, 279.

^(a) 1 Durnf. & East, 711.

^(b) Stat. 24 Geo. II. c. 44, § 4, and see 7 Taunt. 33. 2 Marsh. 356, S. C., where, in an action against a magistrate, the defendant, after issue joined, was allowed to withdraw the general issue, pay money into court, and plead *de novo*. 3 Barn. & Cres. 159. 4 Dowl. & Ry. 776, S. C. *accord*.

^(c) 2 Str. 1271. Barnes, 289, 362.

^(d) *Per Cur.* M. 29 Geo. III. K. B.

^(e) 1 Crompt. 3 Ed. 142.

^(f) R. H. 5 Jac. 1 K. B.

^(g) 1 Str. 638. Barnes, 252. *Ante*, 565.

[A] Money paid into court is payment *pro tanto*. The plaintiff can take it out, but the defendant cannot; where a defendant dies after the payment, the revival of the action against his executor, or even the commencement of a new suit, will not change the effect of the payment. *Murray v. Bethune*, 1 Wend. 191. If the defendant pays money into court, either upon the whole or any single count in the declaration, he must pay costs up to the time when the money is paid in, even although the plaintiff should proceed and recover no more than the amount paid in. *State Bank v. Halcomb*, 2 Halst. 193. If, in an action on a policy of insurance, the defendant pays the amount of the premium into court, which the plaintiff's attorney takes out, after informing the defendant of the intention to go for a total loss, he will not be concluded from proceeding for a total loss. *Sleight v. Rhinelander*, 1 Johns, 192. In an action, on a policy of insurance, the defendant may, after plea pleaded, bring what sum he pleases into court, with costs to the time, but not specifically as the premium on the policy. *Dunlap v. Commercial Ins. Co.*, *Ib.* 149.

court on a plea of tender, the plaintiff may take it out, though he reply that the tender was not made before action brought : (h) Or he may reply a subsequent demand and refusal ; and on a verdict for the plaintiff, on issue taken thereon, Lord *Mansfield* said : “ The money having been taken out of court, the plaintiff shall recover only *nominal* damages, but otherwise the verdict would have been for the sum tendered.” (i)

The rule to bring money into court is commonly drawn up with *costs*, to be taxed by the master in the King's Bench, or one of the prothonotaries in the Common Pleas : And, in the King's Bench, the court will not in general permit the defendant to bring into court the debt and costs up to a certain day after the action brought, (thereby excluding the costs *of the declaration delivered,) upon the ground of an offer to pay [*623] the debt and costs up to that period, without having made a tender before action, or obtaining the common rule for staying proceedings on payment of debt and costs, up to the time of the application. (a) But where the plaintiff's conduct appeared to have been oppressive, the court of King's Bench, on motion, discharged so much of the rule, for bringing money into court, as related to the payment of costs. (b) So, where an action was brought for two separate sums of money, one of which the defendant offered to pay, with all costs to that time, and, the plaintiff's attorney having refused to stay proceedings on those terms, the defendant paid that sum into court ; but the plaintiff afterwards, finding that he could not support the action for the other part of his demand, took the money out of court, and discontinued the action ; the court allowed the defendant his costs, from the date of his offer to pay the sum paid into court, and directed that the same should be set off against the plaintiff's costs previously incurred. (c)

So, in the Common Pleas, according to several recent decisions, where the defendant, after action brought, and before declaration, offers to pay the debt and costs, and the plaintiff refuses to receive it, the court will permit the defendant to pay the debt into court, with the costs of the action up to the time of his offer only ; and if the plaintiff take the money out of court, he will be compelled to pay the costs of the application, and all costs in the action subsequent to the offer : (d) And in like manner, upon setting aside a writ of inquiry, the court of Common Pleas permitted the defendant to pay money to the plaintiff, under a rule of court, with the costs of the action up to that time, and ordered that the plaintiff's further proceedings should be at the peril of paying the subsequent costs. (e) So, in the Exchequer, the court, in a proper case, would it seems adopt a similar mode of proceeding. (f) But where, in an action for work and labour, the defendants, having offered by letter to pay a certain sum for the debt with the costs up to that time, which was refused by the plaintiff, obtained a rule to show cause why the sum offered, and the costs should not be paid into court, and further proceedings stayed, and why the plaintiff should not pay the costs incurred since the offer, and why, if the plaintiff refused to accept it, that sum should not be paid into court, and struck out of the declaration ; the court of Common

(h) 1 Bos. & Pul. 332.

(i) — v. *Ashby*, Mid. Sit. after T. 22 Geo. III. K. B.

(a) 13 East, 551.

(b) 1 Bur. 578.

(c) 2 Barn. & Ald. 776. 1 Chit. Rep. 471, S. C.

(d) 2 Taunt. 203, 283. 4 Taunt. 255. Holt. Ni. Pri. 7 n.; but see Cas. Pr. C. P. 120. Pr. Reg. 258, S. C. *semb. contra*.

(e) 1 Taunt. 491, but see Cas. Pr. C. P. 85. Barnes, 281, 285.

(f) 11 Price, 545, but see id. 533.

Pleas discharged the rule, it appearing that there was nothing oppressive in the plaintiff's conduct: (g) And in general, where money is paid into court upon the common rule, the latter court will not discharge that part of it which directs the payment of costs, unless the defendant have been prevented from making a legal tender, by the fraud or vexatious conduct of [*624] the plaintiff: *Therefore, they refused the application, where the defendant had merely pulled out his pocket book, for the purpose of making a tender, six weeks before action brought, and was prevented by the plaintiff's walking away; the defendant never having repeated the offer. (a) A copy of the rule is usually annexed to the plea, or otherwise served on the plaintiff's attorney: And bringing money into court can only be proved, by the rule for bringing it in. (b)

Bringing money into court is in general considered as an acknowledgment of the right of action, to the amount of the sum brought in; (c) [A] which the plaintiff therefore, on producing an office copy of the rule, is entitled to receive at all events whether he proceed in the action or not, and even though he be nonsuited, or have a verdict against him: (d) And where goods have been sold to the defendant by sample, at a stipulated price, he cannot, after payment of money into court, in an action of *indebitatus assumpsit*, insist upon any defect in the goods; since, by paying money into court, he admits the original contract: (e) If a purchaser mean to insist on such an objection, he ought to return the goods. (e) Bringing money into court being an acknowledgment on record, the party can never recover it back again though it afterwards appear that he paid it wrongfully: (f) And the court of Common Pleas will not order money brought in by the defendant through a mistake to be restored, unless it appear that some fraud or deceit has been practised upon him. (gg) But bringing money into court is said to be an admission of a legal demand only: (h) And

(g) 5 Taunt. 840. 1 Marsh. 392, S. C.; and see 6 Moore, 430. 3 Brod. & Bing. 168, S. C. 6 Moore, 431, 436, *in notis.* 11 Price, 533.

(a) 2 Marsh. 478.

(b) 3 Campb. 41. 1 Car. & P. 21, n.

(c) 5 Bur. 2640. 2 Durnf. & East, 275.

(d) 2 Salk. 597. 2 Str. 1027. Cas. temp. Hardw. 206, S. C. Pr. Reg. 250. Cas. Pr. C. P. 36, S. C.

(e) 2 Stark. Ni. Pri. 103.

(f) 2 Durnf. & East, 645.

(gg) 2 Bos. & Pul. 392.

(h) 1 Bos. & Pul. 264.

[A] Payment of money into court admits the cause of action stated in the declaration to the amount paid in; and, beyond that amount, the party may make his defence. *Spalding v. Vandercook*, 2 Wend. 431. *Johnson v. Columbian Ins. Co.*, 7 Johns, 315. Where money is paid into court, the sum paid in is considered as stricken out of the declaration; and unless the plaintiff proves a larger sum, the defendant must have a verdict. And where, in such case, a verdict is taken for the plaintiff, subject to the question of practice to be settled by the Supreme Court, that question must be determined, on a case made, not as a non-enumerated motion. *Bank of Columbia v. Southerland*, 3 Cow. 336. Upon payment of money into court, the clerk takes it as the private agent of the party paying, except in two cases, upon tender pleaded, and where the party has obtained leave of the court so to do. *Mazyeh v. M'Ewen*, 2 Bailey, 28. A payment made to the plaintiff after action brought is held, in Virginia, equivalent to bringing the money into court, in reference to the costs of the plaintiff. *Hudson v. Johnson*, 1 Wash. 10. And if the defendant, in an action of *assumpsit*, containing the common money counts, and also a count for the use and occupation of certain premises described, pays a part of the sum demanded into court, without specifying to which of the counts the payment is to be applied, such payment is an admission only that the defendant owes the plaintiff on some one or several of the counts, the sum so paid, but it is not an admission of any particular contract or debt under any one of the counts, nor a liability on all of them. *Hubbard v. Knous*, 7 Cush. 556. As to forms and practice on paying money into court, see *Bank of Columbia v. Southerland*, 3 Cowen, 336.

beyond the amount of the sum brought in, it is no acknowledgment of the right of action: (i) therefore if the plaintiff proceed further, it is at his peril. So, in actions of *trespass* against justices of the peace, &c. for acts done by them *ex officio*, bringing money into court seems to be no admission of the right of action. (k) And where money has been paid into court, short of the plaintiff's demand, and it is taken out of court, evidence is admissible to show *quo animo* it was done; and it is not to be taken conclusively as an admission that the rest of the demand was unfounded. (l)

It has been doubted, whether the plaintiff can be *nonsuited*, after bringing money into court; but there seems to be little reason for such a doubt. [A] When money is brought into court, unless the plaintiff will accept it with costs, in discharge of the suit, it is considered as paid before action brought, and struck out of the declaration: and the action proceeds for the residue of the demand, in like manner as if it had been originally commenced for that only. (m) And, accordingly, the practice of nonsuiting the plaintiff, after money paid into court, appears to be supported by many *authorities. (a) It seems, therefore, that after payment [*625] of money into court, there may be a nonsuit, a judgment as in case of a nonsuit, a demurrer to evidence, or a plea *puis darrein continuance*: in short, that the cause goes on substantially in the same manner, as if the money had not been paid in at all. (b)

When the declaration contains a count on a special contract, bringing money into court *generally* is an admission of the contract, so as to supersede the necessity of proving it at the trial: (c) [B] therefore in such case, if the defendant mean to deny the existence of the contract, he should pay money into court *specialty*, on the other counts of the declaration. So, where the defendant paid money into court generally, upon a declaration containing a count on a policy of assurance, together with the money counts, the court of Kings Bench held, that this was an admission of the contract stated in the special count; and that it was not competent to the

(i) 1 Durnf. & East, 464, and see 3 Durnf. & East, 657. 4 Durnf. & East, 579.

(k) 13 East, 202, 3.

(l) 5 Esp. Rep. 69.

(m) 3 Durnf. & East, 6, 7.

(a) 2 Salk. 597. Pr. Reg. 250. Cas. Pr. C. P. 36. S. C. Cas. temp. Hardw. 206. 2 Str. 1027, S. C. 4 Durnf. & East, 10. 7 Durnf. & East, 372. 2 Esp. Rep. 481, 697. 2 H. Blac. 374; and see 1 Campb. 327, 8, *in notis*. 3 Bing. 290. 2 Car. & P. 85, S. C.

(b) 2 H. Blac. 375, *per Eyre*, Ch. J.

(c) 2 Durnf. & East, 275. 4 Durnf. & East, 579. Peake's Cas. N. Pri. 3 Ed. 20, *Id.* (a.) 1 Esp. Rep. 347. 2 East, 128. 2 H. Blac. 374. *Bryan v. Williamson*, M. 38 Geo. III. C. P. 2 Bos. & Pul. 550. 2 Campb. 357. 1 Car. & P. 20. (b.)

[A] It is settled, that a plaintiff may be nonsuited after plea of tender and payment into court. *Jenkins v. Clutchen*, 2 Miles, 65, Per Pettit, P. J. *Accord.* *McCredy v. Fay*, 7 Watts. 409.

[B] Where money is paid into court generally, it is an admission of the contract set forth in each of the counts; but if the payment was not intended to be made on all the counts, the court will allow an amendment of the rule, so as to apply it to particular counts. *Jones v. Hoar*, 5 Pick. 285. *Huntington v. American Bank*, 6 Pick. 340. Thus, where by the vote of the directors of a bank, the plaintiff was appointed special director, to receive such compensation as "should, in the opinion of the board, be reasonable and fair," and he declared for a reasonable compensation in a *quantum meruit* count, and the defendants paid into court the amount voted by the directors to be a "reasonable compensation,"—it was held, that, by paying the money into court, the defendants waived this limitation of the contract. *Huntington v. American Bank*, 6 Pick. 340. The holder of a promissory note commenced actions thereon against the maker, and against the indorser, and the maker brought into court the full amount of the note with interest. It was held, that the holder was not bound to accept it, unless the costs of both actions should be paid. *Whipple v. Newton*, 17 Pick. 168.

defendant to show that the policy, by which the risk was originally made to cease after the ship had moored twenty-four hours in safety, was afterwards altered by the broker, without the defendant's knowledge.(d) So, where two breaches were assigned in one count of a declaration upon a contract, and the defendant paid money into court upon one of them, the court held that he thereby admitted the whole contract, as set out in that count.(e) And after payment of money into court by a defendant, in an action brought against him on the 2 & 3 Edw. VI. c. 13, by a farmer of tithes, he cannot object to the plaintiff's title to the tithes; because he has admitted the plaintiff's right generally, and has reduced the cause to a mere question of the amount of the damages.(f) A tender also, upon which money is paid into court, admits the contract and facts stated in the declaration: Therefore, where a count averred, that in consideration that the plaintiff would let to the defendant certain tithes, the defendant agreed to pay 41*l.*, and that plaintiff did let the said tithes, and permit the defendant to take them; a tender pleaded to all the counts generally, was held to preclude the defendant from showing a legal interruption to his taking the tithes, if any such interruption had subsisted.(g) But payment of money into court generally, upon a declaration containing a count on a policy of assurance, and the money counts, is only an admission of the contract; but does not preclude the defendant from disputing his liability beyond such payment, for goods which were not loaded according to the terms of the policy.(h) And where, in an action on a policy of *assurance, [*626] it appeared that the plaintiff, by his conduct previous to the trial, had induced the defendant to believe that the only point to be tried was a question of fraud, and suffered him to prepare his evidence accordingly; the court of Common Pleas would not allow the plaintiff to object to the receipt of that evidence at the trial upon the ground of the contract having been admitted by the payment of money into court.(a) So, in an action on a valued policy, the payment of money into court, upon a count which states a total loss by capture, is no admission of a total loss; but the plaintiff is bound to prove that he has suffered damage from the capture, beyond the amount of the sum paid into court.(b) So, the payment of money into court, on several common counts, one of which alone is applicable to the plaintiff's demand, admits a cause of action on that count only:(c) And accordingly, where the plaintiff alleges in his declaration, multifarious and inconsistent demands, arising out of the same transaction, payment into court of a sum insufficient to meet all the demands, cannot be applied by the plaintiff to prove such one of them as he may elect at the trial.(d*d*) Where the declaration stated that the plaintiff had sold to the defendant a quantity of oak bark, at the average price of the season, to be ascertained before a given day, and then averred that before that day the average price was ascertained to be a given sum; it was holden that the payment of money into court did not admit the average price to be as stated in the declaration.(e*e*) And in *assumpsit* for goods sold and delivered, and on the money counts, where the defendant had pleaded the general issue,

(d) 9 East, 325.

(e) 1 Barn. & Cres. 3. 2 Dowl. & Ry. 19 S. C.

(f) 4 Price, 58.

(g) 3 Taunt. 95.

(h) 2 Maule & Sel. 106.

(a) 3 Bos. & Pul. 556.

(b) 1 Campb. 557. 1 Taunt. 419, S. C.

(c) 9 Moore, 724. 2 Bing. 377. 1 Car. & P. 403, S. C.

(d*d*) 7 Taunt. 450. 1 Moore, 158, S. C.(e*e*) 2 Barn. & Ald. 116.

with the statute of limitations, and paid money into court generally; the court held, that such payment did not take the case out of the statute.(f)

When money is brought into court, the plaintiff either accepts it, with costs, in discharge of the suit, or proceeds in the action: In the former case, he should take an office copy of the rule, and procure an appointment thereon from the master, or one of the prothonotaries, to tax the costs, and serve the same on the defendant's attorney; or, in default thereof, it will be considered that the plaintiff intends to proceed in the action, to recover a larger sum than that paid into court.(g) The costs being taxed, should be forthwith paid to the plaintiff or his attorney; and if they are not paid, the plaintiff may proceed in the action; and proof of the rule to pay money into court will of itself entitle him to a verdict, with nominal damages:(h) Or, in the Common Pleas and Exchequer, the plaintiff, after demanding the costs, may have an attachment for the non-payment of them; and in these courts, he may proceed in the action, *without a previous [*627] demand of the costs.(aa) But, in the King's Bench, the plaintiff must proceed in the action, if they are not paid, and cannot have an attachment;(bb) for the rule in this court is conditional, and not, as in the Common Pleas,(cc) obligatory upon the defendant to pay the costs.

If the plaintiff proceed in the action, the sum brought into court is, by the terms of the rule, to be struck out of the declaration, and paid out of court, to the plaintiff or his attorney; and upon the trial of the issue, the plaintiff shall not be permitted to give evidence for the same: In such case, if the plaintiff proceed to trial,(d) otherwise than for the non-payment of costs, and do not prove more to be due to him than the sum brought in, the plaintiff, on the rule being produced,(e) shall be nonsuited,(ff) or have a verdict against him,(gg) and pay costs to the defendant:(hh) and even though the rule be not produced, the plaintiff it seems cannot take a verdict for the sum brought into court.(i) But if more appear to be due to him, he shall have a verdict for the overplus, and costs.(k) When the plaintiff proceeds further, without going on to trial, he shall have his costs, to the time of bringing money into court; and the defendant be allowed his subsequent costs:(l) And the plaintiff is entitled to costs, up to the time of bringing money into court,[A] though he afterwards give notice of trial, which he neglects to coun-

(f) 3 Barn. & Cres. 10. 4 Dowl. & RyL. 632, S. C.

(g) R. M. 31 Geo. III. K. B. 4 Durnf. & East, 12.

(h) 1 Campb. 558, n. So if, after action brought, the money sought to be recovered is paid, without a rule of court, the plaintiff must have a verdict. *Id.* 559, n. Holt N. Pri. 6, and see 5 Barn. & Ald. 886. *Ante.* 338.

(aa) 2 New Rep. C. P. 473. 6 Price, 126. 7 Price, 674.

(bb) 2 Str. 1220. 7 Durnf. & East, 6.

(cc) Barnes, 283. Pr. Reg. 259, S. C. 11 East, 319.

(d) 2 Salk. 597. 2 Str. 1027. *Cas. temp. Hardw.* 266, S. C. Say. Rep. 196, 7. 2 Bur. 1121.

(e) 5 Com. Dig. 20, and see Willes, 485.

(ff) *Qu.* Whether a plaintiff, having taken money out of court after being nonsuited, and never having moved to set the nonsuit aside, is barred from bringing a new action? 3 Esp. Rep. 106.

(gg) *Cas. temp. Hardw.* 260.

(hh) 4 Durnf. & East, 10. 1 Saund. 33, (2.) 2 Taunt. 361, 4. Taunt. 196, but see 1 Durnf. & East, 710. 2 Bos. & Pul. 56, *contra.* (i) *Hariland v. Cole*, M. 21 Geo. III. K. B.

(k) *Cas. temp. Hardw.* 260. As to the effect of taking the single rent out of court upon a plea of tender, in an action for double value, with a count for use and occupation, see 10 East, 48.

(l) 1 Durnf. & East, 629. Willes, 191. Barnes, 280, 282. Pr. Reg. 254, 5, S. C. 1 Younge & J. 213, but see Say. Rep. 196, *contra.*

[A] Costs paid into court are irrevocable. *Clement v. Bixler*, 3 Watts, 248. Where money

termant, whereby the defendant is entitled to judgment as in case of a nonsuit :(*m*) or though the plaintiff afterwards enter the record for trial, and withdraw it.(*n*) But the plaintiff is not entitled to costs, up to the time of bringing money into court, after the defendant has obtained judgment as in case of a nonsuit,(*o*) or judgment of *non pros* for not entering the issue,(*p*) or after a juror has been withdrawn by consent.(*q*) In the Exchequer, the plaintiff is entitled to costs, up to the time of bringing money into court, although he has made default in trying the cause, after a peremptory undertaking ;(*r*) And he may take the money out of court, without an application for that purpose ; and by so doing, all further proceedings are stayed.(*r*)

[*628] *In the King's Bench, where the defendants, in several actions on a policy of assurance, paid money into court, which the plaintiff took out, without taxing costs, at that time and afterwards the defendants entered into the common consolidation rule, and the plaintiff was nonsuited in the action that was tried ; the court held, that the latter was not entitled to the costs in any of the actions, up to the time of paying money into court.(*a*) But in actions on policies, in the Common Pleas, where there is a consolidation rule, and money paid into court, although the cause tried follows the general practice, and the defendant, if he succeed, is entitled to the whole costs of that cause, yet the plaintiff is entitled to the costs of the short causes, up to the time of paying the money into court.(*b*) So, in the King's Bench, where the defendants in several actions on a policy of insurance, paid money into court, and (the plaintiffs refusing to consent to a consolidation rule) obtained a rule for staying proceedings in the others, until after the trial of one, upon the terms of their admitting their subscription to the policy, the interest of the plaintiffs, &c. and afterwards judgment passed for the defendant in the cause tried ; the court held, that the plaintiffs were entitled, in the other actions to costs, to the time of paying money into court.(*c*) Where the defendant, having paid money into court generally, upon a declaration containing a count on a policy of assurance, together with the money counts, obtained a rule after verdict, to amend the rule for paying money into court, by confining it to the money counts, and for a new trial, on payment of costs ; the court of King's Bench held, that the plaintiff on taking the money out of court, was entitled to all the costs of the action, and not merely to the usual costs on a rule for a new trial.(*d*) And, in the Common Pleas, where in an action on a policy, with

(*m*) 8 Durnf. & East, 403.

(*n*) *Id.* 486.

(*p*) 6 Taunt. 158. 1 Marsh. 519, S. C.

(*r*) 1 Younge & J. 213.

(*b*) 2 Taunt. 361 ; and see 2 Bos. & Pul. 56, 3 Bos. & Pul. 558, *accord*.

(*c*) 6 Maule & Sel. 107.

(*o*) 2 Maule & Sel. 335.

(*q*) 3 Durnf. & East, 657.

(*a*) 7 Durnf. & East, 372.

(*d*) 9 East, 325.

is paid into court after issue joined, and the plaintiff proceeds in the suit, but recovers no more than the amount paid in, the defendant is entitled to the costs of the defence subsequent to the payment of the money, but not to the costs previously accrued. *Aikins v. Colton*, 3 Wend. 326. Money paid into court, not in pursuance of a tender made before the suit is brought, must, to be available, include the costs in the suit up to that time. *Goslin v. Hodson*, 24 Verm. 140. The acceptance of money paid into court, operates as a payment, pro tanto, and also as a conclusive admission of the conditions upon which it was paid into court. *Ib.* A party cannot make the payment of money into court available, unless it be done under an order of court, and upon the payment of all costs up to the time of bringing the money into court. *Keith v. Smith*, 1 Swan, (Tenn.) 92. *Harvey v. Hackley*, 6 Watts, 264.

the usual money counts, the defendant paid the *premiums* into court, on the count for money had and received, and the plaintiff took it out, there being no consolidation rule, the latter was holden to be entitled to his full costs on all the counts, although he had failed on the special counts, in another action on the same policy.(*e*)

In the Common Pleas, if the plaintiff die.(*f*) or be nonsuited,(*g*) after money is brought into court, the court will not order it to be paid back to the defendant. So, if the defendant die after bringing money into court, it shall not be paid back to his executors.(*h*) But where the bail, upon putting off a trial, had paid a sum of money into court, to abide the event of the suit, and the suit having afterwards abated by the death of the defendant, they were permitted to take the money out of court, although it was opposed both by the plaintiff, and by the administrator of the defendant.(*i*) And if the plaintiff have a verdict against him, after money is brought into *court, the court will order it to be paid out to the defendant, [*629] towards satisfaction of his costs.(*a*)[A] It had been a question often agitated in that court, whether in cases where there was a rule to pay money into court, the production of it by the defendant was to be considered as evidence on his part, which gave the plaintiff's counsel a right to reply: If the plaintiff took a verdict for the whole of his demand, without giving credit for the sum paid into court, the court would set it aside, without requiring evidence of the existence of such a rule: and therefore a rule was made, that in future this should not be considered as evidence on the part of the defendant, so as to give the plaintiff a right to reply.(*b*)[1]

(*e*) 5 Taunt. 607.

(*f*) Cas. Pr. C. P. 129. Pr. Reg. 255, Barnes, 281, S. C.

(*g*) Cas. Pr. C. P. 36. Pr. Reg. 250, S. C., and see *id.* 252.

(*h*) Barnes, 279. Pr. Reg. 252, S. C.

(*i*) *Ward v. Lowring*, M. 45, Geo. III. K. B. 2 Smith R. 49, S. C.

(*a*) Cas. Pr. C. P. 54. Pr. Reg. 251, S. C. Barnes, 280.

(*b*) 2 Taunt. 267, 1 Car. & P. 21, n.

[1] The practice on the subject of paying money into court has been materially improved in England by a recent statute. By the provisions of the law amendment act, 3 & 4 W. IV. c. 42, § 21; and see 2 Rep. C. L. Com. 52, 97; "it shall be lawful for the defendant in all *personal* actions, (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant,) by leave of any of the superior courts of law at *Westminster*, where such action is pending, or a judge of any of the said superior courts, to pay into court a sum of money, by way of compensation or amends, in such manner, and under such regulations, as to the payment of costs, and the form of the pleading, as the said judges, or any *eight* or more of them, of whom the chief of each of the said courts shall be *three*, shall, by any rules or orders by them to be from time to time made, order and direct." By the above act, the defendant may pay money into court, in many cases where he was not formerly allowed to do so, as in actions for general damages, not being for assault and battery, or false imprisonment, &c. But in an action by landlord against tenant, for not repairing, the court refused to allow the defendant to pay a sum of money into court, by way of compensation and amends, under the above statute; and that the same sum might be received into court, under a plea in the form given by the rule made thereon, and under a plea of tender before action brought; *Searle v. Barrett*, 4 Nev. & M. 200, *Dearle v. Barrett*, 2 Ad. & E. 82. *Barret v. Dearle*, 3 Dowl. Rep. 13. 9 Leg. Obs. 108, 206, S. C.

In pursuance of the power given by the above act, a statutory rule was made by the judges

[A] Where money has been paid into court by the defendant, and the plaintiff dies and his administrator is substituted, who does not appear and is nonsuited, the money will be impounded to answer the defendant's costs. *Jenkins v. Cutchins*, 2 Miles, 65. And after payment of money into court, the defendant can never take it out; yet if the plaintiff fails in his action, as by nonsuit on motion, and the money has not already been taken out of court by him, the court will impound it to answer the defendant's costs. *Jenkins v. Cutchins*, 2 Miles, 65. Payment into court, under a plea of tender, by one of several joint defendants, is a payment for all, and the money may be impounded in such case, for cost of all. *Ibid.*

*CHAPTER XXVI.

Of PLEAS to the JURISDICTION; CLAIMING CONUSANCE; and PLEAS in ABATEMENT.

THE general order of Pleading is,

- I. To the JURISDICTION of the Court.
- II. To the PERSON,
 1. Of the *Plaintiff*;
 2. Of the *Defendant*.
- III. To the COURT.
- IV. To the WRIT; and herein,
 1. To the *Form*;
 2. To the *Action* of the Writ.
- V. To the ACTION itself, in *bar* thereof.^(a)

(a) Co. Lit. 303, Latch, 178. Gilb. C. P. 49, and see Steph. Pl. 429, 30. And for an account of the various kinds of pleas in Equity, and their essential difference, see Beam. Pl. Eq. Chap. II.

of all the courts; R. Pl. Gen. II. 4 W. IV. *reg.* 17, 18. 5 Barn. & Ad. Append. vi. 10 Bing. 468. 2 Crompt. & M. 18, by which it was ordered, that "when money is paid into court, such payment shall be pleaded in all cases, and as near as may be in the form prescribed by the rule." Besides that it was thought much more convenient, as well as more consistent with the real state of facts, that payment of money into court should be put into the shape of a plea, other advantages are gained by putting it into that shape, namely, that the expense of a rule of court, and of proving such rule at the trial, is avoided; that a specific issue will arise as to the sufficiency of the sum; and that the admission of the plaintiff's right of action, and the extent of that admission, will appear on the record; a circumstance which will be found peculiarly beneficial in actions of *trespass* to land; 2 Rep. C. L. Com. 54, 5.

If it be intended to defend part of the action, and to pay money into court as to other part, the plea or pleas to the part defended should be pleaded first, and the payment into court should be pleaded as to the residue; *Sharman v. Stevenson*, 1 Gale, 74. 5 Tyr. Rep. 564. 3 Dowl. Rep. 709. 2 Crompt. M. & R. 75. 10 Leg. Obs. 315, S. C. And where, to a declaration for 31*l.* on a bill of exchange, and 100*l.* for money paid, money lent, goods sold, interest, and on an account stated, the defendant pleaded as to the 31*l.*, and as to 12*l.* parcel of the 100*l.* for goods sold, and as to the 100*l.* on the account stated, payment into court of 51*l.* and alleged that the plaintiff had not sustained damages to a greater amount, in respect of so much of those causes of action as in the plea mentioned, it was doubted whether such plea was good, on special demurrer: and it seems that the defendant ought to have shown distinctly, what portion of the money paid into court was to be applied to the bill of exchange; *Jourdain v. Johnson*, 2 Crompt., M. & R. 564. 5 Tyr. Rep. 524. 1 Gale, 312. 4 Dowl. Rep. 534, S. C.; and see *Marshall v. Whiteside*, 1 Meeson & W. 191, 2. 1 Tyr. & G. 485. 4 Dowl. Rep. 770, S. C. And it has been holden, that a plea of payment of money into court, beginning "as to so much, parcel" &c., and concluding without any prayer of judgment, is bad, on special demurrer; *Sharman v. Stevenson*, 1 Gale, 74; and see *Porter v. Izot*, 1 Tyr. & G. 639. Where there are several counts for several causes of action, or several breaches are assigned in *covenant*, the defendant may plead payment into court of one entire sum, in satisfaction of all the counts or breaches; *Marshall v. Whiteside*, 1 Meeson & W. 188. 1 Tyr. & G. 485. 4 Dowl. Rep. 766, S. C.; and see *Mee v. Tomlinson*, 5 Nev. & M. 624. 1 Har. & W. 614, S. C. *Lorymer v. Vizeu*, 3 Bing. N. R. 222. But where, upon a declaration consisting of two counts, the defendant paid into court enough to cover the demand in the first, and obtained a verdict on the second, but had omitted to plead the payment, as required by the new rules, the court held that he was not entitled to costs; *Adlard v. Booth*, 1 Bing. N. R. 693. 1 Scott, 644, S. C.

The practice of paying money into court, however, is now governed by the law amendment act, and the statutory rules made thereon; by one of which rules, R. Pl. Gen. II. 4 W. IV. *reg.* 18; 5 Barn. & Ad. Append. vi., 10 Bing. 468; it is ordered, that "no rule or judge's order to pay money into court shall be necessary, except under the 3 & 4 W. IV. c. 42, § 21; but the money shall be paid to the proper officer of each court, who shall give a receipt or the amount in the margin of the plea, and the said sum shall be paid out to the plaintiff

By this order of pleading, each subsequent plea admits the former: as, when the defendant pleads to the person, he admits the jurisdiction of the court; when he pleads to the count, he admits the competency of the plaintiff, and his own responsibility; when he pleads to the form of the writ, he admits the form of the count; (b) and in like manner of the rest.

(b) Gilb. C. P. 50.

on demand." By this rule it is unnecessary to have any rule or order for paying money into court, in cases where it was allowed before the law amendment act. In such cases it is to be paid to the proper officer, as a matter of course, without any rule or order for that purpose, in like manner as upon a plea of tender. Tidd, Sup. 1830, p. 18. But in cases where the payment of money into court was first allowed by the law amendment act, as in actions for general damages, &c., a rule of court or judge's order must be obtained for leave to pay it in: And the payment of money into court must in all cases be pleaded, even though it be paid in under a rule of court or judge's order.

By a rule of all the courts, R. Pl. H. 4 W. IV. reg. 19; 5 Barn. & Ad. Append. vi. vii.; 10 Bing. 468, 69; 2 Crompt. & M. 19; made in pursuance of the law amendment act, "the plaintiff, after the delivery of a plea of payment of money into court, shall be at liberty to reply to the same, by accepting the sum so paid into court, in full satisfaction and discharge of the cause of action, in respect of which it has been paid in; and he shall be at liberty, in that case, to tax his costs of suit, and in case of non-payment thereof, within *forty-eight* hours, to sign judgment for his costs of suit so taxed: or the plaintiff may reply that he has sustained damages, (or that the defendant is indebted to him, as the case may be,) to a greater amount than the said sum; (for the form of a replication to a plea of payment of money into court, see 6 Car. & P. 712. (a); 1 Chit. Pl. 371, 72; and see *Proctor v. Nicholson*, 7 Car. & P. 67; *Jourdain v. Johnson*, 2 Crompt. M. & R. 564; 5 Tyr. Rep. 524; 1 Gale, 312; 4 Dowl. Rep. 534, S. C.; *Marshall v. Whiteside*, 1 Meeson & W. 191, 92;) and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment, and his costs of suit."

If the defendant pay money into court, as to part of the plaintiff's demand, and plead *non assumpsit*, or *nunquam indubitatus*, or a set-off, or other plea, as to the residue, the plaintiff may take the money out of court, in satisfaction of the cause of action in respect of which it was paid in, and take issue, and proceed to trial, on the other plea: But where, to a declaration in *assumpsit*, brought to recover the sum of 30*l.*, the defendant pleaded, first, to the whole declaration, payment of the sum of 27*l.* 4*s.* 4*d.* into court, and that the plaintiff had not sustained damages to a greater amount; secondly, except as to 27*l.* 4*s.* 4*d.* *non assumpsit*; thirdly, payment of the sum of 10*l.* before action; and fourthly, as to all except 27*l.* 4*s.* 4*d.*, a set-off; to which the plaintiff replied that he accepted the sum paid into court, and was satisfied, the court held that the defendant was not justified in signing judgment of *non pros*, for want of a replication to the second, third, and fourth pleas. *Coates v. Stevens*, 2 Crompt. M. & R. 118. 5 Tyr. Rep. 764. 3 Dowl. Rep. 784. 1 Gale, 75, S. C. In an action on the case for an injury to the plaintiff's reversionary interest in a wharf, by breaking a wall, the defendant having pleaded not guilty to the whole declaration, and a special plea of justification, and the plaintiff having now assigned, the defendant paid money into court, which was accepted in satisfaction of the cause of action, the court held that the plaintiff was entitled to the costs of the writ, and the defendant to all other costs prior to the new assignment. *Griffiths v. Jones*, 5 Dowl. Rep. 167. 1 Meeson & W. 731, S. C. In an action for *dilapidations*, the defendant having paid money into court, the plaintiff replied further damage; and having subsequently given a peremptory undertaking, pursuant to which, however, he did not go to trial, the court permitted a rule for judgment as in case of a nonsuit to be discharged, on his amending his replication, by accepting the money in satisfaction of the cause of action, and paying the defendant's costs, incurred since the payment of the money into court. *Kelly v. Flint*, 13 Leg. Obs. 94. In an action against a carrier, for not delivering goods at a specified time, the defendant pleaded payment of money into court, and the plaintiff replied that he had sustained more damages; the amount paid in was the cost price of the goods, the defendant having offered them in *specie* to the plaintiff two days only after they ought to have been delivered; but the plaintiff proved that he had sustained inconvenience and loss, by not having the goods delivered at a proper time; the jury, however, found for the defendant, and the court refused to set aside the verdict. *Evans v. Lewis*, 3 Dowl. Rep. 819. 10 Leg. Obs. 332, S. C. If the defendant, to a declaration in the ordinary form, in *indubitatus assumpsit*, with particulars containing various causes of action, plead payment into court, he is not precluded by his plea, from contesting his liability in respect of any *items* beyond the amount paid into court: the particulars not being considered as part of the declaration. *Booth v. Howard*, 5 Dowl. Rep. 438. 1 Willmore, W. & D. 54, S. C.

Pleas to the jurisdiction of the court are either in *local* or *transitory* actions. In *local* actions, it is a good plea to say that the lands are ancient demesne, holden of the king's manor ;(e) or that the cause of action arose in *Wales*,(d) or beyond the sea,(e) or in a county palatine,(f) cinque port,(g) or other *exempt* jurisdiction.(h) In *ejectment*, the tenants in possession cannot plead to the jurisdiction, without leave of the court :(i) And where ancient demesne is pleaded, there must be an affidavit, stating that the lands are holden of a manor, which is ancient demesne ; and that there is a court of ancient demesne, regularly holden ; and that the lessor of the

[*631] *plaintiff has a freehold interest.(a) This plea may be filed *de bene esse*, in the King's Bench, within the time allowed for pleading in abatement.(b)

In *transitory* actions, it is said,(cc) the defendant cannot plead to the jurisdiction of the court, unless the plaintiff by his declaration show, that the cause of action accrued within a county palatine : and even then, it must be averred in the plea, either that the defendant dwells in the county palatine, or that he had sufficient goods and chattels there, by which he may be attached ; otherwise the plea cannot be allowed, lest a failure of justice should ensue ;(dd) and the defendant cannot in such case demur to the declaration,(ee) or move in arrest of judgment.(ff)

Of a nature very similar to pleading to the jurisdiction of the court, is claiming *conusance* ;(gg) or praying that the cause may be determined before an inferior jurisdiction : concerning which, it will be proper to consider, the several sorts of inferior jurisdictions ; in what cases conusance may be claimed ; and the time and manner of claiming it.

There are *three* sorts of inferior jurisdictions.(hh) The first is to *hold pleas*, which is merely a concurrent jurisdiction ; and can neither be claimed nor pleaded. The second is a *general conusance* of pleas ; which being intended for the benefit of the lord, may be claimed by him, though it cannot be pleaded by the defendant. The third is a *conusance* of pleas, with *exclusive* words ; as where the king grants to a city, that the inhabitants shall be sued within the city, *and not elsewhere* : This being an *exempt* jurisdiction, may be either claimed or pleaded.(ii) Hence it is a general

(e) Herne, 7, 351. Rastal, 101. Hans. 103. Thomp. 2. 3 Inst. Cl. 8, 9. 1 Salk. 56. 2 Ld. Raym. 1418. This plea must be pleaded within the first *four* days of the term. 8 Durnf. & East, 474.

(d) 1 Wils. 193.

(e) 1 Salk. 80. 1 Show. 191, S. C.

(f) Rastal, 419. Herne, 7. 3 Inst. Cl. 14.

(g) 4 Inst. 224. Jenk. 190. Keilw. 88, &c., S. C. 3 Inst. Cl. 7 ; but see Yelv. 12, 13. Carth. 109.

(h) Bro. Abr. tit. *Conusance*, 52. 1 Blac. Rep. 197. And as to pleas to the jurisdiction, in courts of equity, see Beam. Pl. Eq. 57, &c., 252, 53, 54.

(i) 1 Barnard. K. B. 7, 352, 365. Andr. 368. 2 Str. 1120. 1 Blac. Rep. 197. 3 Wils. 51.

(a) 2 Bur. 1046 ; and see 3 Wils. 51.

(b) 10 East, 523.

(cc) 4 Inst. 212, 13. 1 Sid. 103. Carth. 109. Gilb. C. P. 191. 1 Bac. Abr. 560 ; and see 3 East, 128.

(dd) Carth. 355.

(ee) *Id.* 354. 5 Mod. 144, S. C. ; and see further, as to pleas to the *jurisdiction*, 1 Chit. Pl. 4 Ed. 380, &c.

(ff) Carth. 11. Comb. 30, 48, S. C. ; and see Comb. 115. As to *conusance* in general, see Gilb. C. P. 192, &c. Vin. Abr. tit. *Conusance*. Com. Dig. tit. *Courts*, P. 1 Chit. Pl. 4 Ed. 361, &c. 1 Sel. Pr. Chap. VII. § 1.

(gg) Gilb. C. P. 191. 1 Bac. Abr. 560. 1 Rol. Abr. 489.

(hh) Palm. 456. Hardr. 509. 2 Ld. Raym. 836. 1 Salk. 148. 3 Salk. 79. 12 Mod. 643, S. C. *Id.* 666. 10 Mod. 126. Vin. Abr. tit. *Conusance*, 589.

(ii) Bro. Abr. tit. *Conusance*, 52. 1 Blac. Rep. 197.

rule, that whenever the defendant can plead to the jurisdiction of the court, there the lord of the franchise may claim conusance, but not *vice versâ*.(k)

The privilege of claiming conusance is confined to courts of record,(l) and local actions ;(m) except where the defendant is a member of the university of *Oxford* or *Cambridge* ;(n) And it is also confined to such actions as were in *esse* at the time of the grant ;(o) and does not extend to those created since, by act of parliament, except where a common law action is *given against a person by another name, as *debt* against an ad- [*632] ministrator.(a) Neither shall this privilege be allowed, where the franchise cannot give a remedy,(b) and there would consequently be a failure of justice ;(c) as in replevin,(d) *quare impedit*.(e) waste, &c. or where the lord is a party, and the plea is to be holden before himself.(f) or the defendant is a stranger, who hath nothing within the franchise ;(g) or lastly, where the plaintiff is a privileged person, as an attorney or officer of the court.(h) But conusance may be claimed by a defendant in custody of the marshal.(i) And, in a modern case, it was allowed in the King's Bench, on a claim made by the *Vice Chancellor* of the University of *Oxford*, during the vacancy of the office of *Chancellor* by death, on behalf of the university.(kk) In the Exchequer of Pleas, a member of either university cannot set up his privilege, against that of an officer or accountant, or against any person suing as a debtor ; this court not being mentioned in their charter of exemption.(ll)

Conusance of Pleas must be claimed after appearance.(mm) and before imparlance,(nn) in the first instance, or on the very first day the party hath in court ; even upon the return day of the writ, if the cause of action appear therein : if not, then upon the first day given upon the declaration.(oo) As for instance, in *trespass* by original, where place is named, or *precipe quod reddat*, where land is demanded, conusance must be claimed on the return day of the writ ; because, in these cases, the writ states where the cause of action arises.(p) But in *debt* or *detinue* it is otherwise ; for it does not appear, till the plaintiff has counted, where the contract or obligation was made ; and therefore till then, the lord need not make his claim.(q) So in *replevin*, the place where the cattle were taken does not appear, till the plaintiff has counted, if it be between strangers : but if a replevin be sued against the lord of the franchise himself, there the lord's claim would come too late after the count ; because the law intends that he knew the place of taking, being himself a party, and so, by not demanding his privilege on the writ, he gives the court seisin of the cause : for the lord must use no delay.(r)

(k) Gilb. C. P. 193.

(m) 4 Inst. 213. 1 Sid. 103.

(o) 14 Hen. IV. 20, b.

(b) 2 Vent. 363.

(d) 2 Inst. 140.

(f) 8 Hen. VI. 48, 19, 20, 21. Hob. 87.

(h) 3 Leon. 149. Lit. Rep. 304. Willes, 233. Barnes, 346. Prac. Reg. 96. Vin. Abr. tit.

Conusance, 590, S. C. *Id.* 562. Bendl. 233, *contra*.

(i) Bro. Abr. tit. *Conusance*, 50. 1 Salk. 2 Gilb. C. P. 195.

(kk) 11 East. 543, and see 12 East, 12.

(ll) Comb. 319.

(mm) 1 Sid. 103. 1 Show. 352. 10 Mod. 125. Willes, 233. Barnes, 346. Prac. Reg. 96.

Vin. Abr. tit. *Conusance*, 590, S. C. *Id.* 592. 1 Barnard, K. B. 66. 2 Wils. 411. Gilb. C. P. 196. *Ante*, 463.

(oo) 2 Wils. 413.

(q) 10 Mod. 127.

(l) 2 Inst. 140.

(n) Gilb. C. P. 193. 1 Bac. Abr. 560.

(a) 14 Hen. IV. b. 22. Ed. IV. 22.

(c) Hardr. 597.

(e) Dalis, 12.

(g) 22 Ass. 83. 1 Rol. Abr. 493.

(p) 22 Ass. 83. 1 Rol. Abr. 493.

(r) 22 Ass. 83. 1 Rol. Abr. 493.

(ll) Hardr. 188. *Ante*, 81, 2.

(p) 5 Bur. 2823.

(r) 5 Bur. 2823.

In a modern case,(s) conusance of a plea of *trespass*, sued against a resident member of the university of *Cambridge*, for a cause of action verified by affidavit to have arisen within the town and suburbs of **Cam-*
 [*633] *bridge*, over which the university court has jurisdiction, was allowed in the King's Bench; upon the claim of the vice-chancellor, on behalf of the chancellor, master and fellows of the university, entered on the roll in due form, setting out their jurisdiction under charters confirmed by act of parliament, and averring the cause of action to have arisen within such jurisdiction: although it was objected that the claim was preferred too early, on the mere issuing of a writ of *latitat* against the privileged member, to answer in a plea of *trespass*, before declaration; by which it could not appear where the cause of action arose, nor consequently that it arose within the town and suburbs of *Cambridge*, to which the jurisdiction of the university court in personal actions is confined; and that it was not sufficient to supply that fact by affidavit: But the court held, that it was the usual course to support claims of conusance by affidavits verifying the necessary facts, which it was competent to the plaintiff to deny in the same mode; and that the difficulty was not greater before, than after declaration; and the sooner the claim, if well founded, was preferred, the better for the plaintiff. In the same case it was objected, that if the claim might be preferred upon the *latitat* before declaration, then it ought to be preferred in the first instance, after the return of the *latitat*, namely, upon the day of appearance given by the rule of court, that is, in eight days: but the court held, that the first instance after the return day of the writ, which is the first step of the plaintiff entered on the record, continued till the declaration filed, which is the next step taken by the plaintiff on the record; within which time the claim was made. Another objection was, that it appeared by the roll, on which the power of attorney to claim conusance and the claim itself were made, that the claim was made on the return day of the writ, that is, on the fifteenth of *November*, before the power of attorney to claim it was executed, which bore date on the 27th: But the court took notice that the claim was in fact made on the 28th, in the letter missive and significatory of the vice-chancellor to them; although, in making up the roll, it was entered by their officer as on the return day of the writ by relation, no subsequent day in court being then given on the record.

As to the manner of making the claim, it is holden, that conusance may be claimed by the lord of the franchise in person, or by his bailiff or attorney:(a) If it be claimed by attorney, the warrant of attorney must be produced in court, and filed.(b) The grant of conusance must also be produced,(c) or an exemplification of it under the great seal;(d) and if the grant was before time of memory, an allowance must be shown in the King's Bench, or before justices in *Eyre*.(e) Upon a claim made by the university of *Orford*, or *Cambridge*,(f) there must be likewise, in addition
 [*634] *to the grant, an exemplification of the statute confirming it,(aa) together with an affidavit of the defendant's residence;(bb) and,

(s) 12 East, 12.

(a) Bro. Abr. tit. *Conusance*, 50. 12 Mod. 644, 666.

(b) Palm. 456. 1 Sid. 103. 1 Lev. 89, and see 12 East, 12.

(c) 12 Mod. 644. 1 Blac. Rep. 454.

(d) 5 Bur. 2820.

(e) Keilw. 189, 90. 1 Sid. 103. 1 Salk. 183. 1 Ld. Raym. 427, 8; 475, S. C. Gilb. C. P. 195, but see Bro. Abr. tit. *Conusance*, 51.

(f) 10 Mod. 126. 1 Blac. Rep. 454. 12 East, 12.

(aa) 13 Eliz. c. 29.

(bb) 1 Barnard. K. B. 49, 65. 2 Str. 810. 2 Wils. 311. 1 Blac. Rep. 454. 5 Bur. 2820. 12

where the claim is made by the university of *Cambridge*, that the cause of action, if any, arose within the liberty of the university, *viz.* within the town and suburbs of the town of *Cambridge*.(c) The claim itself must be entered upon a roll ;(d) and, after stating the several proceedings that have been had in the cause, must set forth the grounds upon which it is made, with great precision.(e) It may be demurred to, or the facts therein alleged may be controverted by pleading.(f) If allowed, a day is given upon the roll, for the lord of the franchise to hold his court ; and the parties are commanded to be there on that day.(g) But the record still remains in the court above ; and a transcript only is sent down to the court below : (h) so that if justice be not done there, as if the defendant be a stranger, and has nothing within the franchise by which he can be summoned, or if the judge misbehave himself, &c. the plaintiff shall have a re-summons.(i) upon the record in the court above ; and if a re-summons issue, upon failure of right in a franchise, the lord of the franchise shall never afterwards have conusance of that plea.(k)

Pleas in abatement to the person of the *plaintiff*, are either that he is not in existence,(being only a fictitious person,(l) or dead,)(m) or else that being in existence, he is an alien enemy,(n) attainted of treason or felony.(o) outlawed upon mesne or final process,(p) under a *premunire*.(q) excommunicated,(r) or convicted of popish recusancy.(s) When the cause of action is forfeited, as by the plaintiff's being an alien enemy,(t) attainted,(u) or outlawed for felony,(x) there his disability may be pleaded in abatement, or in bar, but otherwise it can only be pleaded in abatement.

*Pleas in abatement to the person of the *defendant* are, that he is privileged, as an attorney or officer of the court ;(a) under the [*635] king's protection : (b) or an infant,(cc) when sued as heir on the obligation of his ancestor, &c. ; in which latter case, the *parol* shall demur, or proceedings be stayed, till he come of age. There are two ways of pleading an attorney's privilege, first, with a *profert* of a writ of privilege, or of an exemplification of the record of his admission ; upon which the plaintiff must reply *nul tiel record*, and cannot otherwise deny the defendant's being an attorney ; secondly, as a mere matter of fact, without a *profert* ;(dd) and then a *certiorari* shall be awarded, to certify whether he be

East, 12 ; but see 15 East, 634, where an affidavit of the residence of a common servant, called *Marshal* of the University, for the execution of local duties therein, was dispensed with.

(c) 12 East, 12. (d) Comb. 319. 1 Barnard. K. B. 65. 2 Str. 819.

(e) For the form of a claim of conusance by the university of *Oxford*, see Willes, 233. (a.) 2 Wils. 406, and for a similar claim by the university of *Cambridge*, see 12 East, 12.

(f) 2 Wils. 409, 10. Comb. 319.

(g) 2 Ld. Raym. 836, 7. 12 Mod. 644. 3 Salk. 79, S. C. (h) *Id.* Jenk. 31.

(i) *Id.* Hardr. 407, but see Vin. Abr. tit. *Conusance*, 589. 10 Mod. 127.

(k) Jenk. 34.

(l) Ast. Ent. 10. 3 Inst. Cl. 89.

(m) Ast. Ent. 8. 3 Inst. Cl. 75, &c.

(n) 1 Lutw. 34. 3 Inst. Cl. 16.

(o) Carth. 137, 8.

(p) 1 Lutw. 6, 1529. 3 Inst. Cl. 23, &c. 1 East, 634. And as to the plea of *outlawry*, in courts of Equity, see Beam. Pl. Eq. 100, &c. ; and as to the plea of *excommunication*, *Id.* 106, &c. ; of *attainder*, *Id.* 109, &c. ; of *alien enemy*, *Id.* 112, &c. ; of *infancy* of plaintiff, *Id.* 115, 16 ; of *coverture* of plaintiff, *Id.* 116, 17 ; and of *bankruptcy*, or *insolvency* of plaintiff, *Id.* 118, &c.

(q) Co. Lit. 129, b. (r) 1 Lutw. 17. 3 Inst. Cl. 18. (s) 3 Inst. Cl. 20. 1 Str. 520.

(t) Co. Lit. 129, b. 6 Durnf. & East, 23, 35.

(u) Bro. V. M. 252.

(x) Co. Lit. 128, b. Gilb. C. P. 200.

(a) 1 Lutw. 639.

(b) 2 Bro. Ent. 106.

(cc) Rastal, 360, 362, 379, Bro. Red. 195. And as to pleas to the person of the *defendant*, in courts of Equity, see Beam. Pl. Eq. 129, &c.

(dd) Lil. Ent. 3.

an attorney or not.(e) And where an attorney of the King's Bench, in pleading his privilege to an action by *original*, stated the custom of the court to be, that no attorney ought to be compelled to answer an original writ, unless first forejudged from his office, &c. (which is not the custom of this court, but of the Common Pleas,) the court nevertheless held the plea to be sufficient; as they will take notice of the custom, that an attorney of this court can only be sued by *bill*, and what is stated as to forejudging may be rejected as surplusage.(f)

Under the head of pleas to the person, may also be included *coverture*, in the plaintiff,(g) or defendant;(h) or that the plaintiffs or defendants, suing or being sued as husband and wife, are not married:(i) or any other plea for want of proper parties, as that there is an executor,(k) administrator,(l) or other person,(m) not named, who ought to be made a co-plaintiff or co-defendant. We have already seen, that if an action be brought for a *tort*, by one of several joint tenants or tenants in common,(n) or against one of several partners upon a joint *contract*,(o) the defendant must plead in abatement, and cannot otherwise take advantage of the objection.(p) And he may plead a secret partnership in abatement, though the plaintiff had no means of knowing of the partnership, and could not have proved it, had he joined the secret partner in the action.(q) It should also be observed, that if an action be brought against a carrier, in *case* on the custom of the [*636] realm, for not safely carrying goods, the defendant may plead *in abatement, that his partners ought also to have been sued:(a) Or, if an action of *debt* be brought on the statute 9 Ann. c. 14, to recover back money won at play, he may plead in abatement, that the money was due from others not named, as well as from himself.(b) In these cases, the defendant, if required, must deliver to the plaintiff the places of abode and additions of the parties jointly liable; or in default thereof, the court of King's Bench, we have seen,(c) will set aside the plea. And on a plea in abatement of the nonjoinder of A. B. as a defendant, his declarations made before action brought, are evidence in support of the plea. 1 Moody & M. 45. But in an action on the case against a common carrier, for not safely carrying a passenger, the defendant cannot plead in abatement, the nonjoinder of a co-proprietor.(dd) In a plea in abatement, that another person ought to have been sued with the defendant, it is not necessary to lay a

(e) 1 Ld. Raym. 336. 7 Mod. 106. 2 Salk. 545. 6 Mod. 305. 2 Ld. Raym. 1172. 1 Str. 76, 532.

(f) 9 East, 424.

(g) Ast. Ent. 9. 3 Inst. Cl. 70. If the plaintiff take husband, after suing out the writ and before declaration, the defendant cannot give the coverture in evidence under the general issue, but must plead it in abatement. 6 Durnf. & East, 265. And as to the plea of *coverture* of the plaintiff, in courts of Equity, see Beam. Pl. Eq. 116, 17.

(h) 1 Lutw. 23. 3 Inst. Cl. 71.

(i) 3 Inst. Cl. 69.

(k) Id. 51. Rastal, 325, a.

(l) 3 Inst. Cl. 53. Rastal, 324.

(m) 3 Inst. Cl. 53, 119. 1 Lutw. 696, and see 1 East, 634.

(n) *Ante*, 9, and see 1 Salk. 32, 290. 2 Str. 820.

(o) *Ante*, 6, but see 2 Mod. 279. 3 Mod. 321. 2 Salk. 440. Show. 29, 101. 3 Lev. 258. Carth. 58, S. C. Gilb. Evid. 189.

(p) 1 Wms. Saund. 5 Ed. 291, b. (4.)

(q) 5 Taunt. 609. 1 Marsh. 246, S. C., but see Abbott on Shipping, 5 Ed. 76. 1 Stark. Ni. Pri. 338. 3 Stark. Ni. Pri. 8. 1 Moody & M. 88, *contra*.

(a) 6 Durnf. & East, 369. 2 New Rep. C. P. 365, but see 5 Durnf. & East. 649. 2 Chit. Rep. 1. 6 Moore. 141. 3 Brod. & Bing. 54, S. C. *Ante*, 9.

(b) 7 Durnf. & East, 257.

(c) *Ante*, 534.

(dd) 2 Chit. Rep. 1, and see 5 Durnf. & East, 649. 6 Moore, 141. 3 Brod. & Bing. 54. 9 Price, 408, S. C.

venue: And if it be pleaded that such other person is alive, to wit, in *Spain*, it will be considered as pleaded without any venue.^(c) And, by the statute 9 Geo. IV. c. 14, § 2, "if any defendant or defendants, in any action on any simple contract, shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial, that the action could not, by reason of the therein recited acts or that act, or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same."

Pleas in abatement to the *count* can only be pleaded in actions by *original writ*: and are for some uncertainty, repugnancy, or want of form,^(f) not appearing on the face of the writ, or else for some variance therefrom.^(g) To the *writ*, they are either for matter apparent on the face of it, or for matter *dehors*,^(h) existing at the time of suing out the writ, or arising afterwards.⁽ⁱ⁾ To the *form* of the writ, they are for some apparent uncertainty, repugnancy, or want of form:^(k) *variance*^(l) from the record, specially, &c.; *misnomer*^(m) of the plaintiff or defendant,⁽ⁿ⁾ or of one of several plaintiffs;^(o) or, in actions by original writ, the omission or mistake of the defendant's *addition*,^(p) that is, of his estate, degree, mystery, or place of abode. But the plaintiff may sue the defendant, either by the addition of his degree or mystery;^(q) and may name him of the place where he *lately dwelt*:^(r) And as a plea of the statute of additions is bad, without *oyer* of the original writ, which by the practice of the court is not grantable, it seems that such a plea cannot now be pleaded; and accordingly, in several recent instances, the courts have ordered it to be set aside.^(s) And, in general, it may be remarked, that since the courts have refused to allow *oyer* of the original writ, pleas in abatement thereto, for objections *apparent* on the face of it, or *variance* between the writ and *the [*637] count, have fallen into disuse; and it is now usual to plead in abatement for matters *extrinsic* only, such as *privilege*, *coverture* in the plaintiff or defendant at the time of bringing the action, *non-joinder* of a necessary party to suit, *misnomer* of the plaintiff or defendant, or *another action* depending for the same cause.

Pleas in abatement to the *action* of the writ are, that the action is misconceived;^(a) or was prematurely brought, before the cause of it arose;^(b) or that there is another action depending for the same cause.^(c) It is said.

(c) 7 Durnf. & East, 243. 1 Wms. Saund. 5 Ed. a. (1). *Ante*, 428, (b).

(f) 3 Inst. Cl. 62.

(g) Reg. Pl. 277, 78.

(h) Gilb. C. P. 51.

(i) Com. Dig. tit. *Abatement*, (II.)

(k) 1 Lutw. 25. 3 Inst. Cl. 49, 54, 66, &c.

(l) 3 Inst. Cl. 43, &c.

(m) 1 Lutw. 10. Ast. Ent. 1. 3 Inst. Cl. 79, &c.; and see 1 Chit. Rep. 512, 13, (a). 705, *in notis.* *Ante*, 447, &c.

(n) Append. Chap. XXVI. § 1, &c. For a replication that the defendant was called as well by one name as the other, see *Id.* § 6; and for the evidence on this issue, see 3 Maule & Sel. 453.

(o) 6 Maule & Sel. 45.

(p) Stat. 1 Hen. V. c. 5. 3 Inst. Cl. 92.

(q) 8 Mod. 51, 52. 1 Str. 556. 2 Str. 816. 2 Ld. Raym. 1541, S. C.

(r) 2 Str. 924.

(s) 3 Bos. & Pul. 395. 7 East, 383. *Ante*, 564.

(a) 3 Inst. Cl. 120, &c.

(b) 1 Lutw. 8, 13. 3 Inst. Cl. 56. Fort. 334.

(c) 1 Lutw. 33. 3 Inst. Cl. III. And as to the plea of another suit depending, in courts of equity, see Beam. Pl. Eq. 134, &c., 140, &c.

in one case, *(d)* that the pendency of a prior action for the same cause may be pleaded in bar to a second action; but it cannot be pleaded in abatement. This, however, must be understood with reference to the particular case of a popular action, and not as a general rule applicable to all cases.

The general requisites of a plea in abatement are, that it should be certain, *(e)* give the plaintiff a better writ, *(f)* and have an apt and proper beginning and conclusion: For it is the beginning and conclusion that make the plea. *(g)* Pleas to the jurisdiction of the court, or in abatement, cannot be pleaded and after making a *full* defence; *(h)* the former must be pleaded in *person*, but the latter may be pleaded by *attorney*. *(i)* And they are both usually begun, by defending the *wrong* (or *force*) and *injury, when, &c.* which is considered only as making *half* defence: *(k)* for the *&c.* implies only *half* defence, in cases where such defence is to be made, but will be understood as a *full* defence, if that be necessary. *(l)* When the defendant pleads to the writ, for matter *apparent*, he should begin his plea by praying judgment of the writ, and conclude it in the same manner; *(m)* but when the plea is for matter *dehors*, as joint-tenancy, non-tenure, or the like, there he should conclude it only in this manner. *(n)* A plea of misnomer of the defendant is bad, which begins thus: "And the said *Richard*, sued by the name of *Robert, &c.*" *(o)* or thus: "And *he* against whom the plaintiff hath exhibited his bill, by the name of J. S. &c.;" *(o)* and it must also [*638] set out the defendant's *surname*. *(p)* In pleading *to the jurisdiction, the defendant should conclude his plea by praying judgment *if the court will take further cognizance of the suit*. *(a)* But the plea of an attorney, to an action brought against him by *bill* in the King's Bench, as a common person, stating his privilege not to be compelled to answer any bill exhibited against him in custody of the marshal, &c. and concluding that the court would not *take further cognizance of the action aforesaid against him*, instead of praying judgment of the *bill*, and that the same might be quashed, will not be taken as a plea to the jurisdiction, but only as objecting to the court's taking cognizance of the action against one of its attorneys, in that form; and therefore the court will adjudge the bill to be quashed. *(b)* In pleading to the person, the conclusion is, *whether the defendant ought to answer, or the plaintiff to be answered*; *(c)* or if excommunication, or other temporary disability, be pleaded, *that the plaintiff*

(d) Say. Rep. 216.

(e) Co. Lit. 203, a. Cro. Jac. 82. 3 Lev. 67.

(f) Brownl. 139. *Turtle v. Lady Worsley*, M. 29 Geo. III. K. B. 6 Maule & Sel. 88; and see Steph. Pl. 435, 36.

(g) 1 Sid. 189. 1 Vent. 136. Comb. 106, 7. 1 Show. 4, S. C. 1 Ld. Raym. 593. 1 Salk. 210. S. C. 12 Mod. 525. 10 Mod. 112, 192, 210. Willes, 479. 2 Wms. Saund. 5 Ed. 209, b, c, d. Steph. Pl. 392, &c. 6 Taunt. 587. 2 Marsh. 299, S. C.

(h) Steph. Pl. 436.

(i) Gilb. C. P. 187; and see 2 Blac. Rep. 1094. 2 Wms. Saund. 5 Ed. 209, b. 1 Chit. Pl. 4 Ed. 368, &c.

(k) Lit. § 195. Co. Lit. 127, b. Hardr. 365. 1 Lutw. 7. Willes, 40. Gilb. C. P. 188. *Whalley v. Cadmerson*, M. 15 Geo. II. C. P. *Thomson v. Stockdale*, H. 23 Geo. III. K. B. cited in Willes, 41, *(c)*. 8 Durnf. & East, 631. 3 Bos. & Pul. 9, *(a)*.

(l) 8 Durnf. & East, 633. 3 Bos. & Pul. 9, *(a)*. 2 Wms. Saund. 5 Ed. 209, b. Steph. Pl. 430, &c.

(m) Moor. 30. Dalis. 33, S. C. Reg. Pl. 273. 2 Wms. Saund. 5 Ed. 209, (1). 1 Lutw. 11. 12 Mod. 525.

(n) 5 Durnf. & East, 487.

(o) 8 Durnf. & East, 515. 5 Taunt. 652, 653, *(a)*; and see 2 Wms. Saund. 5 Ed. 209, a.

(p) 5 Taunt. 652.

(a) Latch, 178. 2 Wms. Saund. 5 Ed. 209, e.

(b) 12 East, 544.

(c) Latch, 178. Lit. § 195, &c.

may remain without day, until, &c.(d) In pleading to the writ or count, if the action be by *original*, the plea should conclude, by praying judgment of the writ or count, and that the same may be quashed:(e) But if the action be by *bill*, the plea should conclude by praying judgment of the bill only, and not of the declaration:(f) or of the writ and declaration founded thereon:(g) nor even, as it seems, of the bill and declaration.(h) A mis-statement, in the traverse at the conclusion of a plea of mis-nomer, of the name by which the defendant is called in the declaration,(i) or a prayer of judgment *if* the bill, and that the same may be quashed,(k) is ill on special demurrer. And where, to a joint action of trespass against four defendants, one of them pleaded a misnomer in abatement, and concluded by praying judgment of the writ, and that the same may be quashed, &c., the Court of Common Pleas held the plea to be bad on general demurrer, as the misnomer only operated to abate the writ as to the party misnamed. 1 Moore & P. 26. It seems to be a rule, that pleas in abatement are not amendable; because they are dilatory, and do not go to the merits of the action:(l) which rule has been extended to criminal cases:(m) and the plaintiff therefore need never demur specially to such pleas.(n) But the plaintiff has been allowed to withdraw a demurrer thereto, and reply.(o)

Pleas to the jurisdiction of the court,(p) and in abatement,(q) ought to be pleaded before a general imparlance; and they must be pleaded within *four days inclusive(a) after the delivery, or filing and [*639] notice, of the declaration;(b) unless the declaration be delivered or filed after term, or so late in the term, that the defendant is not bound to plead to it that term; in both which cases, the defendant in the King's Bench may, within the first four days inclusive of the next term, plead to the jurisdiction of the court, or in abatement, as of the preceding term:(c) But, in the Common Pleas, the defendant cannot plead in abatement, within

(d) 3 Lev. 240. 1 Lutw. 19. 3 Inst. Cl. 18. 1 Str. 521. 2 Wms. Saund. 5 Ed. 209, c.

(e) 5 Mod. 132.

(f) 2 Bos. & Pul. 124, (c). 2 Chit. Rep. 539, S. C., and see 5 Mod. 132, 144. 12 Mod. 133, S. C. 10 Mod. 192, 210. 2 Wms. Saund. 5 Ed. 209, d. Per Cur. E. 25 Geo. III. Excheq.

(g) 1 Barn. & Ald. 172.

(h) 2 Maule & Sel. 484, and see 2 Chit. Rep. 539, (a.)

(i) 1 Chit. Rep. 705, *in notis*.

(k) 3 Durnf. & East, 185. For the manner of concluding a plea in abatement of misnomer, to an indictment for a misdemeanor, see 10 East, 83.

(l) Cas. Pr. C. P. 29. Per Buller, J. E. 22, Geo. III. K. B.

(m) 2 Barn. & Cres. 871. 4 Dowl. & Ry. 592, S. C.

(n) Per Bayley, J. 2 Maule & Sel. 485.

(o) 2 Chit. Rep. 5.

(p) Dyer, 210, b. *in marg.* T. Raym. 34. 1 Keb. 137, S. C. Gilb. K. B. 317, 344. Gilb. C. P. 183, 4; 187. 4 Bac. Abr. 28, 9. 8 Durnf. & East. 474. Steph. Pl. 436; but see Dyer, 210, b. *in marg.* Doc. Plac. 234. Latch, 83. Cro. Car. 9. Sty. Rep. 90. Willes, 239. Vin. Abr. tit. *Cousance*, p. 591, as to the plea of ancient demesne.

(q) 2 Keb. 143. 1 Mod. 14. 1 Vent. 184. 1 Lutw. 23. Sty. P. R. 465. Gilb. K. B. 344. R. E. 5 Ann. (a.) R. T. 5 & 6 Geo. II. (b.) K. B. 1 Str. 523. 2 Chit. Rep. 5, (a.) 4 Durnf. & East, 520. 6 Durnf. & East, 369. 7 Durnf. & East, 447, (d.) Barnes, 224, 334. Ante, 463.

(a) 1 Durnf. & East, 277. 5 Durnf. & East, 210.

(b) 11 Mod. 2. 2 Str. 1192. 1 Wils. 23, S. C. 2 Str. 1268. Smith v. Whymall, M. 26 Geo. III. K. B. 1 Durnf. & East, 277, 689. 7 Durnf. & East, 298. 11 East, 411; and see Gilb. C. P. 52. Pr. Reg. 3. Cas. Pr. C. P. 23, S. C. Pr. Reg. 286. Cas. Pr. C. P. 63, S. C. Forrest, 149. 13 Price, 178. McClell. 65, S. C.; but see Sty. P. R. 458, 468. R. E. 5 Ann. (a.) K. B. 1 Durnf. & East, 278, 9; from whence it should seem, that formerly they were allowed to be pleaded, at any time before the rule for pleading had expired.

(c) 1 Salk. 367. Gilb. K. B. 344, 5. Per Buller, J. E. 22 Geo. III. K. B. and see 3 Barn. & Ald. 259. 1 Chit. Rep. 704, S. C. Steph. Pl. Append. xxvii. Ante, 463.

the first four days of the next term, without a special imparlance, which may be granted by the prothonotaries.(d) If such a plea be pleaded after a *general* imparlance, the plaintiff, we have seen,(e) may either sign judgment, or apply to the court by motion to set it aside; or he may demur thereto, or allege the imparlance in his replication, by way of estoppel: and if it be not delivered, or left in the office, in due time, it is not to be received, whether a rule to plead be given or not.(f) And *Sunday*, or any other day on which the court does not sit, is to be accounted as one of the four days,(g) unless it happen to be the last.(h) It is a rule in the King's Bench, that pleas in abatement cannot be filed, before the plaintiff has declared,(i) and the defendant has appeared:(k) And if the defendant plead in *bar* before the bail are perfected, his plea may be considered as a nullity, although the bail afterwards justify.(l) So where the plaintiff declared *de bene esse*, and the defendant pleaded in abatement before he had put in special bail, and the plaintiff, treating his plea as a nullity, signed interlocutory judgment, the court held it to be regular.(m) But in a country cause, if the defendant put in special bail in time, he may plead in abatement, though the bail be not perfected till after the four days, if they be ultimately perfected within the time allowed by the practice of the court:(n) And a similar practice has since obtained in town causes.(o)

*Before the statute for the amendment of the law, when the [*640] defendant pleaded a *foreign* plea, he was obliged to verify it by affidavit.(a) And now, by that statute,(b) "no *dilatory* plea shall be received in any court of record, unless the party offering such plea do, by affidavit, prove the truth thereof; or show some probable matter to the court, to induce them to believe that the fact of such dilatory plea is true." The affidavit required by this statute may be made by the defendant himself, or by a third person:(c) and as the statute only requires probable cause, there does not seem to be any necessity for an affidavit, when the plea is for matter apparent on the face of the proceedings, as want of addition,(dd) &c.; nor when the truth of the plea will appear to the court, upon an inspection of their own records, as where an attorney of the King's Bench pleaded that he was an attorney of that court, and ought to be sued by bill.(ee) Yet, where the defendant pleaded, after *oyer* of the original, that it was not returned, the Court of King's Bench set aside the plea, for want of an affidavit of the truth of it.(ff) *Aid prayer*,(gg) in the Common Pleas, or a plea to a *scire facias* against heir and tertenants, that

(d) Pr. Reg. 1. Cas. Pr. C. P. 78. Barnes, 224, S. C. *Id.* 334, S. P. *Ante*, 462, 3.

(e) *Ante*, 463, 4. But after a *special* imparlance, the defendant may plead in abatement, though not to the jurisdiction of the court. *Ante*, 463.

(f) 1 Lil. P. R. 3, R. E. 5 Ann. (a.) K. B. 1 Durnf. & East, 278, 9. 7 Durnf. & East, 298. Cas. Pr. C. P. 23, 64, 79.

(g) R. E. 5 Ann. (a.) K. B. 5 Durnf. & East, 210.

(h) 3 Durnf. & East, 642.

(i) *Id.* 8. 2 Dowl. & Ry. 252.

(j) 2 Chit. Rep. 7.

(l) 4 Durnf. & East, 578. *Ante*, 465, 6.

(m) 2 Dowl. & Ry. 252. *Ante*, 465, 6.

(n) 2 East, 406; and see 11 East, 411.

(o) *Holland v. Sladen*, M. 47 Geo. III. K. B. 11 East, 411. 13 East, 170; and see Forrester, 149.

(a) 2 Lil. P. R. 299, Sty. Rep. 435. 1 Wms. Saund. 5 Ed. 98. Carth. 402. 5 Mod. 335, S. C. 1 Wms. Saund. 5 Ed. 98. (1.)

(b) 4 & 5 Ann. c. 16, § 11.

(c) Pr. Reg. 6 Barnes, 344, S. C.

(dd) Pr. Reg. 5. 3 Bos. & Pul. 397, *accord*; and see 2 Wms. Saund. 5 Ed. 210, *d.*

(ee) *M'Dougall v. Claridge*, M. 48 Geo. III., and see 6 Mod. 114. 2 Blac. Rep. 1088.

(ff) 1 Str. 639. 2 Ld. Raym. 1409, S. C.

(gg) 2 Bos. & Pul. 384.

there are other tertenants not returned, (*hh*) is holden to be a dilatory plea within the statute, and must be verified by affidavit.

In the King's Bench, a plea in abatement should be signed by counsel; and filed in the office of the clerk of the papers: and if it be not signed, it is irregular, and the plaintiff may sign judgment as for want of a plea. (*ii*) In the Common Pleas, it is signed by a serjeant; and either delivered to the plaintiff's attorney, or filed in the prothonotaries' office: and, in both courts, an affidavit should be annexed to the plea, stating that it is true, in substance and matter of fact; (*k*) And if the plea be not filed in due time, (*l*) or there be no affidavit annexed to the truth of it, (*m*) or a defective affidavit, (*n*) the plaintiff may consider it as a nullity, and sign judgment; or he may move the court to set it aside. (*o*) But the court will not, upon motion, quash a bad plea in abatement. (*p*) And the plaintiff cannot sign judgment after a plea in abatement, because the affidavit to verify the plea was sworn before the defendant's attorney. (*q*) A defendant putting in a plea in abatement in time, with an affidavit in the usual form, that the promises contained in the declaration were made, if at all, by others as well as himself, which affidavit was sworn at *Liverpool* on the [*641] day of filing the declaration in town, before the defendant could have seen it, was holden, in the King's Bench, not to be a nullity, so as to entitle the plaintiff to sign interlocutory judgment as for want of a plea: (*a*) And the Court of Common Pleas refused to grant a rule, to quash an insensible plea in abatement; saying, that they would not try the goodness of a demurrer on motion: but the plaintiff might, at his own peril, have signed judgment. (*b*) In the Exchequer, if a plea in abatement be not supported by a proper affidavit of the truth of it, the plaintiff may sign judgment immediately: (*c*) and a mistake in omitting the name of one of the plaintiffs, in the title to the affidavit, renders it insufficient to support the plea, although it refer expressly to the next plea, in which the title of the cause is right: (*c*) And, in that court, if the plaintiff has regularly signed judgment for want of an affidavit, the court will not afterwards permit the defendant to make one. (*d*)

When a plea in abatement is regularly put in, the plaintiff must reply to it, or demur. If he reply, and an issue *in fact* be thereupon joined, and found for him, the judgment is *peremptory, quod recuperet*; (*e*) but if there be judgment for the plaintiff, on *demurrer* to a plea in abatement, or replication to such plea, the judgment is only *interlocutory, quod respondeat ouster*. (*f*) In the latter case, the defendant has in general four days

(*hh*) Forrester, 144.

(*ii*) 1 Chit. Rep. 209.

(*k*) 2 Str. 705; and see Append. Chap. XXVI. § 5.

(*l*) 1 Durnf. & East, 277, 689. 5 Durnf. & East, 210. 7 Durnf. & East, 298. *Ante*, 566.

(*m*) Pr. Reg. 4. Forrester, 139. *Ante*, 565; but see 1 Str. 638.

(*n*) 2 Moore, 213.

(*o*) 1 Str. 638, 39. 2 Str. 705, 738. Say. Rep. 19, 293. 1 Ken. 364. S. C. 3 Bur. 1617; but see 2 Moore, 213.

(*p*) 2 Barn. & Cres. 618. 4 Dowl. & Ry. 114, S. C.

(*q*) 3 Maule & Sel. 154. *Ante*, 565.

(*a*) 4 East, 348. And see 4 Maule & Sel. 332, where it was said by Bayley, J., that an affidavit to support a plea in abatement, may be made before declaration.

(*b*) 4 Taunt. 668.

(*c*) 3 Price, 197. *Ante*, 565.

(*d*) Forrester, 144.

(*e*) Gilb. C. P. 53. 1 Ld. Raym. 594. 2 Ld. Raym. 1022. 1 Str. 532. 2 Wils. 367. 1 East, 542. 2 Bos. & Pul. 389, (*a*); but see 1 East, 636. 2 Wms. Saund. 5 Ed. 211, (3).

(*f*) *Id. Ibid.* 2 Wms. Saund. 5 Ed. 211, (3). Append. Chap. XXVI. § 9, 10. But see 3 Barn. & Cres. 502. 5 Dowl. & Ry. 422, S. C., by which it appears that the judgment against

time to plead; but this is in the discretion of the courts:(*g*) and they will sometimes order him to plead *instante*, or on the morrow. In *assumpsit*, the defendant pleaded that the promises were made by him jointly with another; and issue being taken upon that fact, the jury by their verdict found that the defendant promised, without stating whether he promised alone or jointly with another; and the court held that this verdict was bad, because it did not distinctly pronounce upon the issue.(*h*) After a judgment of *respondeat ouster*, it is said, there can be no plea in abatement; for if it were allowed, there would be no end of such pleas:(*i*) But this must be understood of pleas in abatement *in the same degree*, as popish recusancy and outlawry,(*k*) being both to the person; for the defendant may plead to the *person* of the plaintiff, and if that be overruled, he may afterwards plead to the *form* of the writ.(*l*)

[*642] *The judgment for the *defendant*, on a plea in abatement, whether it be on an issue in *fact* or in *law*, is that *the writ or bill be quashed*;(a) or if a temporary disability or privilege be pleaded, as excommunication, or the king's protection, infancy, &c., *that the plaint remain without day, until, &c.* A writ in *debt* may be abated in part, and stand good for the remainder:(*b*) And if a plea in abatement contain matter which goes in part abatement of the writ only, but conclude with a prayer that the whole writ may be abated, the court may abate so much of the writ as the matter pleaded applies to:(*c*) On an issue in *fact*, the defendant is entitled to *costs*; but not on an issue in *law*.(*d*)

[*643]

*CHAPTER XXVII.

Of PLEAS in BAR: and herein, of the GENERAL ISSUE, and what may be given in EVIDENCE under it; of SPECIAL PLEAS, and when necessary to be pleaded; of PLEADING SEVERAL MATTERS, and the COSTS thereon; and of the PLEA, and NOTICE of SET-OFF, &c.

PLEAS in bar are calculated to show, either that the plaintiff never had any cause of action, or if he had, that it is discharged by some subsequent matter: And they are in denial, or confession and avoidance, of the cause of action; or they conclude the plaintiff by matter of estoppel.(*aa*) Pleas in denial are of the whole, or a part of the declaration: and in avoidance; they are by matter precedent, which shows the plaintiff never had a cause

the defendant, on demurrer to a plea of *autrefois acquit*, to an indictment for a misdemeanor, is final.

(*g*) Comb. 19.

(*h*) 3 Barn. & Ald. 605.

(*i*) 4 Bac. Abr. 51. Gilb. C. P. 186. 2 Wms. Saund. 5 Ed. 40, 41. 12 Mod. 230.

(*k*) Hetl. 126.

(*l*) Com. Dig. tit. *Abatement*, I. 4, cites Theol. Dig. lib. X. c. 1.

(*a*) Gilb. C. P. 52. Append. Chap. XXVI. § 7, &c.; and see 3 Maule & Sel. 453, 54.

(*b*) 1 Wms. Saund. 5 Ed. 285, *a*, (7). 2 Wms. Saund. 5 Ed. 210, &c.

(*c*) 2 Bos. & Pul. 420.

(*d*) 2 Ld. Raym. 992. 1 Salk. 194, S. C. And see further, as to pleas in *abatement*, their effect, qualities and form, the affidavit of the truth of them, the replications, &c., thereto, and judgments thereon, 1 Chit. Pl. 4 Ed. 386, &c. And as to pleas in *abatement*, in courts of equity, see Beam. Pl. Eq. 53, 54, 57, 280, &c.

(*aa*) 5 Hen. VII. 14. 1 Leon. 77. Sav. 86.

of action, and is called an avoidance in *law*, or by matter subsequent, which discharges the cause of action, and is called an avoidance in *fact*.(bb)

In actions upon CONTRACTS, the defendant may either plead the general issue which denies that there was any contract between the parties, in point of fact; as in *assumpsit*, *non-assumpsit*.(cc) in *debt* on simple contract, *nul debet*;(dd) in *covenant* or *debt* on speciality, *non est factum*;(e) and in *debt* on record, or *scire facias*, *nul tiel record*;(f) or if there was a contract in point of fact, he may plead some special matter, which shows that it was *void* in point of law, as by *coverture*, or the statutes of *gaming* or *usury*, &c., or *voidable*, by *infancy*, or *duress* of imprisonment, &c.: or if there was a good and valid contract, that has been *performed*; or if not, that there was some legal *excuse* for its non-performance, arising from the act of God, or the law, or of the king's enemies, or from the act or default of the plaintiff, either by *releasing* the defendant from the performance of the contract, refusing a tender, or *hindering* him from performing it, or by the non-performance of a condition precedent, &c. These pleas tend to show that the plaintiff never had any cause of action: or, admitting that he had, the defendant may plead that it was *discharged* by some subsequent or collateral matter; as, at common law, by an *accord* and **satisfaction*;(a) *arbitrament*;(b) *release*, *former recovery*, *acquittal* or [*644] *conviction*, *foreign attachment*;(c) or *set-off*; or that the cause of action was *forfeited*, by the plaintiff's being an *alien enemy*;(d) *attainted*;(ee) or *outlawed*; or, by act of parliament, that it was *assigned* to other persons, under the statutes relating to *bankrupts*;(ff) or *insolvent debtors*; or he may plead his own *bankruptcy*, or discharge under an *insolvent debtors' act*; or that the debt ought to be sued for in a *court of conscience*; or lastly, that the remedy is barred by the *statute of limitations*.(g)

(bb) 5 Hen. VII. 14.

(cc) Append. Chap. XXVII. § 1, 2.

(dd) *Id.* § 3, 4.

(e) *Id.* § 5.

(f) *Id.* Chap. XXXII. § 1. And for the forms of general issues in different actions, see Steph. Pl. 172, &c.

(a) 4 Barn. & Cres. 506. 6 Dowl. & Ry. 567, S. C.

(b) *Arbitrament*, without performance, is a good plea, where the parties have mutual remedies. 1 Younge & J. 19.

(c) 2 Chit. Rep. 438.

(d) 6 Durnf. & East, 23, 35. But the court of King's Bench, would not stay judgment and execution, on a summary application, because the plaintiffs, *after verdict*, had become alien enemies. 9 East, 321.

(ee) By *attainder*, all the personal property, and rights of action in respect of property, accruing to the party attainted, either before or after attainder, are vested in the crown, without office found; and therefore, attainder may be well pleaded in bar to an action on a bill of exchange, indorsed to the plaintiff after his attainder. 2 Barn. & Ald. 258.

(ff) 8 Durnf. & East, 140. 1 Bos. & Pul. 418. 7 East, 53.

(g) For a full account of the pleas, &c., in *assumpsit*, in *denial*, see Lawes, on Pleading, Chap. XVI., in *avoidance*; *Id.* Chap. XVII., in *performance*, and *excuse* thereof; *Id.* Chap. XVIII., and in *discharge*, at common law or by statute; *Id.* Chap. XIX. XX. And see the Elements of Pleas in Equity, by Mr. *Beames*, in which there is a clear and learned account of the correspondence, as far as it goes, between pleas at law and in equity; which latter pleas are treated of as applicable to the relief and discovery sought by original bills, and also to bills not original, as bills of revivor, &c., and to information filed by the attorney-general. From these elements it appears, that in equity, as well as at law, there are pleas to the jurisdiction, in abatement, and in bar; and the chief difference between the two courts arises, from pleas in denial of the facts which constitute the cause of action, or ground of complaint, and which at law are referred to the jury by the general issue, which denies the whole, or by pleas in denial of some particular facts necessary to maintain the action; but which, in equity, are the subject of answers. Pleas in equity are treated of by Mr. *Beames*, under the fourfold division, of pleas to the jurisdiction, to the person of the plaintiff

In an action against an *executor* or *administrator*, the defendant may plead any matter which the testator or intestate might have pleaded: and in addition thereto, he may deny the character in which he is sued, by pleading *ne unquus executor* or *administrator*; or, admitting it, he may plead that *no assets* have come to his hands, or that he has *fully administered* them, and that either generally, or specially, with the exception of assets to a certain amount, which are not sufficient to satisfy the plaintiff; or he may plead a *retainer* to pay his own debt, of equal or superior degree or debts of a superior degree due to third persons, on bonds or [*645] judgments, &c.(h) So, in an action against an *heir* or a *devisee*, the *defendant, in addition to any matter which might have been pleaded by the ancestor or deviser, may either deny the character in which he is sued; or, admitting it, may plead that he has *nothing by descent* or *devise*, either generally or specially, *viz.* that he has nothing but a reversion after an estate for life; or that he has *paid* debts of an equal or superior degree, to the amount of the assets descended or devised, or that he *retains* the assets to satisfy his own debt, of equal or superior degree, or debts of a superior degree due to third persons. The *heir*, if an *infant*, may also pray that the *parol* may demur, till he is of full age.

In actions for *WRONGS*, the defendant may either deny the charge contained in the declaration, by pleading the general issue; as in *case*, *not guilty* of the premises;(a) in *detinue*, *non detinet*: in *replevin*, *non cepit*:(b) and in *trespass vi et armis*, *not guilty* of the trespasses;(a) or he may plead specially, in justification or excuse of the injury complained of, as in *case* for a *libel* or *words*, by showing the truth of them, &c.

In *replevin*, the defendant may plead *property*, in himself or a third person; and where he goes for the return of the cattle or goods, he either *avows*, if the distress was made in his own right, or in right of his wife, or makes *cognizance*, if it was made by him as bailiff to another; but if he do not go for a return, he may merely *justify* the taking. Avowries and cognizances are founded on distresses at *common law*, for *rents*,(c) *services* or *customs*; or for *damage feasant*, and that either by the party in *possession*, claiming as freeholder,(d) or under a demise, or by *commoners*; or for *finés* or *amerciements*, or on *bye laws*, or *judgments* of the county court, or court baron: or they arise out of distresses by *act of parliament*; as for *double rent*, on the statute 11 Geo. II. c. 19, § 18, or, after a *fraudulent removal* of goods, on the same statute, &c. *Pleas in bar* to avowries and cognizances for *rent*, &c., either deny the tenancy,(e) or that there was any rent in arrear,(e) &c., or, if the distress was for *damage feasant*, they are under *title*,(f) or rights of *common*, or for *defect of fences*, &c.

In *trespass* to the *person*, the defendant may plead *son assault demesne*,

or defendant, to the bill, and in bar: but what he considers as pleas to the bill, as that there is another suit depending for the same cause, &c., would at law be considered as pleas in abatement; and pleas in bar, in equity, are either statutory bars, such as the statute of limitations, or of frauds, &c., or founded on some matter precedent or subsequent, showing that the complainant never had any title to the relief or discovery he seeks, or if he had, that it is discharged by a release, &c.

(h) For pleas, &c., in actions by and against *executors* and *administrators*, see Lawes, on Pleading, Chap. XXI.

(a) Append. Chap. XXVII. § 6.

(c) *Id.* § 63.

(e) *Id.* § 69.

(b) *Id.* Chap. XLV. § 64.

(d) *Id.* § 66.

(f) *Id.* § 67.

either *generally*, in defence of himself or of third persons, or *specially*, with an *irâ motus*; *molliter minus imposit*, in defence of real or personal property, or to preserve the peace, and prevent damage; *moderate correction*, or *amicable contest*, &c. In *trespass to personal property*, in taking cattle or goods, he may plead that they are his own *property*, giving colour, or *tenancy in common* with the plaintiff; or, as in *replevin*, that they were taken under distresses, at *common law* or by *act of parliament*; or, in *trespass for killing dogs*, he may justify as park-keeper, &c., or for cutting *ropes*, that it was necessary, to prevent damage. In *trespass to real property*, the defendant may plead that the *locus in quo* is his freehold, (*liberum tenementum*), or that of a third person, under whom he acted; or that he has *title less than freehold*, giving colour, or is *tenant in common* with the plaintiff; or he may justify under rights of *common* of *pasture, estovers, or turbary, &c., or of several or free [*646] *fishery*, free *warren*, &c.; rights of *way*, which are public or private, and may be claimed, if private, by grant or prescription, or of necessity; or rights of *entry*, which are of various kinds, and may be classed as follows: first, to enter places of public resort, as fairs and markets, inns, taverns, &c.; secondly, to enter private houses, for the purpose of speaking with the plaintiff, or his lodgers, or of demanding a debt, or to remove goods belonging to the defendant; thirdly, by the lord of a manor, to take wreck; fourthly, by a rector or vicar, to fetch away tithes; fifthly, by an occupier of adjoining land, to repair fences; sixthly, as between landlord and tenant, to view waste, cut down timber, or follow and distrain goods fraudulently removed, or to take estovers, emblements, fixtures, or way-going crops; or, seventhly, to abate nuisances, or remove obstructions, &c.; Lastly, the defendant may allege, by way of excuse, that his cattle escaped for *defect of fences*, which the plaintiff was bound to repair. The defendant may also justify in any species of action of *trespass*, under a *license* from the plaintiff, or *legal process*, criminal or civil; which latter may issue out of superior or inferior courts, and is original, mesne or final; or he may justify by *authority of law*, without process, as an *individual*, on suspicion of felony, &c., or as an *officer*, or in his aid; or on the ground of inevitable necessity.

The pleas which have been mentioned, in actions for *wrongs*, go to prove that the plaintiff never had any cause of action: or, admitting that he had, the defendant may plead, as in actions upon *contracts*, that it was *discharged*, by some subsequent or collateral matter, as by an *accord and satisfaction*, *arbitrament*, *release*, *former recovery* or *distress* for the same cause, *tender* of sufficient amends for an involuntary trespass,^(a) or the *statute of limitations*.

It will next be right to consider when the *general issue*[A] may be pro-

(a) Stat. 21 Jac. I. c. 16, § 5. *Ante*, 36. And a tender of amends may be pleaded, in actions against *justices* of the peace, by stat 24 Geo. II. c. 44, § 2; against officers of the *excise* or *customs*, by stat. 23 Geo. III. c. 70, § 31; 24 Geo. III. sess. 2. c. 47, § 35, (repealed by 6 Geo. IV. c. 105;) 28 Geo. III. c. 37, § 26, and 6 Geo. IV. c. 108, § 95; against any person or persons, for anything done in pursuance of the statute 43 Geo. III. c. 99, § 70, for consolidating the provisions of the acts relating to the duties under the management of the commissioners for the affairs of *taxes*, or any act for granting duties to be assessed under the regulations of that act; against commissioners of bankrupt, by stat 6 Geo. IV. c. 16, § 44; against officers of the army, navy, or marines, by stat 6 Geo. IV. c. 108, § 95; and

[A] The general issue is a denial of all the material facts alleged in the declaration.

perly pleaded; and what may be given in evidence under it, or must be pleaded specially, in the different actions.

In *assumpsit*, the general issue is proper, where there was either no contract between the parties, or not such a contract as the plaintiff has declared on: And the defendant may give in evidence under it, that the contract was void in law, by coverture, *(b)* gaming, *(c)* usury, *(d)* &c. or voidable [*647] *by infancy, *(aa)* duress, &c.; or, if good in point of law, that it was performed, *(bb)* or that there was some legal excuse for the non-performance of it, as a release or discharge before breach, or non-performance by the plaintiff of a condition precedent, &c. This sort of evidence will show that the plaintiff had no cause of action. But if he had, the defendant may give in evidence, under the general issue, that it was discharged, by an accord and satisfaction, *(cc)* arbitrament, release, *(dd)* foreign attachment, *(e)* or former recovery for the same cause, *(f)* &c. In short, the question in *assumpsit*, upon the general issue, is whether there was a subsisting debt, or cause of action, at the time of commencing the suit. *(g)* But matter of defence arising after action brought, cannot be pleaded in bar of the action generally; and therefore cannot be given in evidence under the general issue. *(h)* And matters of law, *(i)* in avoidance of the contract, or discharge of the action, are usual pleaded: It is also necessary to plead a tender, or the statute of limitations, *(k)* &c. and to plead or give a notice of set-off. Formerly, matters in discharge of the action must have been pleaded specially: *(l)* Afterwards, a distinction was made between express and implied *assumpsits*: In the former, these matters were still required to be pleaded, but not in the latter. *(m)* At length, about the time of Lord

against any person, for anything done in pursuance of the statutes 7 & 8 Geo. IV. c. 29, and c. 30, § 41, for consolidating the laws relative to larceny, &c., or malicious injuries to property.

(b) 12 Mod. 101.

(c) 1 Ld. Raym. 87. 1 Salk. 344. Carth. 356. 5 Mod. 170. 12 Mod. 97, S. C.

(d) 1 Str. 498. *(aa)* 1 Salk. 279. 1 Bos. & Pul. 481, *(a)*.

(bb) 1 Ld. Raym. 217, 566. 12 Mod. 376, S. C. 1 Salk. 394.

(cc) 1 Ld. Raym. 566. 12 Mod. 376, S. C. 4 Esp. Rep. 181. But a plea of an account stated, and balance paid to the plaintiff, or balance in favour of the defendant, which the plaintiff promised to pay, is not a good plea. 1 Ken. 250, 391. 1 Bur. 9, S. C.

(dd) Gilb. C. P. 64. Doug. 106, 7. 3 Esp. Rep. 234. And as to the plea of release, in courts of Equity, see Beam. Pl. Eq. 218, &c., 275, 76.

(e) 1 Salk. 280.

(f) 2 Str. 733. 9 Moore, 724. 2 Bing. 377. 1 Car. & P. 403, S. C. And as to the plea of former judgment or decree, in courts of Equity, see Beam. Pl. Eq. 197, &c., 205, &c.

(g) Doug. 106, 7. Gilb. C. P. 64, 5.

(h) 4 Barn. & Cres. 390. 6 Dowl. & Ryl. 475, S. C.

(i) Hob. 127. 2 Vent. 295.

(k) 1 Ld. Raym. 153. Gilb. C. P. 66. And as to the plea of the statute of limitations, in courts of Equity, see Beam. Pl. Eq. 161, &c., 167, &c., 274, 75.

(l) 1 Ld. Raym. 566. 12 Mod. 376, S. C.

(m) Vin. Abr. tit. *Evidence*, Z. a. 1 Salk. 280. Gilb. C. P. 65.

Dudley v. Sumner, 5 Mass. 438. And any matter going to show that a deed, or contract, or other instrument, is void, may be shown under it. *Phelps v. Decker*, 10 Mass. 267, 274. *Anthony v. Wilson*, 14 Pick. 303, 305. Under it, too, in actions arising *ex contractu*, the defendant may give in evidence any matter which goes to show that the plaintiff never had any cause of action; as that it was void for want of consideration, or founded on illegal consideration, and therefore void; or that the supposed consideration had entirely failed, and such like cases. But where the defence in any way admits that the plaintiff's cause of action did exist, and seeks to avoid it, either in part or in the whole, by matter *aliunde*, he must either plead it, or, in cases of set-off, give notice of it to the plaintiff. *Maverick v. Gibbs*, 3 McCord, 315.

Holt, they were universally allowed to be given in evidence, under the general issue.(n)

The bankruptcy of the *plaintiff*;(o) or his discharge under an insolvent act,(p) may be given in evidence, under the general issue, in *assumpsit*; though they are sometimes pleaded specially. But, in an action by the provisional assignee of a bankrupt, the fact of the bankrupt's estate having been assigned by the plaintiff to new assignees, between the time of issuing the *latitat* and delivery of the declaration, was holden to be no ground of nonsuit, upon a plea of *non assumpsit*; but, if it were an answer to the action, should have been pleaded specially.(q) The *defendant* cannot give his bankruptcy in evidence, under the general issue:(r) But his certificate,*allowed after the filing of the plaintiff's bill, and before [*648] plea pleaded, was holden to be evidence to support the general plea of bankruptcy, given by the statute 5 Geo. II. c. 30, § 7, *viz.*, that before the exhibiting of the plaintiff's bill, the defendant became a bankrupt, and that the cause of action accrued before he became a bankrupt.(s) And a plea, in the general form, was deemed sufficient to entitle a bankrupt to the benefit of the statute 49 Geo. III. c. 121, § 8, which discharges him, after having obtained his certificate, of all demands at the suit of a surety or person liable for his debt, who has paid the same after the issuing of the commission, in like manner, to all intents and purposes, as if such person had been a creditor before the bankruptcy.(t) But where the certificate is allowed after plea pleaded, it seems that the bankruptcy must be pleaded *specially*, and not in the *general* form prescribed by the above statute.(e) And a certificate obtained at *Newfoundland*, under the 49 Geo. III. c. 27, § 8, does not, we have seen,(d) entitle the defendant to be discharged, on entering a common appearance, but must be pleaded in bar.(e) To a general plea of bankruptcy, a replication that the defendant had before been discharged as a bankrupt, by virtue of the statute 5 Geo. II. c. 30,(f) and that he had not paid 15s. in the pound under the second commission is bad on special demurrer.(g)

In *covenant*, there is properly speaking no general issue; for though the defendant may plead *non est factum*, as in *debt* on specialty, yet that only puts the deed in issue, and not the breach of covenant: and *non infregit conventionem* is a bad plea.(h) In this action therefore, the defendant must specially contravert the deed, or show that he has *performed* the covenant, or is legally *excused* from the performance of it; or, admitting the breach, that he is *discharged* by matter *ex post facto*, as a release, &c.: And a *tender* may be pleaded, in *covenant* for the payment of money.(i)

In *debt* on simple contract, *nil debet* is a good plea, or, in actions by

(n) 1 Ld. Raym. 217, 566. 12 Mod. 376, S. C.; and see Lawes, on Pleading, 522, 23.

(o) 3 Chit. Pl. 918, (a).

(p) 3 Camp. 236. And as to the plea of bankruptcy, or insolvency, of the plaintiff, in courts of Equity, see Beam. Pl. Eq. 118, &c.

(q) 4 Barn. & Ald. 345.

(r) 9 East, 82.

(s) 1 Campb. 363.

(t) 5 Barn. & Ald. 12; but see 12 East, 664, *semb. contra*, and see stat. 6 Geo. IV. c. 16, § 52.

(e) 6 East, 413. 2 Smith R. 659. 1 McClel. & Y. 350, S. P.; but see 2 H. Blac. 553.

(d) *Ante*, 214. (e) 3 Moore, 244, 623. 1 Brod. & Bing. 13, 294, S. C.

(f) § 7; and see *id.* § 9. 6 Geo. IV. c. 16, § 127.

(g) 2 Maule & Sel. 549. 3 Camp. 499, (a), S. C.

(h) 1 Lev. 183. 3 Lev. 19. 1 Sid. 289. 8 Durnf. & East, 278. 1 Car. & P. 265. *Id.* (a).

(i) 7 Taunt. 486. 1 Moore, 209, S. C.

executors and administrators, *non detinet*, in all cases where nothing was due to the plaintiff, at the time of commencing the action :(*k*) And under this plea, the defendant may not only put the plaintiff upon showing the existence of a legal contract, but he may give in evidence the *performance* of it. He may also give in evidence, under this plea, a release, or other matter in discharge of the action :(*l*) And it has even been holden, that as

the plea is in the present tense, the statute of limitations may be [*649] given in *evidence under it.(*a*) But in *debt* for rent, on an indenture of lease, if the defendant plead *nil debet*, he cannot give in evidence that the plaintiff had nothing in the tenements ; because, if he had pleaded that specially, the plaintiff might have replied the indenture, and estopped him :(*b*) And in *debt qui tam*, the defendant was not allowed to give in evidence, on *nil debet*, a former recovery against him by another person, for the same cause.(*cc*) In this action also, as in *assumpsit*, a tender and set-off must be specially pleaded.

The plea *nil debet*, in *debt* on simple contract, concludes either by the defendant's putting himself upon the country, or, by waging his law, and professing himself ready to defend against the plaintiff and his suit, in such manner as the court shall consider,(*dd*) &c. The former is called, in the old books of entries, *nil debet per patriam* ; the latter, *nil debet per legem*. The right of the defendant to wage his law, in an action of *debt* on simple contract, has fallen into complete disuse, though it still exists in point of law.(*ee*) And where the defendant, having waged his law, in the King's Bench, and the master having assigned a day for him to come in and perfect it, applied by his counsel to the court, to assign the number of compurgators, with whom he should come to perfect it, on the ground that the number being uncertain, it was the duty of the court to say how many were necessary ; the court, being disinclined to assist the revival of this obsolete mode of trial, refused the application, and left the defendant to bring such number as he should be advised were sufficient ; and observed that if the plaintiff were not satisfied with the number brought, the objection would be open to him, and then the court would hear both sides :(*f*) The defendant afterwards prepared to bring *eleven* compurgators, but the plaintiff abandoned the action.(*g*)[1]

When a specialty is but inducement to the action, and matter of fact the foundation of it, there *nil debet* is a good plea ; as in *debt* for rent by indenture, for the plaintiff need not set out the indenture.(*h*) So, in *debt* for an escape,(*i*) or on a *devastavit* against an executor,(*k*) the judgment is but inducement, and the escape and *devastavit* are the foundation of the action. But, by the statute 8 & 9 W. III. c. 27. § 6, "no retaking on fresh pursuit

(*k*) Com. Dig. tit. *Pleader*, 2 W. 17.

(*l*) 5 Mod. 18. 1 Ld. Raym. 566. 12 Mod. 376, S. C. ; but see Gilb. C. P. 63. Gilb. *Debt*, 434, 443, *semb. contra*.

(*a*) 1 Ld. Raym. 153. 2 East, 336, *per Lawrence*, J.

(*b*) 1 Salk. 277.

(*cc*) 1 Str. 701, 2.

(*dd*) 3 Chit. Pl. 4 Ed. 954. Steph. Pl. 250.

(*ee*) 1 New Rep. C. P. 297.

(*f*) 2 Barn. & Cres. 538. 4 Dowl. & Ryl. 3, S. C.

(*g*) 3 Chit. Blac. Com. 341, (9.) And see further, as to wager of law, Bac. Abr. under that title, 3 Chit. Bl. Com. 341, &c. Steph. Pl. 124, 5 ; and for entries thereon, see Co. Ent. 119, *a*. 2 Mod. Ent. 242. Lil. Ent. 467.

(*h*) Gilb. C. P. 61, 2. Hardr. 332. 2 Ld. Raym. 1501, 2, 3. 1 New Rep. C. P. 105, 109. 1 Wms. Saund. 5 Ed. 38, *a*, (3.) 2 Wms. Saund. 5 Ed. 297, (1.)

(*i*) 2 Salk. 565.

(*kk*) 1 Wms. Saund. 5 Ed. 219. Carth. 2.

[1] The Supreme Court of the United States have decided, that wager of law has no existence in the jurisprudence of the Union. 9 Wheaton, 642.

shall be given in evidence, on the trial of any issue, in any action of *escape* against the marshal, &c., unless the same shall be specially pleaded; nor shall any special plea be received or allowed, unless oath be first made in writing by the defendant, and filed in the proper office, that the prisoner, for whose escape such action is brought, *did escape without his [*650] consent, privity or knowledge."(*a*) And when the deed is the foundation, and the fact but inducement, there *nil debet* is no plea; as in *debt* for a penalty on articles of agreement, (*b*) or on a bail-bond, (*c*) &c. In the latter action however, if the defendant plead *nil debet*, and the plaintiff do not demur, but take issue thereon, it lets the defendant into any defence he may have on the merits. (*d*)

It sometimes happens, that instead of pleading the general issue of *nil debet* to the whole declaration, the defendant, for greater certainty, will select and deny some particular fact, necessary to maintain the action; as the demise, in *debt* for rent on a parol lease, to which he may plead *non dimisit*: (*e*) but he cannot plead this plea, in *debt* for rent on an indenture: (*f*) and it is said, that *riens en arriere* is not a good plea, without concluding *et issint nil debet*. (*g*)

In *debt* on bond, or other specialty, the general issue of *non est factum* is good, in all cases where the deed was not executed, or varies from the declaration: (*h*) And the defendant may give in evidence under it, that the deed was delivered as an escrow, (*i*) to a third person; or that it was void at common law *ab initio*, (*k*) being obtained by fraud, or made by a married woman, (*l*) lunatic, (*m*) &c. or that it became void after it was made, and before the commencement of the action, (*n*) by erasure, alteration, cancelling, &c. or that a bail bond was taken *after* the return day of the writ, conditioned for the defendant's appearance *on* the return day. (*o*) But he cannot give in evidence, under the general issue, that the deed was void or voidable by infancy, (*p*) duress, (*q*) *per minas*, (*q*) &c., or that it was

(*a*) As to the form of the affidavit, see 2 Blac. Rep. 1059.

(*b*) 2 Ld. Raym. 1500. 2 Str. 778. 1 Barnard K. B. 15. 8 Mod. 106, 323, 382, S. C.

(*c*) *Id.* Fort. 363, 367. 5 Bur. 2586. And the plea of *nil debet*, in debt on bond, is bad on a general demurrer, though perhaps it might be aided after verdict, 2 Wils. 19. And see further, as to the cases in which *nil debet* is or is not a good plea, Com. Dig. tit. *Pleader*, 2 W. 17. 1 Wms. Saund. 5 Ed. 38, (3.) 2 Wms. Saund. 5 Ed. 187, (2.) 1 Chit. Pl. 4 Ed. 424, to 428. Steph. Pl. 177, 8.

(*d*) 5 Esp. Rep. 38.

(*e*) Gilb. *Debt*, 438.

(*f*) *Id.* 436.

(*g*) *Id.* 440; cites Bro. *Debt*, 113. Keilw. 153.

(*h*) Com. Dig. tit. *Pleader*, 2 W. 18; and see 6 Taunt. 394. 2 Marsh. 96, S. C. 4 Maule & Sel. 470.

(*i*) 2 Rol. Abr. 683, 4, 5. T. Raym. 197. 6 Mod. 217. 4 Esp. Rep. 255.

(*k*) 5 Co. 119; and see 2 Wils. 341, 347; but see 2 Stark. Ni. Pri. 35. 2 Chit. Rep. 334, S. C., where it was ruled, that the defendant cannot, under the plea of *non est factum* to a declaration upon a bond, go into evidence to show that the consideration was illegal at common law; and see 2 Stark. Ni. Pri. 36, *in notis*.

(*l*) 2 Campb. 272.

(*m*) 2 Str. 1104; but see 2 Salk. 675. (*n*) 5 Co. 119, b. Sav. 71, *scmb. contra*.

(*o*) 4 Maule & Sel. 338; and see 2 Durnf. & East, 569.

(*p*) The contract of an infant seems in general to be void; though, in the case of a bond, &c., his infancy must be pleaded to avoid it. 5 Co. 119, a. Gilb. *Debt*, 437. 2 Salk. 675. 1 Ld. Raym. 315, S. C.; but see 1 Salk. 279, where *Treby*, Ch. J., said, that the promise of an infant is absolutely void; but a bond takes effect by sealing and delivery, and consequently is a more deliberate act, and therefore is only voidable; and see 3 Bur. 1794, 1805. Lawes, on Pleading, 569. 3 Taunt. 307. 3 Maule & Sel. 477. 2 Stark. Ni. Pri. 36. 6 Moore, 488. See also stat 9 Geo. IV. c. 14, § 5, by which "no action shall be maintained, whereby to charge any person, upon any promise made after full age, to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing, signed by the party to be charged therewith.

(*q*) 2 Inst. 482, 3.

[*651] void by *act of parliament,(a) as by the statutes of usury,(b) or gaming, &c. In these cases therefore, the defendant must plead specially. So he must plead *payment*, at or after the day, *performance*, or any matter in *excuse* of performance, as *non damnificatus* to a bond of indemnity, *no award* to an arbitration bond, or, to a bail bond, no process to arrest the defendant,(c) &c. He must also plead specially, in *discharge* of the action, a tender, or set-off.

In *debt* on record, the general issue of *nul tiel record* is proper, where there is either no record at all, or one different from that which the plaintiff has declared on.(d) But as this plea only goes to the existence of the record, the defendant must plead *payment*, or any matter in discharge of the action: And if an action of *debt* be brought here, on a judgment in *Ireland*, the plea of *nul tiel record* must conclude to the country.(e)

In actions upon the *case*, the defendant, upon the general issue of not guilty, may not only put the plaintiff upon proof of the whole charge contained in the declaration, but may offer any matter in excuse or justification of it;(f) or he may set up a former recovery, release, or satisfaction:(g) For an action upon the *case* is founded upon the mere justice and conscience of the plaintiff's case, and is in the nature of a bill in equity, and in effect is so; and therefore such a former recovery, release, or satisfaction need not be pleaded, but may be given in evidence: since, whatever will, in equity and conscience, according to the circumstances of the case, bar the plaintiff's recovery, may in this action be given in evidence by the defendant; because the plaintiff must recover upon the justice and conscience of his case, and upon that only. In *trover*, it is commonly said, there is no special plea, except a release; but this is a mistake: for the defendant may plead specially any thing else, which, admitting the plaintiff had once a cause of action, goes to discharge it, as the statute of limitations,(h) or a former recovery,(i) &c. The *bankruptcy* of the plaintiff, before the cause of action accrued, may be given in evidence, in this action, under the general issue of not guilty:(k) but where the bankruptcy happens after the cause of action accrued, it should it seems be pleaded specially.

In an action for *words*, the truth of them cannot be given in evidence, under the general issue of not guilty.(l) And it is not competent for the defendant, under the general issue, to offer in mitigation of damages, evidence that the specific facts in which the slander consists and for which [*652] the action is brought, were communicated to him by a third *person:(aa) But, in an action on the case for slander of title, the truth of the words may be given in evidence under the general issue, to disprove malice, 1 Moody & M. 1. But it seems that the defendant may, on the general issue, go into evidence to show that he spoke the words *bonâ fide*,

(a) 5 Co. 119, a.

(b) 1 Str. 498.

(c) Say. Rep. 116.

(d) Gilb. *Debt*, 444. 3 Mod. 41.

(e) 5 East, 473. 2 Smith R. 25, S. C.; and see 1 Barn. & Ald. 153. 9 Price, 3. 3 Barn. & Cres. 449. 5 Dowl. & Ry. 235, S. C. 4 Barn. & Cres. 411. 6 Dowl. & Ry. 471, S. C.

(f) 2 Mod. 276, 7. 3 Mod. 166. Com. Rep. 273. 1 Wils. 44, 175.

(g) 3 Bur. 1353. 1 Blac. Rep. 388, S. C.

(h) 1 Lutw. 99.

(i) 1 Show. 146.

(k) 7 Durnf. & East, 391. And the defendant in this case, having pleaded *bankruptcy* in the plaintiff specially, Lord *Kenyon* was of opinion, that the plea would have been bad on special demurres. *Id.* 396. *Ante*, 647, 8.

(l) Willes. 20. 2 Str. 1200. 1 Bos. & Pul. 525. 2 Bos. & Pul. 225. (a.)

(aa) Holt Ni. Pri. 533; and see Sel. Ni. Pri. 6 Ed. 1232. 4 Bing. 167.

and without malice;(b) or he may prove, on the general issue, in mitigation of damages, such facts and circumstances as show a ground of suspicion, not amounting to actual proof of the guilt of the plaintiff.(c) And when words are given in evidence, in order to prove malice, which are not stated in the declaration, the defendant may prove the truth of such words.(d) So, in an action for *libel*, the defendant may give in evidence, on the general issue, in mitigation of damages, not only that there were rumours and reports, of the same tenor as in the supposed libel, previously current, but that the substance of the libellous matters had been published in a newspaper; and he is not required to lay a basis for this evidence, by producing the newspaper at the trial.(e) But the plaintiff is not permitted, in an action for a libel, to go into evidence, on the general issue, to show that the allegations in the libel are false :(f) Neither can he give in evidence subsequent declarations by the defendant, where the intention of publication is not equivocal;(f) nor can the defendant give in evidence other libels, published of him by the plaintiff, not distinctly relating to the same subject.(g) In an action for a libel, purporting to be a report of a coroner's inquest evidence of the correctness of the report is admissible under the general issue, in mitigation of damages; but no evidence of the truth or falsehood of the facts stated at the inquest, is admissible on either side. 1 Moody & M. 46.

In *detinue*, the defendant may give in evidence, under the general issue of *non detinet*, a gift from the plaintiff; for that proves he detaineth not the plaintiff's goods :(hh) But he cannot give in evidence, that the goods were pawned to him for money, which is not paid; but he must plead it.

In *trespass* to the person, the general issue of *not guilty* may be properly pleaded, if the defendant committed no assault, battery, or imprisonment, &c.; in trespass to *personal* property, if the plaintiff had no property in the goods; and in trespass to *real* property, if he was not in possession of the land, &c.: And *liberum tenementum*, or other evidence of title or right to the possession, may be given in evidence under the general issue.(i) But the defendant cannot justify, under the general issue, cutting the posts and rails of the plaintiff, though erected upon the defendant's own land; there being no question raised as to the property remaining in the plaintiff.(k) And regularly, by the common law, matter of justification or excuse must be *specially* pleaded;(l) as, in *trespass* to the person, *son assault demesne*, or, in *trespass* to real property, a license;(m) that the beasts came through the plaintiff's hedge, which he ought to have repaired; or in respect of a rent charge, common, or the like;(n) And the *de- [*653] fendant must plead specially a release, or other matter in *discharge* of the action.(a) But in actions against justices, &c. and in various other

(b) 1 Car. & P. 475, 673.

(c) Peake's Evid. 5 Ed. 308; and see 2 Campb. 251. 1 Maule & Sel. 284. Holt Ni. Pri. 306, 7. 1 Car. & P. 279. 11 Price, 235.

(d) 2 Stark. Ni. Pri. 457; and see 2 Str. 3 Ed. 1200. (1.)

(e) Holt. Ni. Pri. 299.

(f) 2 Stark. Ni. Pri. 93; and see 8 Moore, 467. 1 Bing. 403, S. C.

(g) 3 Barn. & Cres. 113. 4 Dowl. & Ry. 670, S. C. Ry. & Mo. 422.

(hh) Co. Litt. 283.

(i) Andr. 108. Willes, 222. 7 Durnf. & East, 351. 8 Durnf. & East, 403.

(k) 8 East, 404.

(l) Co. Lit. 282, 3. 2 Rol. Abr. 682. 12 Mod. 120.

(m) Hob. 274, 5. 2 Durnf. & East, 168. 7 Taunt. 156; but see 21 Hen. VII. 28, a, *per Rede, contra*.

(n) Co. Litt. 283.

(a) 3 Bur. 1353.

cases, the defendant, by act of parliament, (b) is allowed to plead the general issue, and give the special matter in evidence. (c) In an action of *trespass* and false imprisonment, a constable may justify under the general issue, though he acted without a warrant, provided there was a reasonable charge of felony made; although he afterwards discharge the prisoner, without taking him before a magistrate, and although it should turn out in fact, that no felony was committed. (d) But a private individual, who makes the charge, and puts the constable in motion, cannot justify under the general issue: he must plead the special circumstances by way of justification, in order that it may be seen whether his suspicions were reasonable. (e)

When the defence consists of matter of fact, and the general issue may, it ought to be pleaded; it being in such case a good cause of demurrer, that the plea amounts to the general issue. (f) But it is observable, that in many cases, where the defence consists of matter of law, the defendant may either plead it specially, or give it in evidence under the general issue; as in *assumpsit*, infancy, accord and satisfaction, or a release, &c. may be either pleaded, or given in evidence upon *non assumpsit*; and in *debt* on bond, made by a married woman, the defendant may either plead coverture, or give it in evidence upon *non est factum*. So, in *assumpsit*, the court of Common Pleas held, that the defendant's undertaking was for the default of another, without writing, and without consideration, or that the person for whom the defendant's undertaking was given, was a *feme covert*, might be pleaded, although the facts might have been given in evidence under the general issue. 1 Moore & P. 294. 4 Bing. 470, S. C. In these cases, from the nature of the defence, the plaintiff has an *implied colour* of action; bad indeed in point of law, if the facts pleaded be true, but which is properly referred to the decision of the court. And where, from the nature of the defence, the plaintiff would have no implied colour of action, the defendant in some cases is allowed to give him an *express colour*. (g) Thus, in the common and almost only case where express colour is now given, if in an action of trespass *quare clausum friget*, the defendant plead a possessory title under a demise from a third person, (for if he claim under the plaintiff, there is an implied colour,) this, without more, would amount to the general issue; (h) for it goes to deny that the trespass was committed in the *plaintiff's* close: but if the defendant, after stating his own title, sup-
[*654] poses (as is usual,) that the plaintiff entered upon him, *under colour of a former deed of feoffment without livery, and that he re-entered, this creates a question of law, for the decision of the court; and

(b) See particularly the statutes 43 Eliz. c. 2, § 19. 1 Jac. I. c. 15, § 16. 7 Jac. I. c. 5. 21 Jac. I. c. 12, § 5. 11 Geo. II. c. 19, § 21. 23 Geo. III. c. 70, § 34. 28 Geo. III. c. 37, § 23. 42 Geo. III. c. 85, § 6. 43 Geo. III. c. 99, § 70. 6 Geo. IV. c. 16, § 44, & c. 108, § 97. 7 & 8 Geo. IV. c. 4, § 155, c. 29, § 75, & c. 30, § 41. 9 Geo. c. 4, § 155. And see further, as to what must be pleaded specially, or may be given in evidence under the general issue, in different actions, 1 Chit. Pl. 4 Ed. 416, &c.; and in the action of *assumpsit* in particular, Lawes, on Pleading, Chap. XVI. p. 520, &c.

(c) Co. Lit. 283.

(d) Doug. 359. 5 Durnf. & East, 315. 3 Campb. 420. Holt Ni. Pri. 478. 6 Barn. & Cres. 635.

(e) Holt Ni. Pri. 478; and see 4 Taunt. 34.

(f) Co. Lit. 303, b. Doc. pl. 203, 4. Gilb. C. P. 60, 61. 2 Chit. Rep. 642. And see further, as to the cases in which the general issue may, and ought to be pleaded, Steph. Pl. 176, &c.

(g) For the difference between *express* and *implied* colour, see an argument of Holt, in Reg. Plac. 303. Steph. Pl. 225.

(h) 8 Durnf. & East, 406. 1 East, 215.

by that means prevents the plea from amounting to the general issue : and being matter of supposal, it is not traversable.

In *trespass* for taking goods, if the defendant plead that A. was possessed of them, as of his proper goods, and sold them in market overt, or that B. stole the goods from A. and waived them within his manor, wherefore he took them, the defendant must give colour; for his plea proves that no property was in the plaintiff, so he had no colour of action : And the colour usually given in such cases is, that the defendant bailed the goods to a stranger, who delivered them to the plaintiff, from whom the defendant took them. But, in the same cases, if the defendant plead that A. sold the goods in market overt, without saying that they were his own, or that B. took them *de quodam ignoto*, and waived them, the plea is good without colour; for it does not deny but that the property was in the plaintiff, and the defendant is not bound to show expressly in whom it was.^(a)

Pleas in bar are *single* or *double* ;[A] or, in other words, the defendant may rely upon a single ground, or plead several matters in his defence. At common law, the defendant could only have pleaded a single matter to the whole declaration; which rigour often abridged the justice of his defence, and was doubtless one cause of perplexed inartificial pleading; the party endeavouring to crowd as much reasoning as he could into his plea, however intricate, repugnant and contradictory he made it by so doing.^(b) But even at common law, the defendant might have pleaded several matters, to different parts of the declaration; as not guilty to part, and to other part a justification, or release, &c. And where there were several defendants, each of them might have pleaded a single matter to the whole, or several matters

(a) Dr. *Leyfield's case*, 10 Co. 90, b. And for more of the doctrine concerning colour, see the same case, *per totum*; Doct. & Stud. lib. 2, c. 53. 3 Salk. 273. 3 Blac. Com. 309. 3 Reeve's Hist. 24, 438. 1 Chit. Pl. 4 Ed. 443, &c. Steph. Pl. 220, &c. *Id.* Append. lviii.

(b) 2 Ennom. 141; and see 1 Chit. Pl. 4 Ed. 208. Steph. Pl. 289, 90.

[A] A plea is not double, unless it contain more than one ground of defence to the action, although it may contain many distinct matters, all going to make one entire defence. *Torrey v. Field*, 10 Verm. 353. Under the peculiar practice of South Carolina, leave to plead double, or to withdraw a plea and plead *de novo*, cannot be granted by a judge at chambers, but must be applied for in open court. *Frazer v. M-Leod*, 1 Brevard, 198. And the constitutional court will not grant leave to plead double, or make any other original order, which has not first been applied for in the District Court. *Id.* But, on motion to plead double, leave is always granted, on condition of pleading instantly, if the cause be at issue; therefore, no notice or rule to reply is necessary. *Pickins v. Shackelford*, 2 Brevard, 96. Under the Mississippi statute, relating to double pleading, a plea of the general issue, and a special plea which amounts to the general issue, cannot be allowed. *Moore v. Mickell*, Walker, 231. A defendant, generally, may not plead double, without leave of the court. *Miller v. Fisk*, 1 McCord, 50. The filing of consistent double pleas is, however, a motion of course, and is always allowed. *Richardson v. Whitfield*, 2 *Id.* 148. The courts will not allow a motion for leave to plead double, if it will be a surprise to the other side. *Van Holton v. Lewis*, 1 *Id.* 12. A motion for leave to plead double, was refused in a court having no original jurisdiction, only an appellate one. *Frazer v. M-Leod*, 2 Bay, 407. Double pleading is allowed in real as well as in personal actions. *Gordon v. Pierce*, 2 Fairf. 213. It seems they must be signed by counsel. *Satterlee v. Satterlee*, 8 Johns. 327. On a motion for leave to reply double, it must be shown that the matters sought to be replied are true. *McNair v. Bronson*, 6 Wend. 534. Under leave of double pleading to a writ of entry *sur disseizin*, the tenant pleaded, first, *nil disseizin*; second, in bar, that the demandant was never seized *modo et forma*, &c. Upon demurrer, the second plea was adjudged bad, as putting in issue a fact which must be proved under the first issue. *Martin v. Woods*, 6 Mass. 6.

to different parts of the declaration.(c) And now, by the statute for the amendment of the law,(d) "the defendant or tenant in any action or suit, or any plaintiff in *replevin*, in any court of record, may, with the leave of the same court, plead as many several matters thereto, as he shall think necessary for his defence: Provided nevertheless, that if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the court; or if a verdict shall be found, upon any issue in the said cause, for the plaintiff or defendant, costs shall be also given in like manner; unless the judge who tried the said issue, shall certify that

the said defendant or tenant, or plaintiff in *replevin*, had a probable cause to plead such matter, *which upon the said issue shall be found against him. Provided also, that nothing in this act shall extend to any writ, declaration, or suit of appeal of felony, &c., or to any writ, bill, action or information, upon any penal statute."(a)

Upon this statute it has been holden, that the defendant shall not be allowed to plead any pleas that are manifestly inconsistent, such as *non assumpsit*,(b) or *non est factum*,(cc) to the whole declaration, and a *tender* as to part; for one of these pleas goes to deny that the plaintiff ever had any cause of action, and the other partially admits it. So, the defendant is not allowed to plead *non assumpsit*, and the stock-jobbing act;(dd) or a plea of alien enemy, with *non assumpsit*,(e) a tender,(f) or other inconsistent matter.(g) And he shall not plead several matters which require different trials, as in dower, *ne unques accouple en loyal matrimonic* and a mortgage, or *ne unques seisie que dower*;(h) for the first matter is triable by the bishop, and the others by a jury, and if the former be found against the defendant, the judge cannot certify that he had a probable cause of pleading it. The statute for pleading double does not extend to any action for information upon a penal statute:(i) And as the king is not bound by this statute,(k) the defendant cannot plead double in an information of intrusion;(l) in *quare impedit*, where the king is a party;(m) or in *scire facias*, for a bond debt to the king:(n) nor could he plead double, till the statute 32 Geo. III. c. 58, in an information in nature of *quo warranto*.(o)

In the Common Pleas, the defendant was not formerly allowed to plead, in *assumpsit*, *non assumpsit* and infancy,(p) or a release,(q) or set-off;(r) in *debt* on bond, *non est factum* and *solvit ad* or *post diem*;(s) in *debt* for

(c) Co. Lit. 303, a.

(d) 4 Ann. c. 16, § 4, 5.

(a) 4 Anne, c. 16, § 7.

(b) *Kaye v. Patch*, T. 27 Geo. III. K. B. 4 Durnf. & East, 194. 2 Blac. Rep. 723. 3 Wils. 145, S. C.

(cc) 5 Durnf. & East, 97. 4 Taunt. 459.

(dd) 1 Bos. & Pul. 222.

(e) 2 Blac. Rep. 1326. *Palmer v. Henderson*, E. 21 Geo. III. C. P. 1 Bos. & Pul. 222, (a). 2 Bos. & Pul. 72. 10 East, 327.

(f) 10 East, 326.

(g) 12 East, 206.

(h) Com. Rep. 148. 2 Blac. Rep. 1157, 1207, but see 2 Wils. 118, *semb. contra*.

(i) § 7, *Supra*; and see 1 Barnard, K. B. 17 Cas. temp. Hardw. 262. 2 Str. 1044, S. C. 4 Durnf. & East, 701, K. B. Pr. Reg. 318. Barnes, 15, 353, 365. 2 Wils. 21. 1 Bos. & Pul. 222, C. P.

(k) 1 P. Wms. 220. Forrest, 57.

(l) *Attorney General v. Allgood*, Parker, 1. *Rez v. Sir C. W. Phillips*, H. 20. Geo. II. Parker, 16.

(m) *Rez v. Archbishop of York*, Willes, 533. Barnes, 353, S. C.

(n) Forrest, 57; but see Bunb. 96. Com. Rep. 422, *semb. contra*; which cases, however, were in effect over-ruled by the case of the *Attorney General v. Allgood*, Parker, 1.

(o) 1 P. Wms. 220. Parker 10.

(p) Barnes, 363.

(q) Cas. Pr. C. P. 154. Barnes, 328, S. C.

(r) Barnes, 333.

(s) *Id.* 363. 2 Blac. Rep. 905, 993.

rent, *nil debet* and *nil habuit in tenementis* ;(t) in *trover*, not guilty and the bankruptcy of the plaintiff ;(u) or in *trespass*, not guilty and a justification,(x) or release of a particular trespass ;(y) But of late years, the court has been less strict than formerly, in the construction of the act of parliament for pleading double, which is general, and a remedial law ;(z) and *accordingly it is now settled, that, with the exceptions mentioned [*656] in the preceding paragraph, the defendant may in general plead as many different matters as he shall think necessary for his defence, though they may appear at first view to be contradictory or inconsistent ; as *non assumpsit* and the statute of limitations,(a) or *non est factum* and the statute of gaming, or usury ;(b) or in *trespass*, not guilty and a justification,(c) accord and satisfaction, or tender of amends,(d) &c. So, he may plead *non assumpsit* and infancy, or a release,(e) or not guilty and *liberum tenementum* ;(f) though as infancy may be given in evidence upon *non assumpsit*, and *liberum tenementum* upon not guilty, the pleading of these matters specially seems to be unnecessary. And the plaintiff in *replevin* may plead in bar to the defendant's avowry or cognizance, that he did not hold as tenant, and no rent in arrear, with a plea of infancy.(g) But, in an action on a deed made beyond seas, the court of Common Pleas would not permit the defendant to plead *non est factum*, where he relied in some of his pleas, on matters of defence which necessarily imported the execution of the deed.(h) So, in *scire facias* on a judgment, the defendant having moved to plead several matters, *viz.* first, payment ; secondly, that the judgment was fraudulent ; and thirdly, that it was on a warrant of attorney fraudulently obtained ; the court refused to allow the three pleas to be pleaded, and put the defendant to his election.(i) And, in a late case,(k) the court of Common Pleas gave out, that for the future, inconsistent pleas should not be allowed unless accompanied with an affidavit, to show that they were necessary to the justice of the cause. And where the plaintiff in *quare impedit*, having traced his title through a period of two centuries, and the defendant having, in *forty-three* pleas, taken issue on every allegation in the declaration, though the plaintiff's claim rested solely on the validity of an ancient deed, and the defendant could have no writ to the bishop, unless he succeeded in setting it aside ; the court of Common Pleas, after the declaration had been twice amended, and after a trial had, rescinded the rule to plead several matters. 4 Bing. 525.

By the statute 32 Geo. III. c. 58, it is enacted, that " it shall be lawful for the defendant, to any information in the nature of a *quo warranto*, for the exercise of any office or franchise in any city, borough, or town corporate, to plead that he had first actually taken upon himself, or held or exe-

(t) Cas. Pr. C. P. 154. Barnes, 333, S. C.

(u) Barnes, 360.

(y) Barnes, 351.

(a) Barnes, 361.

(c) Barnes, 355, 6; 365.

(e) *Wright v. Gregory*, T. 32 Geo. III. C. P. Imp. C. P. 7 Ed. 251.

(f) Cas. Pr. C. P. 153. Barnes, 336, S. C. *Id.* 356.

(g) 5 Taunt. 340. 1 Marsh. 74, S. C.

(h) 3 Taunt. 316.

(k) 3 Bing. 635 ; and see 1 Moore & P. 345, where it was said by Mr. Justice Park, that in future the Court would require the substance of the pleas to be stated to them, in order to ascertain whether they were fit pleas to be put on the record or not ; and that if a party were under terms to plead issuably, the court always exercised a control over the pleas intended to be filed, and imposed terms accordingly.

(x) Cas. Pr. C. P. 154. Barnes, 333.

(z) *Id.* 347, 8.

(b) 2 Bos. & Pul. 12 ; and see *Id.* 549.

(d) *Id.* 366. 2 Blac. Rep. 1093.

(i) 2 Bing. 325. 9 Moore, 694, S. C.

entered the office or franchise which is the subject of such information, *six* years or more before the exhibiting of such information, &c.: which plea shall and may be pleaded either singly, or together with and besides such plea as he might have lawfully pleaded before the passing of the act; or such several pleas as the court on motion shall allow." In the construction of which statute it has been holden, that the legislature intended to give a defendant in such a proceeding, the liberty of pleading several pleas, whether with or without the plea of the statute of limitations; the concluding words of the act being, "or such several pleas, &c."(*l*) But this statute, as well as the 9 Ann. c.20. § 4, &c. is confined to corporate offices: (*m*) and it [*657] does not *apply where there is a continuing incompatibility; as where a burgess has accepted the office of town clerk, which he still exercises. (*a*) And for preventing the vexation and expense occasioned to defendants, in informations in the nature of *quo warranto*, by the practice of raising issues upon various matters distinct from the ground on which the information was granted by the court; it is a rule, (*b*) "that the objections intended to be made to the title of the defendant, shall be specified in the rule to show cause; and that no objection, not so specified, shall be raised by the prosecutor on the pleadings, without the special leave of the court, or of some judge thereof."

In order to plead two or more matters, in the King's Bench, it is not necessary that an affidavit should be made of the facts; but the court formerly expected to be informed what the matters were, that were desired to be pleaded, in order to judge whether they were proper; (*c*) though now, the motion for leave to plead several matters is, in that court, become a mere motion of course, which only requires counsel's signature: And the motion paper being delivered to the clerk of the rules, he will draw up a rule absolute thereon, (*d*) a copy of which should be delivered with the pleas, if it be then ready; or otherwise the plaintiff's attorney should have notice, that instructions have been given for the rule, and that a copy will be delivered as soon as it is drawn up. In the Common Pleas, the rule to plead several matters is drawn up by the secondaries; (*e*) and they will draw it up as a matter of course, on a brief or motion paper signed by a serjeant, without a rule to show cause, for leave to plead the following pleas, *viz.* in *assumpsit*, *non assumpsit*, and *non assumpsit infra sex annos*, or a release, or set-off; *non assumpsit* as to part, with a tender and set-off; *non assumpsit* and a discharge under an insolvent act, or *plene administravit*, generally or specially; *plene administravit* and a set-off, or *ne unques executor* and *plene administravit*: in *debt* on bond, *non est factum* and infancy or duress, or *solvit ad diem* and a set-off; and in *trespass*, not guilty and *liberum tenementum*, *son assault demesne*, *molliter manus imposuit*, or a tender of amends. (*f*) But in other cases, there must be a rule to show cause, why the defendant should not have leave to plead the several matters intended to be pleaded; (*f*) which rule is drawn up by the secondaries, on a brief or motion paper signed by a serjeant: And formerly, where the pleas

(*l*) 8 Durnf. & East, 467.

(*m*) 9 East, 469; but see 5 Barn. & Ald. 771. 1 Dowl. & Ry. 438, S. C. And see further, as to pleading *several* pleas, 1 Chit. Pl. 4 Ed. 477, &c. Steph. Pl. 288, &c.

(*a*) 2 Chit. Rep. 371.

(*b*) R. H. 7 & 8 Geo. IV. K. B. 6 Barn. & Cres. 267.

(*c*) R. T. 5 & 6 Geo. II. (*b*) K. B.

(*d*) Append. Chap. XXVII. § 11.

(*e*) *Id.* § 12.

(*f*) Imp. C. P. 7 Ed. 251.

were contradictory, as not guilty and a license or general release in *trespass*, the defendant was obliged to make it appear by affidavit, that it was necessary for his defence to insist upon both. *(g)* So, an affidavit was required to be made by an executor or administrator, that he had fully administered, and by an heir, that he had nothing by descent, before he could move to plead *plene administravit*, or *riens per descent*: *(h)*

*but now, an affidavit is dispensed with in these cases: *(aa)* and [*658] the court will not decide on the necessity of pleas, or refer them to the prothonotary, where the question on which they depend, appears, on the face of them, to be one of doubt and nicety. *(bb)*

The motion for leave to plead several matters cannot be made, in the Common Pleas, till the defendant has appeared; *(c)* but afterwards, it may be made at any time before judgment: *(d)* and if the time for pleading be nearly expired, the court, on the same motion, will allow the defendant further time, on putting the plaintiff in as good a situation. *(e)* The rule *nisi* being drawn up, a copy of it should be made, and served on the plaintiff's attorney, showing him the original rule; and on the day of showing cause, the court, on an affidavit of service, will make the rule absolute: *(f)* which latter rule being drawn up by the secondaries, a copy thereof should be made, and annexed to the pleas, before they are filed or delivered; *(e)* or, if filed or delivered before the rule is made absolute, it is deemed sufficient in this court, to annex a copy of the rule *nisi* to the pleas, and to indorse a notice thereon, that the rule absolute will be served, as soon as it is drawn up. *(gg)* In *vacation*, a judge on summons will make an order for the clerk of the rules in the King's Bench, or secondaries in the Common Pleas, to draw up the rule, on producing a brief or motion paper, signed by a counsel or serjeant, for that purpose. *(hh)* In the King's Bench, if several pleas be filed, to the whole or part of a declaration, without a rule to plead several matters being drawn up, or instructions given for it to the clerk of the rules, they are considered as a nullity, and the plaintiff may sign judgment: *(i)* or, in the Common Pleas, he may apply to the court, to strike out one of them: *(k)* But if a rule be obtained, and the pleas put in, without saying *by leave of the court*, it is only an irregularity, or at most cause of special demurrer for duplicity. *(l)* And where the plaintiff signed judgment as for want of a plea, because the rule to plead several matters was erroneously entitled, the court of Common Pleas set aside the judgment, without costs; affidavit being made that the pleas were true, and that the defendant had a good defence. *(m)*

Respecting *costs*, upon the statute of Anne, the intention of the legislature appears to have been, that if there be several matters pleaded, some of which are found for the plaintiff, he shall be entitled to the costs of

(g) Barnes, 351.

(h) Cas. Pr. C. P. 154. Barnes, 332, S. C.

(aa) Barnes, 347, 8; 364.

(bb) 1 Bing. 66. 7 Moore, 351, S. C; but see 3 Bing. 635. *Ante*, 656.

(c) Barnes, 331.

(d) Cas. Pr. C. P. 154. Barnes, 329, S. C.

(e) Imp. C. P. 7 Ed. 252.

(f) Append. Chap. XXVII. § 13.

(gg) Imp. C. P. 7 Ed. 252. 3 Brod. & Bing. 256. 7 Moore, 66, S. C.

(hh) Imp. C. P. 7 Ed. 255.

(i) *Per Buller, J.* in *Bedford & Gatfield*, II. 26 Geo. III. K. B. *Ante*, 566, 7.

(k) 1 Bos. & Pul. 415. *Ante*, 567.

(l) 1 Wils. 219; and see Cowp. 500, 501, where the court held, that though an information against several defendants, for usurping several offices, can only be filed *by leave of the court*, yet that leave need not appear on the record.

(m) 1 Bing. 187. 7 Moore, 599, S. C.

[*659] those,⁽ⁿ⁾ notwithstanding other matters are found for the *defendant,^(a) which entitle him to judgment upon the whole record; unless the judge, before whom the cause was tried, shall certify that the defendant had a probable cause to plead the matters which are found against him. That this is the true construction of the statute will appear from the following cases.

In *trespass*, the defendant pleaded not guilty and several justifications; upon the trial, the plaintiff not proving his possession of the *locus in quo*, the defendant had a verdict; and, by direction of *Denison, J.*, the verdict was entered upon the general issue only; upon which there was a motion for a *venire de novo*: but the court refused the motion, saying, the verdict was complete, and determined the cause: that the plaintiff was not entitled to damages, though they said he might have insisted to have a verdict entered on the other issues, for the sake of costs, which he would be entitled to, unless the judge certified that the defendant had probable cause to plead such plea.^(b)

When the defendant pleads not guilty, and a justification to which the plaintiff demurs, and the plaintiff has judgment on the demurrer, but is nonsuited on the plea of not guilty, he shall nevertheless be allowed the costs of the demurrer, which shall be deducted out of the costs allowed to the defendant.^(c) And if one of several pleas, pleaded by the defendant, be adjudged bad, on a demurrer to the plaintiff's replication, the plaintiff is entitled to have the costs of those pleadings deducted from the costs taxed for the defendant upon the *postea*, if afterwards, upon the trial of the issues joined on the other pleas, the defendant should have a verdict; even though it should appear, on the whole of the record, that the plaintiff had no cause of action.^(d) But if the plaintiff take issue on several pleas, one of which is insufficient in law, and has a verdict on all the issues, except that joined on the insufficient plea, which is found for the defendant, and afterwards judgment is entered for the plaintiff, still he shall not be allowed any costs upon the issue found for the defendant.^(e) And it has been resolved, at a meeting of all the judges, that if there be a certificate upon the 43 *Eliz.*, the plaintiff shall not have the costs of any plea pleaded with leave of the court; although the issue thereupon joined be found for him, and the judge have not certified, that the defendant had a probable cause for pleading the matter therein pleaded.^(f)

In an action for criminal conversation, the defendant pleaded two pleas, *viz.* not guilty, and not guilty within *six* years; on the former the plaintiff joined issue, and obtained a verdict, but to the latter there was a demurrer, and judgment against him; and it was holden, that the defendant [*660] *should have the costs of the demurrer; but upon the trial, there should be no costs on either side.^(aa)

(n) In *Sayer's Law of Costs*, p. 223, it is said, he shall have the costs, not only of *those* matters, but also of the *others*, notwithstanding they are found for the defendant. But this seems to be a mistake; for the defendant being entitled to judgment upon the matters found for him, is consequently entitled to the cost of them. 11 East, 263.

(a) 7 East, 583.

(b) Bul. Ni. Pri. 335; and see 1 Wils. 44. Barnes, 461, 2. 2 H. Blac. 393, 394, (a). 2 Barn. & Ald. 546.

(c) Barnes, 136.

(d) 2 Durnf. & East, 391.

(e) 1 Durnf. & East, 266. 2 Bos. & Pul. 376, *accord.*; but see Barnes, 133, 266.

(f) Say. Rep. 260. 1 Ken. 245, S. C. 7 East, 583; and see 3 Brod. & Bing. 117. 1 Barn. & Cres. 278.

(aa) 2 Bur. 753. 2 Wils. 85. Say. Costs, 221, S. C. The authority of this case seems to

The *avowant* or defendant in *replevin*, though not within the words, is plainly within the meaning of the statute 4 Ann. c. 16.(bb) And accordingly, where there are several avowries or pleas in bar in *replevin*, and some of the issues joined thereon are found for the plaintiff, and some for the defendant, the party for whom the issues are found, which entitle him to judgment on the whole record, shall have the general costs of the cause; but the other party shall be allowed to deduct therefrom, the costs of the issues found for him, unless the judge who tried the cause certify, that the party entitled to judgment had a probable cause to make the avowries, or plead the pleas, upon which such issues were joined:(cc) And in that case, the officer of the court, in taxing the costs, will allow the party for whom the issues are found, not only the costs of the pleadings, but also of such parts of the briefs and expenses of witnesses, as relate to the trial of those issues;(d) and he will not allow the other party the costs of such parts of the pleadings, and of the briefs and witnesses, as are not applicable to the points on which the verdict proceeds.(e) On the other hand, if the judge who tried the cause certify, that the party entitled to judgment had a probable cause for making the avowries, or pleading the pleas, the issues on which are found against him, the officer is not to deduct the costs of those issues:(f) And, in the Common Pleas, if a defendant in *replevin*, after trial and verdict for the plaintiff, obtain judgment *non obstante veredicto*, in consequence of the plaintiff's pleas in bar being bad, he is not entitled to any costs upon the pleadings subsequent to the pleas in bar, because he should have demurred to them.(g) The certificate of probable cause is not required to be made in court, at the trial of the cause:(h) and where the judge refuses to grant it, the court have not a discretionary power, whether they will allow the plaintiff any costs at all; but are bound by the statute to allow him some costs, though the *quantum* is left to their discretion.(i)

The general qualities and conditions of a plea are, first, that it be conformable to the count;(k) and, taken collectively, answer the whole declaration:[A] For if any part of the declaration be left unanswered, it operates

be questionable, as to the costs of the trial, from a similar one that was differently determined, in the court of Common Pleas, (Barnes, 141.) as well as from the reasoning that prevailed in several of the foregoing cases: and see 2 Durnf. & East, 235.

(bb) Doug. 768, 9, *in notis*; and see Barnes, 144, 146.

(cc) *Stone v. Forsyth*, T. 22 Geo. III. K. B. 2 Durnf. & East, 235; and see 5 Taunt. 594. 1 Marsh. 234, S. C.

(d) 2 H. Blac. 435. 2 Bos. & Pul. 68. 5 Taunt. 594. 1 Marsh. 234, S. C. 8 Moore, 239. 1 Bing. 275, S. C.

(e) 2 Bos. & Pul. 335.

(f) 2 Durnf. & East, 237.

(g) 2 Bos. & Pul. 376.

(h) Barnes, 141.

(i) *Id.* 140. 2 Durnf. & East, 394, 5.

(k) Co. Lit. 303, a.

[A] Every plea must contain in itself an answer to the whole declaration, or to one count in the declaration, whichever it professes to answer. The defendant may deny part, and justify the residue, if he chooses, but the whole *gravamen* must be answered in some way. *Underwood v. Campbell*, 13 Wend. 78. A plea which, at its commencement, purports to be an answer to the whole declaration, but answers only a part of it, is bad. *Nerins v. Keeler*, 6 Johns. 65. *Gillespie v. Thomas*, 15 Wend. 464. *Hallet v. Holmes*, 18 Johns. 28. *Loder v. Phelps*, 13 Wend. 46. *Van Ness v. Hamilton*, 19 Johns. 349. *Taylor v. Bank of Kentucky*, 2 J. J. Marsh. 564. *Slocum v. Despard*, 8 Wend. 615. *Itikok v. Coates*, 2 Wend. 419. *Postmaster v. Reeder*, 4 Wash. C. C. 678. *Farquhar v. Collins*, 3 A. K. Marsh. 31. And is subject to a demurrer. *Frink v. King*, 3 Scam. 144. *Snyder v. Gaither*, 3 Scam. 91. *Warner*

as a discontinuance. If a plea begin as an answer to the whole, [*661] but in *truth the matter pleaded be only an answer to part, or *vice versâ*, (a) the whole plea is naught, and the plaintiff may demur: (b) but if a plea begin only as an answer to part, and be in truth but an answer to part, it is a discontinuance, and the plaintiff must not demur, but take his judgment for the part unanswered, as by *nil dicit*: for if he demur, or plead over, the whole action is discontinued. (c) Secondly, the plea at common law should be *single*, consisting only of one fact, or of several facts making together one point; for if a plea contain duplicity, or allege several distinct matters, which require several answers to the same thing, it is bad. (dd) Thirdly, it should be *certain*, (ce) in point of form as well as substance: but certainty to a common intent is sufficient; (ff) and that which is apparent to the court, by necessary collection out of the record, or is necessarily implied, need not be expressed; (gg) as in setting forth the feoffment of a manor, it is unnecessary to state livery and attornment. (hh) So, that which is alleged by way of conveyance, or inducement to the substance of the matter, need not be so certainly alleged as that which is the substance itself. (i) Fourthly, every plea, for the sake of certainty, must be *direct and positive*, and not by way of argument or rehearsal. (k) Fifthly, it should be so pleaded, as to be *capable of trial*, by the court upon demurrer or *nul tiel record*, or by the jury upon an issue in fact. (l) Sixthly, it should be *true*, and capable of proof; for truth is said to be the goodness and virtue of pleading, as certainty is the grace and beauty of it. (m) Seventhly, the plea shall be taken most strongly against him that pleadeth it; for every man is presumed to make the best of his own case. (n) But lastly, *surplusage* shall never make the plea vicious, except where it is repugnant, or contrary to matter precedent. (o)

In many cases, the law doth allow *general* pleading, for avoiding prolixity and tediousness; and the particulars shall come on the other side. (p) Thus, when a man is bound to perform all the covenants in an indenture, if they

(a) 2 Bos. & Pul. 427; and see 2 Chit. Rep. 303. 2 Barn. & Cres. 477. 3 Dowl. & Ryl. 647, S. C.

(b) 2 Chit. Rep. 303. 2 Barn. & Cres. 477. 3 Dowl. & Ryl. 647, S. C.

(c) 1 Salk. 179, 80. Gilb. C. P. 155, 157. Willes, 480. 1 H. Blac. 645. 1 Bos. & Pul. 411; and see 1 Wms. Saund. 5 Ed. 28, (3). 1 Chit. Rep. 132, (a). 1 Barn. & Cres. 465, 6, 7. 2 Dowl. & Ryl. 471, 2, 3, S. C. 1 Moore & P. 102. 4 Bing. 428, S. C.

(dd) Co. Lit. 304, a. Steph. Pl. 264, &c.; but see 1 Moore & P. 102. 4 Bing. 428, S. C.

(ce) Co. Lit. 303, a. Steph. Pl. 342, &c. And as to certainty of *place*, see Steph. Pl. 297, &c.; certainty of *time*. *Id.* 311, &c.; quantity, quality, and value. *Id.* 314, &c.; and the names of persons. *Id.* 319, &c.

(ff) Co. Lit. 303, b. Steph. Pl. 380, 81. (gg) Co. Lit. 303, b. Steph. Pl. 357, &c.

(hh) For the cases on this subject, see 2 Wms. Saund. 5 Ed. 305, a. (13).

(i) Co. Lit. 303, a. Steph. Pl. 374, &c.

(k) Co. Lit. 303, a, 304, a. Hob. 295. Steph. Pl. 384, &c.

(l) Co. Lit. 303, b. 9 Co. 24, 5. 1 Marsh. 207.

(m) Hob. 295; and see Steph. Pl. 444, &c.

(n) Co. Lit. 303, b.

(o) *Id. Ibid.* Steph. Pl. 417, &c. And for the several cases that illustrate the above rules, see Com. Dig. tit. *Pleader*, (E.) &c. 1 Chit. Pl. 4 Ed. 451, &c., 463, &c.

(p) Co. Lit. 303, b.

v. *Shelton*, 7 Mis. 237. *Adams v. McMillan*, 7 Port. 73. *Smalley v. Anderson*, 2 Monr. 56. *Tappan v. Prescott*, 9 N. Hamp. 531. *Latin v. Vail*, 17 Wend. 188. *Bettle v. Wilson*, 14 Ohio, 257. *Griffith v. Fishkill*, 4 Blackf. 427. *Foley v. Cowgill*, 5 Blackf. 18. *White v. Conover*, 5 Blackf. 462. *Hawk v. Pollard*, 6 Blackf. 108. *Hickley v. Crossjean*, 6 Blackf. 351. *Deshler v. Hodges*, 5 Ala. 509. *Plant v. Wormager*, 5 Blackf. 236. *Rust v. Smith*, 5 Blackf. 352.

are all in the affirmative, he may plead performance generally : but if any are in the negative, to so many he must plead specially, (for a negative cannot be performed,) and generally to the rest. So, if any are *in the disjunctive, he must show which of them he hath per- [*662] formed : (a) And if any are to be done of record, he must show the performance of those specially, and cannot involve them in general pleading. In setting forth a title, general estates in fee simple may be generally alleged ; but the commencement of estates tail, and other particular estates, must regularly be shown, unless in some cases where they are alleged by way of inducement : (b) and the life of tenant in tail, or for life, ought to be averred. (c)

Every plea ought to have its proper *conclusion* : (d) When the general issue is pleaded, or the defendant simply denies some material fact alleged in the declaration, he should conclude his plea by putting himself upon the country : (e) but where the plea advances new matter in the *affirmative*, the defendant should conclude it with an averment, or verification and prayer of judgment *si actio* : or, in other words, by professing himself ready to verify the plea, and praying judgment, if the plaintiff ought to have or maintain his action against him. An *avowry* however, wherein the defendant is an actor, and which is the nature of a count, need not be averred ; (f) nor pleas which are merely in the *negative*, because a negative cannot be proved. When a judgment, or other matter of record, is pleaded, the plea should conclude with a verification *by the record* : And where in *debt*, the matter of the plea shows that there never was a good cause of action, as in *debt* on bond against an heir, who pleads *riens per discent*, the defendant, instead of concluding that the plaintiff ought not to have his action, may conclude that he (the defendant,) ought not to be charged with the debt, by virtue of the writing obligatory. (g) In an action of *debt*, the defendant, in pleading a tender, ought to conclude his plea, by praying judgment if the plaintiff ought to have or maintain his action, to recover *any* damages against him ; for in this action, the debt is the principal, and the damages are only accessory : but in *assumpsit*, the damages are the principal ; and therefore, in pleading a tender, the defendant ought to conclude his plea, with a prayer of judgment, if the plaintiff ought to have or maintain his action, to recover any *more* or *greater* damages than the sum tendered, or *any* damages by reason of the non-payment thereof. (h) In pleading matter of estoppel, the defendant in his conclusion ought to rely upon it. (i)

As the defence, in actions upon *contracts*, frequently consist in setting off mutual debts, [A] it may here be proper to consider the doctrine of *set-*

(a) Co. Lit. 303, b.

(b) *Id. Ibid.* Steph. Pl. 327, &c. *Ante*, 442.

(c) Co. Lit. 303, b ; but see 1 Wms. Saund. 5 Ed. 235, (8,) as to the difference between tenant for life and tenant in tail.

(d) Co. Lit. 303, b ; and see 1 Chit. Pl. 474, &c. Steph. Pl. 392, &c., 436, &c. And as to the mode of entitling pleadings, see *Id.* 442, &c.

(e) 2 Wms. Saund. 5 Ed. 337, (1).

(f) Co. Lit. 303, a.

(g) 2 Salk. 516.

(h) *Id.* 622, 3. 1 Ld. Raym. 254, S. C. Willes, 13.

(i) Co. Lit. 303, b.

[A] Demands, to be set off, must be mutual and connected, and due in the same right. *Paine v. Whitbridge*, 1 McCord, 7. *Hurlbut v. Ins. Co.*, 2 Sumner, 471. *Shepard v. Turner*,

off: and in what cases it must be pleaded, or may be given in evidence under the general issue: and in the latter case, the *notice* of set-off.

*At common law, if the plaintiff was indebted to the defendant [*663] in as much, or even more than the defendant owed to him, yet he had no method of striking a balance: the only way of obtaining relief was by going into a court of equity.(a) To remedy this inconvenience, it was enacted by the statute 2 Geo. II. c. 22, § 13, that "where there are mutual debts between the plaintiff and defendant, or, if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other; and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require; so as at the time of pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, *notice* shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due; or otherwise such matter shall not be allowed in evidence upon the general issue." This clause was made perpetual by the 8 Geo. II. c. 24, § 4: and it having been doubted, whether mutual debts of a *different* nature could be set against each other, it was by the last-mentioned statute(b) further enacted and declared, that "by virtue of the said clause, mutual debts may be set against each other, either by being pleaded in bar, or given in evidence on the general issue, in the manner therein mentioned, notwithstanding that such debts are deemed in law to be of a different nature; unless in cases where either of the said debts shall accrue by reason of a *penalty*, contained in any bond or specialty; and in all cases, where either the debt for which the action hath been or shall be brought, or the debt intended to be set against the same, hath accrued, or shall accrue, by reason of any such penalty, the debt intended to be set off shall be pleaded in bar; in which plea shall be shown, how much is truly and justly due on either side: and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to him, after one debt being set against the other as aforesaid."(c) If an account has been settled, and balance struck between the parties, it may be given in evidence on the general issue; but a defendant cannot reduce a plaintiff's demand for goods sold, by producing a debtor and creditor account, in the handwriting of the plaintiff's clerk, showing goods to have been sold by defendant to plaintiff, unless he has pleaded or given a notice of set-off.(d)

(a) 2 Bur. 820. 2 Ken. 530, S. C. 4 Bur. 2220.

(b) § 5.

(c) The day after the last act passed, Lord *Hardwicke*, Ch. J., delivered the opinion of the court of King's Bench, that a debt by simple contract might, by the former act, have been set off against a specialty debt. *Brown & Holyoak*, 8 Geo. II. Bul. N. Pri. 179. Willes, 262, 3. 2 Blac. Rep. 871.

(d) 1 Car. & P. 133.

3 McCord, 249. *Gregg v. James*, Breese, 107. *McKinney v. Bellows*, 3 Blackf. 31. *Scott v. Rivers*, 1 Stew. & Port. 19. *Darrock v. Hay*, 2 Yeates, 208. *Morrison v. Furnham*, 1 A. K. Marsh. 41. And between the same parties. *Wain v. Wilkins*, 4 Yeates, 461. *Warner v. Barker*, 3 Wend. 400. And the debts must be due to and from the same persons in the same capacity. *Pitkin v. Pitkin*, 8 Conn. 325. Thus a joint debt cannot be set off against a separate debt, nor a separate debt against a joint debt. *Bibb v. Saunders*, 2 Bibb, 86. *Blanks v. Smith*, Peck, 186. *McDowell v. Tyson*, 14 S. & R. 300. *Porter v. Neckervis*, 4 Rand, 359. *Howe v. Sheppard*, 2 Sumner, 409. *Walker v. Leighton*, 11 Mass. 140. *Woods v. Carlisle*, 6 N. Hamp. 27. *Stewart v. Coulter*, 12 S. & R. 252. Neither can a debt due from an individual partner be set off against a partnership demand. *Scott v. Trent*, 1 Wash. 77. *White v. Union Ins. Co.* 1 N. & M. 556. *Brown v. Thompson*, Coxe, 2. *Richie v. Moore*, 5 Munf. 388.

The actions in which a set-off is allowable upon these statutes are *debt*, *covenant*, and *assumpsit* for the non-payment of money; and the demand intended to be set off must be liquidated,^(e) [A] and such as might have been *made the subject of one or other of these actions. A [*664] set-off therefore is never allowed in actions of *trespass*, or upon the *case*: nor in *debt* on bond conditioned for the performance of the covenants,^(a) &c.; nor in *covenant*, or *assumpsit*, for general damages:^(b) And a penalty,^(c) or uncertain damages,^(dd) cannot be made the subject of a set-off. But where a bond is conditioned for the payment of an annuity,^(ee) or of *liquidated* damages,^(f) a set-off may be allowed: And a judgment may be pleaded by way of set-off, though a writ of error be pending thereon.^(g) The statutes of set-off do not extend to an action of *replevin*.^(h) But to an avowry or cognizance for rent, the plaintiff in *replevin* may plead in bar the payment of ground rent,⁽ⁱ⁾ or of an annuity charged on the premises;^(k) or of land tax, &c. paid for the same, after the rent distrained for had become due, or whilst it was accruing; though any previous payment of land tax, &c. cannot be pleaded in bar of an avowry or cognizance for rent subsequently due.^(l) In *assumpsit* for goods

(e) Peake's Cas. Ni. Pri. 3 Ed 56; and see *Id.* 57, (a), and the cases there cited.

(a) Bul. Ni. Pri. 179. Willes, 261. McClel. 198. 13 Price, 434, S. C.

(b) 1 Esp. Rep. 378. 3 Campb. 329. 5 Maule & Sel. 439. 2 Chit. Rep. 161. 5 Barn. & Ald. 93. *Auber v. Lewis*, E. 58 Geo. III. K. B. Man. Dig. tit. *Set-Off*, A. (b); but see 1 East, 375.

(c) 2 Bur. 1024.

(dd) 1 Blac. Rep. 394. 2 Blac. Rep. 910. Cowp. 56. 6 Durnf. & East, 488. 4 Esp. Rep. 207. 1 Taunt. 137. McClel. 198. 13 Price, 434, S. C.

(ee) 2 Bur. 820. 2 Ken. 530, S. C.

(f) 2 Durnf. & East, 32.

(g) *Reynolds v. Beerling*, M. 25 Geo. III. K. B. 3 Durnf. & East, 188, *in notis*: but see 2 H. Blac. 372.

(h) Barnes, 450. Bul. Ni. Pri. 181, S. C. *Graham v. Fraine*, H. 24 Geo. II. *Laycock v. Tuffnell*, H. 27 Geo. III. K. B. 2 Chit. Rep. 531; and see 4 Durnf. & East, 512, (a), S. C. cited.

(i) 4 Durnf. & East, 511.

(k) 6 Taunt. 524. 2 Marsh. 220, S. C.

(l) 1 Barn. & Ald. 123. 3 Moore, 278. 1 Brod. & Bing. 37, S. C. 3 Barn. & Ald. 516; and see 4 Moore, 431. 2 Brod. & Bing. 59, S. C. 2 Chit. Rep. 531, (a). McClel. 622. 4 Bing. 11.

[A] An unliquidated demand cannot be pleaded in set-off. *Farquhar v. Collins*, 3 A. K. Marsh. 31. *Morrison v. Hart*, Hardin, 150. *McKinney v. Bellous*, 3 Blackf. 31. *State v. Welsted*, 6 Halst. 397. *De Tastett v. Crousillatt*, 2 Wash. C. C. 132. *U. States v. Wells*, 2 Ib. 161. *Williams v. Gilchrist*, 3 Bibb, 49. *Brown v. Curning*, 2 Caines, 33. *Taylor v. Stout*, Coxe, 53. *Edwards v. Davis*, 1 Halst. 394. *Hogg v. Ashe*, 1 Hayes, 471. *Hepburn v. Hoag*, 6 Conn. 613. *McCord v. Williams*, 2 Ala. 71. *Woodruff v. Laylin*, 4 Pike, 527. But unliquidated damages may be set off, under the plea of payment, in an action of debt arising from the same transaction. *Hubler v. Tamney*, 5 Watts, 51. Neither can an account, barred by the statute of limitations, be sustained as a set-off. *Gilchrist v. Williams*, 3 A. K. Marsh. 235. *Williams v. Gilchrist*, 3 Bibb, 49. *Turnbull v. Strohecker*, 4 McCord, 210. *Crist v. Garner*, 2 Pennsylv. 251. *Madden v. Madden*, 2 Rep. Con. Ct. 350. *Jacks v. Moore*, 1 Yeates, 391. Nor a claim in autre droit, *Doyley v. Doyley*, 2 McCord, 185. Neither can a debt due by the plaintiff to one of several obligors, in a bond, be set-off in a suit against all the obligors. *Henderson v. Lewis*, 9 S. & R. 379. *Pitcher v. Patrick*, Minor, 321. And, generally speaking, demands can only be set off between parties in the character in which they are sued; therefore, a demand against its clerk cannot be set off against a demand due to a corporation. *Columbia v. Harrison*, 2 Rep. Con. Ct. 213. Neither can a claim against the plaintiff in a representative capacity be set off in a suit brought in an individual capacity. *Grew v. Burditt*, 9 Pick. 265. *Snow v. Conant*, 8 Verm. 308. *Cummings v. Williams*, 5 J. J. Marsh. 381. *Barton v. Hoomes*, 1 A. K. Marsh. 19. So it has been held that in an action to recover money received by an officer in his official capacity, a debt due from the plaintiff to the officer, in his private capacity, is not a subject of set-off. *Prewett v. Marsh*, 1 Stew. & Port. 17. Or claims against an agent, against a debt due the principal. *Wilson v. Codman*, 3 Cranch, 193. *Atkinson v. Teasdale*, 1 Bay, 299. *Godfrey v. Forrest*, *Ib.* 300.

sold and delivered, the defendant may set off money due upon the plaintiff's acceptance, of which defendant has become holder since the sale, and before the delivery of the goods, though he has agreed to pay the plaintiff ready money for them.^(m) But a debt barred by the statute of limitations cannot be set off: and if it be pleaded in bar to the action, the plaintiff may reply the statute of limitations;⁽ⁿ⁾ or if given in evidence on a notice of set-off, it may be objected to at the trial.^(o)

In order to set off a debt, it is necessary that it should have existed at the time of the commencement of the action; [A] it having been determined,

(m) 2 Maule. & Sel. 510; and see 2 Esp. Rep. 626. 1 East, 375. 8 Moore, 275. 1 Bing. 311, S. C. 9 Dowl. & Ry. 35.

(n) 2 Str. 1271.

(o) Bul. Ni. Pri. 180.

[A] A set-off can be made only of a demand existing and owned by the defendants at the time of the commencement of the suit. *Huling v. Hugg*, 1 Watts & Serg. 418. *Cox v. Cooper*, 3 Ala. 256. *Carfren v. Canaran*, 4 How. Miss. 370. *Kelly v. Garrett*, 1 Gilman, 649. And the debts must be mutual. *Hogg v. Ashe*, C. & N. 3. *Wofford v. Greenlee*, C. & N. 79. *Haughton v. Leary*, 3 Dev. & Batt. 21. *Cash v. Cash*, Geo. Decis. Part 1. 97. *Buchanan v. Gamble*, Ib. 156. See *Ante*, p. 662, [A]. A debt remains mutual as much after verdict as before, and the verdict does not annihilate or extinguish the debt; it only amounts to conclusive evidence of the debt, and the same right exists to set it off after the verdict as before. *Bell v. Cogswell*, 1 Ashmead, 7.

Set-off may be pleaded in an action of covenant; and the plea must contain the requisites of a count in debt. *Roebuck v. Tennis*, 5 Monr. 82. It is a general rule that, where indebitatus assumpsit will lie on a simple contract, the debt due thereon may be pleaded in set-off. *Austin v. Zeland*, Mis. 309.

In Pennsylvania, the doctrine of set-off has been liberally extended by statute, and an unliquidated cross demand, arising from a distinct and independent contract, may there be set off. *Ellmaker v. Franklin Fire Ins. Co.*, 6 Watts & Serg. 439. So in Illinois, under the 17th section of the Practice Act of Illinois, of 1827, unliquidated damages, arising *ex contractu*, may be set off in an action of assumpsit. *Edwards v. Todd*, 1 Scam. 462. *Kuskaskia Bridge Co. v. Shannon*, 1 Gilman, 15. And it has been held in Pennsylvania, that the defendant in an action may set off the excess of interest taken of him by the plaintiff in a transaction different from that on which the action is brought. *Thomas v. Shoemaker*, 6 Watts & Serg. 179. And damages arising from a breach of warranty of goods sold may be set off in an action on a note given in a different transaction. *Phillips v. Lawrence*, 6 Watts & Serg. 150. *Carman v. Franklin Fire Ins. Co.*, 6 Watts & Serg. 155.

"We have gradually enlarged the effect of our act for defalcation by discarding notions derived from the English statute of set-off, till we have brought it to the line of the enactment. There is not a word in the English statute about mutual dealing; or about being indebted by bonds, bills, bargains, promises, or accounts; or about the defendant's being unable to gainsay the deed, bargain, or assumption—expressions in ours which indicate an unsettled course of dealing—nor is there any thing in it to show that the words, 'mutual debts,' the only descriptive ones contained in it, were not to have their technical effect. In our statute, too, the words 'debt or sum demanded,' seem to have been introduced intentionally to enlarge the purview. True it is, that both statutes are susceptible of the same construction without much violence to the words, and that we have been in the habit of receiving English precedents in questions of set-off; but it has seemed that neither justice nor convenience called on us to depart from the obvious and natural meaning of our own. If an unliquidated cross demand may be set up when it has sprung from the same transaction—and we have constantly ruled that it may—why may it not be set up when it has sprung from a distinct and independent contract? The confusion incident to the trial of distinct issues in the same action is no greater where the demands are independent of each other than where they are connected, nor more embarrassing where they are indefinite than where they are liquidated; nor more complicated where they are set against each other than where they are joined in the same declarations or in consolidated actions. The practical difference between a debt, properly so called, and an indefinite demand of money resting in contract, is more seeming than real. A bond for the payment of a sum certain is strictly a debt, and a subject of set-off; yet to ascertain the amount due on it when reduced, as it sometimes is by failure of consideration, or a variety of causes, is often one of the most difficult duties that can be committed to a jury. When its definite character is so often deceptive, what better claim has it to be made matter of set-off than a policy of insurance? The trial of cross demands in the same action saves expense and the vexation of paying out money to get it back at the risk of losing it by insolvency in the circuit." *Per Gibson, C. J.*, in *Ellmaker v. Franklin Ins. Co.*, 6 Watts & Serg. 444.

that a plea of set-off, stating that the plaintiff was indebted to the defendant at the time of plea pleaded, is bad. *(p)* And the debts sued for, and intended to be set off, must be *mutual*, and due in the same right: *(q)* therefore, a joint debt cannot be set off against a separate demand, nor a separate debt against a joint one, *(r)* unless it be so agreed by the parties; *(s)* but *debt due to a defendant as surviving partner, may be set off [*665] against a demand on him in his own right, *(a)* and *vice versa*. *(b)* [A]

A policy broker, who makes an insurance in his own name, for the benefit of his principal, and has a *del credere* commission, may it seems set off the amount of losses and returns of premium, in an action brought against him by an underwriter for premiums. But where the insurance is made by the broker in the name of his principal, *(c)* or he has not a commission *del credere*, *(d)* the losses and returns of premium, not being a mutual debt, cannot be made the subject of a set-off. So, if an action be brought against a policy broker, by the *assignees or executors* of an underwriter, for premiums, where the insurance was made by the broker in his own name on a *del credere* commission, the defendant may set off the amount of losses happening and adjusted, or returns of premium becoming due, before the bankruptcy, or in the life-time of the testator. *(e)* But a loss happening before the bankruptcy cannot be set off, in an action brought by the assignees of an underwriter against a broker, for premiums due to the bankrupt, where the insurance was made in the name of the assured, and the broker was not intrusted with the policy, though he had a *del credere* commission, and had paid the loss to the assured before the bankruptcy; *(f)* nor where the insurance was made by the broker *as agent*, without a *del credere* commission, and there had been no adjustment, though the loss took

(p) 3 Durnf. & East, 186; and see 1 Bing. 93.

(q) 1 Younge & J. 180.

(r) 5 Maule & Sel. 439; and see 7 Barn. & Cres. 217; but see Peake's Cas. Ni. Pri. 3 Ed. 260. 2 Esp. Rep. 469, 594.

(s) 2 Taunt. 170.

(a) 5 Durnf. & East. 493. 1 Esp. Rep. 47.

(b) 6 Durnf. & East, 582; and see 2 Durnf. & East, 476.

(c) 1 Maule & Sel. 494. 2 Maule & Sel. 112; and see 4 Taunt. 242. 4 Maule & Sel. 566. 7 Taunt. 478.

(d) *Wilson and others, assignees, v. Creighton and others*, M. 23 Geo. III. K. B. Marsh. Insur. 1 Ed. p. 204. 16 East, 382.

(e) 1 Durnf. & East, 115, 285. 2 Campb. 586; and see 12 East, 507. 4 Taunt. 584. 6 Taunt. 448. 2 Marsh. 138, S. C.

(f) 7 Taunt. 478. 1 Moore, 178, S. C.

[A] A claim to be set off at law, must be a claim at law and not in equity. *Gilchrist v. Leonard*, 2 Bailey, 135; and of like character, thus, a note cannot be set off against a judgment. *Bagg v. Jefferson*, Com. Pleas, 10 Wend. 615. Or a note given after notice of an assignment, though for a preëxisting liability, cannot be the subject of set-off. *Weeks v. Hunt*, 6 Verm. 15. A judgment recovered by A. against B. and C., may be set off by a judgment recovered by B. against A. *Hutchins v. Riddle*, 12 N. Hamp. 464. And the court may, in its discretion, stay the entry of judgment in the action in favor of B. against A., to enable the latter to obtain judgment on his demand against B. and C., for the purpose of making a set-off. *Ib.* To enable one to set off one judgment against another on motion, he must be the absolute owner of the judgment in his own right. *Mason v. Knowlson*, 1 Hill, 218.

In general, set-offs are not admissible in the admiralty. *Ship Mentor*, 4 Mason, 84. Courts of admiralty do not take notice of set-offs, except so far as they grow out of a maritime contract submitted to their cognizance, and these principles, by way of diminishing compensation, and not as an independent right. *Willard v. Dorr*, 3 Mason, 161. Nor is set-off allowable on a libel for seamen's wages, except a payment on account thereof. *Baines v. Schooner James*, 1 Bald. 544. Neither is it allowable in replevin; but the tenant may prove that the landlord did not comply with his contract. *Fairman v. Huck*, 5 Watts, 516. Or against any one other than the plaintiff on the record. *Johnson v. Bridge*, 6 Cow. 693. *Grigg v. James*, Breese, 107.

place before the bankruptcy, and though the policy had always remained in the hands of the broker, and he had actually paid the amount of the loss to his principal.(g) And a broker who is indebted to the assignees of a bankrupt, for premiums due to them upon policies subscribed by the bankrupt before his bankruptcy, is not entitled to set off returns of premium due upon the arrival of ships after the bankruptcy.(h) So, in an action by the executors of an underwriter against a broker for premiums due on policies subscribed by the testator, the defendant cannot set off returns of premium which became due after the testator's death:(i) and it makes no difference in this respect, that the policies were effected under a *del credere* commission.(k) A broker having adjusted a loss with an underwriter, and struck his name out of the policy and adjustment, after which he became bankrupt within the usual time of credit, it was holden that the underwriter could not set off against the assured, the balance due to him from the broker, at the time of adjusting the loss on the policy.(l) *And where [*666] the defendant purchased as broker for B., the goods of A., for whom he sold them under a *del credere* commission, and did not disclose at the time the name of A., but disclosed it soon after, and paid A. the price of the goods, without any directions from B., the court held, that in an action by the assignees of B., to recover the balance due upon a resale of the goods, made by the defendant on account of B., the defendant was not entitled to set off the money paid to A., either under the statute 2 Geo. II., c. 22, § 13, or 5 Geo. II. c. 30, § 28.(a)

In an action of *debt* against a man on his own bond, he is not allowed to set off a debt due to him in right of his wife:(b) And a debt owing by the wife *dum sola* cannot be set off in an action brought by the husband alone, unless he has promised to pay the debt after marriage, and thereby made it his own.(c) Neither, for the same reason, can a defendant, sued as executor or administrator, set off a debt due to himself personally; nor, if sued for his own debt, can he set off what is due to him as executor or administrator: And where an executor sues for a cause of action arising after the testator's death, the defendant cannot set off a debt due to him from the testator.(d) The defendant cannot plead by way of set-off, a bond debt of the plaintiff, assigned to the defendant by another, to whom and for whose use it was originally given.(e) And one partner cannot set off a debt due to him from another, on the partnership account, unless a final balance has been struck, and agreed to between the parties.(f) But where an action is brought by or against a *trustee*, a set-off may be made of money due to or from the *cestui que trust*.(gg) And where goods belonging partly to A. and partly to B. were put up to auction at A.'s house, having been entered at the excise in A.'s name, and the catalogue stated them to be all the property of A., and C., being a creditor of A., pur-

(g) 4 Campb. 396. 6 Taunt. 519. 2 Marsh. 215, S. C.

(h) 4 Taunt. 534

(i) 6 Taunt. 448. 2 Marsh. 138. Holt Ni. Pri. 88, S. C.

(k) 6 Taunt. 451. 2 Marsh. 141, S. C. Holt Ni. Pri. 89, n.

(l) 3 Sta. k. Ni. Pri. 16.

(a) 4 Maule & Sel. 566.

(b) Bul. Ni. Pri. 179.

(c) 2 Esp. Rep. 594.

(d) Willes, 103. Cas. Pr. C. P. 151. Pr. Reg. 268, S. C.; and see Willes, 106, (1) 264, (a). Bul. Ni. Pri. 180.

(e) 16 East, 36.

(f) 2 Bing. 170. 9 Moore, 319, S. C.

(gg) 1 Durnf. & East, 622; and see Willes, 400. 2 Esp. Rep. 557. 7 Durnf. & East, 359, S. C. 2 Chit. Rep. 387. 7 Taunt. 243. 2 Marsh. 501, S. C. 4 Barn. & Cres. 547. 7 Dowl. & Ry. 42, S. C.

chased several of the articles, without being informed that part of them were the property of B., it was holden that, under these circumstances, the purchaser was entitled to set off, in an action brought by the auctioneer, the debt due to him from A. *(h)* It was formerly holden, that a set-off could not be allowed, as against the assignees of a bankrupt; *(i)* but it has since been determined that, in an action at their suit, the defendant may set off a debt due to him at the time of the bankruptcy: *(k)* And where an insured, being indebted to the underwriter on a balance of accounts, becomes bankrupt, if a loss afterwards happen, the underwriter, in an action by the assignees, may deduct the balance due to him, from the amount of his *subscription. *(aa)* So, a sale of the property of a [*667] bankrupt after an act of bankruptcy, but more than two months before the commission issued, is since the 46 Geo. III. c. 135, § 1, a sale by the bankrupt, and not by the assignee; and a creditor of the bankrupt having become a purchaser, was holden, in an action brought by the assignee for the value of the goods, to be entitled to set off against such claim, the debt due to him from the bankrupt; this constituting a mutual credit between the bankrupt and such creditor, within the meaning of the above statute. *(bb)* But a note indorsed to the defendant, after the bankruptcy, cannot be set off; *(c)* nor cash notes issued by the bankrupt before his bankruptcy, and payable to bearer, unless the defendant show further, that such notes came to his hands before the bankruptcy. *(d)* To enable the holder of a bankrupt's acceptances to avail himself of them, in an action by the assignees against himself on his own acceptance, he must clearly prove, either that the obligation to pay the bankrupt's acceptances subsisted before the bankruptcy, to bring the case within the ordinary law of set-off, or that there was some connection in the origin of the transaction, to bring it within the cases of mutual credit. *(e)*

When either of the debts accrues by reason of a *penalty*, the debt intended to be set off must be pleaded in bar; and the defendant in his plea, must aver what is really due: *(f)* which averment has been holden to be traversable, *(g)* though laid under a *videlicet*. *(hh)* But in all other cases, the defendant may either plead or give notice of set-off, at his election. *(ii)* And where, to *debt* on bond, the defendant pleaded a set-off, and that 1100*l.* was due and no more, and the plaintiff replied generally, that a larger sum was due, to wit, the sum of 1750*l.*, it was ruled, that the plaintiff was bound to prove that more than 1100*l.* was due. *(kk)* If, at the time of the action brought, a larger sum was due from the plaintiff to the defendant, than from him to the plaintiff, the action being barred, it seems more proper to plead the set-off; and it is usually pleaded in country causes, to save the trouble and expense of proving the service of a notice. But where the sum intended to be set off is less than that for which the

(h) 7 Taunt. 243. 2 Marsh. 501, S. C.

(i) 1 Wils. 155.

(k) Cowp. 133; and see the statutes 5 Geo. II. c. 30, § 28. 46 Geo. III. c. 135, § 3. 6 Geo. IV. c. 16, § 50. Holt Ni. Pri. 498. 6 Dowl. & Ryl. 312. 5 Barn. & Cres. 141. 7 Dowl. & Ryl. 539, S. C.

(aa) 2 Marsh. 561. 5 Maule & Sel. 498. 3 Price, 227, S. C.; but see 4 Taunt. 775, *contra*.

(bb) § 3. 1 Barn. & Ald. 471; and see 2 Chit. Rep. 387. Stat. 6 Geo. IV. c. 16, § 50.

(c) 2 Str. 1234.

(d) 6 Durnf. & East, 57.

(e) 4 Taunt. 888; and see 6 Taunt. 517. 2 Marsh. 209, S. C. 6 Barn. & Cres. 42.

(f) Stat. 8 Geo. II. c. 24, § 5.

(g) 3 Durnf. & East, 65.

(hh) 6 Durnf. & East, 460.

(ii) 2 Bur. 1231. Bul. Ni. Pri. 179.

(kk) Holt Ni. Pri. 293.

action is brought, a notice of set-off should be given.^(l) A notice of set-off can only be given when the general issue is pleaded, without any other plea.^(m) And the plea of *non est factum*, in *covenant* for non-payment of rent, is not considered as a general issue, under which the defendant can give a notice of set-off: for in *covenant* there is, properly speaking, no general issue;⁽ⁿ⁾ and if a verdict were found thereon for the [*668] plaintiff, there *would be no means, in entering up the judgment, of setting off the debt due to the defendant.^(a)

The *notice* of set-off should regularly be given with, or at the time of pleading the general issue:^(b) Though if it be not then given, the court, on motion, will give the defendant leave to withdraw the general issue, and plead it again with a notice of set-off:^(cc) and such notice may be given with the general issue, after the defendant has been ruled to abide by his plea.^(dd) In point of form, a notice of set-off should be almost as certain as a declaration: therefore, where the notice of set-off was in these words, "Take notice that you are indebted to me, for the use and occupation of an house, for a long time held and enjoyed, and now lately elapsed;" it was deemed insufficient:^(ee) and it afterwards appearing, that the debt intended to have been set off was rent reserved on a lease by indenture, which was not mentioned in the notice, the chief justice said it was bad on that account also; for if this had been shown, the plaintiff might probably have proved an eviction, or some other matter to avoid the demand.^(f) The notice of set-off is usually written under the plea, and delivered therewith to the plaintiff's attorney; and a copy of the notice should be kept by the defendant's attorney, it being necessary to prove the delivery of it at the trial of the cause.^(g)

When the defendant has a set-off against the plaintiff, of which he gives notice, but does not appear at the trial to offer evidence in support of it, the plaintiff may either take a verdict for the whole sum he proves to be due to him, subject to be reduced to the sum really due on a balance of accounts, if the defendant will afterwards enter into a rule not to sue for the debt intended to be set off; or, it is said he may take a verdict for the smaller sum, with a special indorsement on the *postea*, as a foundation for the court to order a stay of proceedings, if another action should be brought for the amount of the set-off.^(h)

It is sometimes necessary, in actions brought by or against the *assignees* of a bankrupt, for the other party to give a notice in writing, of his intention to dispute the petitioning creditor's debt, trading, or act of bankruptcy; it being enacted, by the statute 6 Geo. IV. c. 16, § 90, that "in any action

(l) Bul. Ni. Pri. 179; but see Lawes, on Pleading, 538.

(m) Ry. & Mo. 413, *per Abbott*, Ch. J.; but see 6 Esp. Rep. 50. 3 Chit. Pl. 4 Ed. 932, (b), 933, (a), *contra*.

(n) *Ante*, 648.

(a) 1 Stark. Ni. Pri. 311. 5 Maule & Sel. 164. 2 Chit. Rep. 388, S. C. Sel. Ni. Pri. 6 Ed. 535; but see Bul. Ni. Pri. 181, *semb. contra*.

(b) Append. Chap. XXVII. § 7.

(cc) 2 Str. 1267.

(dd) 1 Durnf. & East, 693, 4, *in notis*.

(ee) Bul. Ni. Pri. 179. But note, this was before the stat. 11 Geo. II. c. 19, which gives the action for use and occupation.

(f) And see 2 Esp. Rep. 560, 569.

(g) 1 Crompt. 3 Ed. 156. And see further as to the *notice* of set off, Lawes, on Pleading Chap. XVI. p. 535, &c., and as to the *plea* of set-off, and the replications thereto. *Id.* Chap. XX. p. 769, &c.

(h) 1 Campb. 252; and see 1 Chit. Rep. 178.

by or against any assignee, or in any action against any commissioner, or person acting under the warrant of the commissioners, for any thing done as such commissioner, or under such warrant, no proof shall be required, at the trial, of the petitioning creditor's debt or debts, or of the trading, act or acts of bankruptcy respectively, unless the other party in such action shall, if defendant, at **or before pleading*, and, if [*669] plaintiff, *before issue joined*, give notice in writing to such assignee, commissioner or other person, that he intends to dispute some and which of such matters: (a) and in case such notice shall have been given, if such assignee, commissioner or other person, shall prove the matter so disputed, or the other party admit the same, the judge before whom the cause shall be tried may (if he think fit,) grant a certificate of such proof or admission; and such assignee, commissioner or other person, shall be entitled to the costs, to be taxed by the proper officer, occasioned by such notice; and such costs shall, if such assignee, commissioner or other person, shall obtain a verdict, be added to the costs; and if the other party shall obtain a verdict, shall be deducted from the costs, which such other party would otherwise be entitled to receive from such assignee, commissioner or other person." (b) And by § 92, of the same statute, "if the bankrupt shall not (if he was within the united kingdom at the issuing of the commission,) within *two* calendar months after the adjudication, or, if he was out of the united kingdom,) within *twelve* calendar months after the adjudication, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the commissioners, at the time of or previous to the adjudication, of the petitioning creditor's debt or debts, and of the trading, and act or acts of bankruptcy, shall be conclusive evidence of the matters therein respectively contained, in all actions at law or suits in equity, brought by the assignees, for any debt or demand for which the bankrupt might have sustained any action or suit."

Where the defendant, in an action brought by the assignee of a bankrupt, intends to dispute the trading, petitioning creditor's debt, or act of bankruptcy, the notice should specify which of these matters it is intended to dispute; it not being sufficient to give a general notice, that he intends to dispute the *bankruptcy*. (c) In a previous case, arising upon the statute 49 Geo. III. c. 121, § 10, where the general issue had been pleaded before the passing of that act, it was deemed unnecessary for the plaintiff to prove the petitioning creditor's debt, trading, or act of bankruptcy; but a judge, under these circumstances, would have given the defendant leave to withdraw his plea, and plead it *de novo*, with the notice required by the act. (d) So, in a case which occurred after the passing of that act, where a defendant, in an action by the assignees of a bankrupt, pleaded the general issue, without giving notice of his intention to dispute the bankruptcy, but before the time for pleading had expired, delivered the general issue again, with notice of his intention, such notice was deemed insufficient: (e) The defendant in such case ought to have moved for leave to withdraw his plea, &c. (e) And a notice by the plaintiff, of his intention to dispute the act of bankruptcy, served at the **same time the issue is de-* [*670] livered, with notice of trial on the back of it, is not sufficient:

(a) For the forms of notices on this statute, see Append. Chap. XXVII. § 8, 9, 10.

(b) And see stat. 49 Geo. III. c. 121, § 10.

(c) 6 Barn. & Cres. 537.

(d) 2 Campb. 184; and see *id.* 325. Wightw. 80. 6 Moore, 489.

(e) 1 Stark. Ni. Pri. 328.

It must be given before issue joined.(a) The notice may be served on the assignee, by delivery to his attorney:(b) but service of the notice, by leaving it with a maid servant at the dwelling house of the assignee, is not sufficient.(b) And the notice given by a defendant is not to be considered as part of his regular evidence in the cause; but may be proved at the beginning of the trial, and immediately puts the plaintiff upon strict proof of the trading, petitioning creditor's debt, or act of bankruptcy.(ee)

In an action of *trespass*, brought by a bankrupt against his assignees, to try the validity of the commission,(dd) or in *trover* by a third person against the assignees,(ee) although they are not named as assignees on the record, if the plaintiff do not give any notice of his intention to dispute the petitioning creditor's debt, &c., the commission and proceedings under it are *primâ facie* evidence for the defendant, to prove the trading, petitioning creditor's debt, and act of bankruptcy; though the plaintiff may notwithstanding call witnesses to contradict the depositions respecting them.(f) So, in an action of *trespass*, against the assignees of a bankrupt and their servants, the proceedings may be read in evidence, where no notice has been given under the statute, of the plaintiff's intention to dispute the bankruptcy, although there are other defendants on the record, besides the assignees:(g) And where the defendant, in an action at the suit of the assignee of a bankrupt, for the balance of an account, had attended a meeting of the commissioners, and exhibited the account between him and the bankrupt, and afterwards made a part payment to the plaintiff on that account; the court held, that this was *primâ facie* evidence, as against the defendant, that the plaintiff was assignee, and that it was not necessary to produce the proceedings under the commission, the defendant not having given notice of his intention to dispute the bankruptcy.(h) But where the assignees are no parties to the record, and their title only incidentally comes in question in the course of the defence, it must be proved in the same manner as before the statute; although no notice of contesting the bankruptcy has been given by the opposite party:(i) And the defendant, though he has not given notice that he intends to dispute the proceedings under the commission, may nevertheless give evidence to disprove the act of bankruptcy.(k)

If no notice be given by the opposite party, that the validity of the commission is meant to be disputed, the petitioning creditor's debt is held to be sufficiently proved, by the deposition of the petitioning creditor himself before the commissioners.(l) So, in an action for goods sold and delivered, brought by the assignees of A., against whom a com-
[*671] mission *of bankruptcy issued, on the petition of certain persons who alleged that a debt was due to them as assignees of B., a bankrupt; the court held that the petitioning creditor's debt was sufficiently proved by the production of the proceedings under the commission, no notice of an intention to dispute it having been given; and that it was not incumbent on the plaintiffs to give any other evidence, that the petitioning creditors were the assignees of B.(aa) And where, upon the trial

(a) 4 Campb. 207.

(b) 3 Taunt. 526.

(dd) 3 Campb. 251. 4 Campb. 207.

(f) 3 Campb. 424.

(h) 1 Barn. & Ald. 677.

(k) 2 Maule & Sel. 556. Holt. Ni. Pri. 190.

(aa) 2 Barn. & Cres. 560. 4 Dowl. & Ryl. 37, S. C.

(ee) 2 Campb. 324.

(ee) Gow, 24.

(g) 2 Stark. Ni. Pri. 182.

(i) 4 Taunt. 741.

(l) 2 Campb. 493.

of an action of *trespass*, in which the defendant justified under a commission of bankrupt issued against the plaintiff, no notice having been given to dispute the commission, which was put in, with the proceedings under it, and a perfect petitioning creditor's debt did not appear upon the proceedings; the court of Common Pleas nevertheless held, that the validity of the commission could not be disputed: *(b)* But in order to make the depositions evidence of the petitioning creditor's debt, where no notice has been given, it ought to appear therefrom that the debt was due at the time of the act of bankruptcy. *(c)* And a deposition, stating that the bankrupt absented himself, and admitted that he did so for the purpose of avoiding his creditors, but not specifying the time of such admission, is not *prima facie* evidence to prove the act of bankruptcy. *(d)* In an action by a bankrupt against his assignees, to try the validity of the commission, where notice is given only to dispute the act of bankruptcy, and the defendants read the two depositions on the file of the proceedings, which prove the trading and petitioning creditor's debt, the residue of the proceedings are not to be considered in evidence, and the plaintiff's counsel has no right to inspect them. *(e)* When the assignees of a bankrupt are *nonsuited*, they are not entitled, under the above acts, to the costs of proving, after notice, the petitioning creditor's debt, trading, and act of bankruptcy. *(f)*

The general issue is delivered, in the King's Bench, to the plaintiff's attorney, or entered in the general issue book, kept by the clerk of the judgments; *(g)* and need not be signed by counsel. There are also certain *common* pleas in that court, which need not be so signed; such as *plene administravit*, bankruptcy in the defendant, *(h)* a special *non est factum*, *solvit ad diem*, *(i)* *comperuit ad diem* to a bail bond, *(k)* or *nul tiel record* to an action on a judgment or recognizance; in *covenant*, when the plea concludes to the country; and in *trespass*, *son assault demesne*, *liberum tenementum*, or not guilty to a new assignment. These pleas must be *delivered* to the plaintiff's attorney; and not *entered* in the general issue book, or *filed* in the office of the clerk of the papers: and if they be so entered or filed, the plaintiff is not bound to notice them, but may sign *judgment as for want of a plea. *(a)* So, a general [*672] demurrer to part of a declaration, and the general issue to the rest, *(bb)* or a general demurrer to a plea of *nil debet* in an action of *debt* on bond, *(cc)* must be *delivered* to the opposite attorney, and not *filed* with the clerk of the papers. All pleas and demurrers upon writs of error, *scire facias*, and *audita querela*, ought also to be delivered, in the King's Bench: *(dd)* and, by a late rule of that court, *(ee)* pleas cannot be delivered after ten o'clock at night. But, except in the foregoing cases, it is a rule,

(b) 4 Bing. 34.

(c) 1 Stark. Nl. Pri. 456.

(d) *Id.* 353; and see 8 Moore, 536. 1 Bing. 426, S. C.

(e) 4 Camp. 191.

(f) 3 Moore, 601. 1 Brod. & Bing. 275, S. C.

(g) R. T. 5 & 6 Geo. II. *(h)*, K. B. 1 Chit. Rep. 715.

(h) 6 Durnf. & East, 496. 1 Chit. Rep. 225.

(i) 5 Durnf. & East, 661.

(k) 2 Barn. & Ald. 392. 1 Chit. Rep. 211, S. C.

(a) 5 Durnf. & East, 661. 2 Barn. & Ald. 392. 1 Chit. Rep. 211, S. C. *Id.* 225, S. P. 2 Chit. Rep. 295.

(bb) 3 Dowl. & Ryl. 248.

(cc) 5 Barn. & Cres. 766. 8 Dowl. & Ryl. 609, S. C.

(dd) R. T. 12 W. III. *(a)*, K. B.

(ee) R. M. 41 Geo. III. K. B. 1 East, 132.

that all special pleas must be signed by counsel; (*f*) and *filed* in the office of the clerk of the papers, (*g*) who makes copies of them, if required, for the plaintiff's attorney: And all *double* pleas must be filed, and not merely delivered to the plaintiff's attorney; though two pleas be pleaded, which separately need only have been delivered. (*hh*) But where an avowry was not filed, but delivered to the plaintiff's attorney, and on demand of plea in bar, and to know if defendant's attorney might sign judgment of *non pros*, or whether plaintiff would save that expense, by paying the rent and costs then incurred, plaintiff's attorney told him, he might sign judgment if he pleased, which he accordingly did; the court, under these circumstances, discharged the rule for setting aside the judgment with costs. (*ii*)

In the Common Pleas, all pleas, whether general or special, are either delivered to the plaintiff's attorney, or filed with the prothonotaries: The general issue, when delivered to the plaintiff's attorney, must be drawn up at length, in the same manner as when it is filed in the office: (*kk*) And, except where the defendant appears in person, all pleas must be pleaded in the name of an attorney of this court. (*l*) The following pleas did not formerly require a serjeant's hand, *viz. comperuit ad diem, son assault demesne, plene administravit, riens per discent, ne unques executor or administrator, nul tiel record, per minas, per duress, infra etatem, and solvit ad diem*: (*m*) But it is now usual to sign all these pleas, except *comperuit ad diem, nul tiel record*, (*n*) and *solvit ad diem*, (*o*) which are considered as general issues; and it has been determined, that a plea of *non assumpsit infra sex annos*, (*p*) or plea of bankruptcy in the defendant, (*q*) must in this court be signed by a serjeant; although the [*673] latter plea need not, we have *seen, (*a*) be signed by counsel in the King's Bench. So, all double pleas are required to be signed by a serjeant: (*b*) and if a plea, which ought to be signed, be delivered or filed without a serjeant's hand, the plaintiff may sign judgment, as if no plea had been pleaded: (*c*) And although a defendant conduct his cause in person, yet if he file a special plea, it is a nullity, unless it be signed by a serjeant or counsel. (*d*)

In the King's Bench, the defendant cannot commonly *waive* the general issue, or a general demurrer, and instead thereof give a special plea or demurrer: (*e*) but it is said, that if the general issue be not entered, the defendant may waive it, and plead specially, without leave of the court, in *four* days; (*ff*) or, as it should seem, before the adjournment day of the term, (*gg*) or within the first *five* days of the ensuing term; (*h*) and even after-

(*f*) R. E. 18 Car. II. K. B. 2 Chit. Rep. 319. 1 Car. & P. 95, *a*. And for the origin and reason of the signature of pleas by counsel, see 2 Wils. 74. 2 Barn. & Ald. 392. 1 Chit. Rep. 211, S. C.

(*g*) R. T. 2 Jac. I. *reg.* 1. R. T. 16 Car. II. R. M. 2 W. & M., K. B.

(*hh*) 2 East, 225.

(*ii*) *Kingsbury v. Vanbergh*, E. 22 Geo. III. K. B.

(*kk*) Cas. Pr. C. P. 126. Pr. Reg. 306, S. C. Barnes, 239, S. P.

(*l*) Barnes, 259. Pr. Reg. 307, S. C. *Ante*, 566; but see 2 Bos. & Pul. 111. *Ante*, 97, (*b*).

(*m*) Cas. Pr. C. P. 41. Pr. Reg. 282, 3, S. C. Barnes, 365.

(*n*) 2 Blac. Rep. 816; but see 2 Wils. 74, *contra*.

(*o*) 5 Durnf. & East, 663; and see Imp. C. P. 6 Ed. 239.

(*p*) Cas. Pr. C. P. 41.

(*q*) 3 Bos. & Pul. 171

(*a*) *Ante*, 671.

(*b*) Imp. C. P. 6 Ed. 241.

(*c*) Pr. Reg. 282.

(*d*) *Id.* 3 Bos. & Pul. 171. 3 Taunt. 386. *Ante*, 567.

(*e*) R. T. 5 & 6 Geo. II. (*b*), K. B. 1 Wils. 29, *in marg.* Rich. Pr. K. B. 255.

(*ff*) 1 Ld. Raym. 674. 3 Salk. 211, 274, S. C.

(*gg*) Say. Rep. 87.

(*h*) *Prax. utr. Banci*, 37. R. T. 5 & 6 Geo. II. (*b*), K. B.

wards, where it is not to the prejudice or delay of the plaintiff, the defendant, by leave of the court, may withdraw the general issue, in order to plead specially, *(i)* or to plead it again, with a notice of set-off, *(k)* or of the defendant's intention to dispute the petitioning creditor's debt, &c., *(l)* or upon bringing money into court. *(m)* But, on a motion to strike out the plea of the general issue, and file a plea that the plaintiff was convicted of felony, the defendant must produce a certified copy of the record of conviction, and prove the identity of the party convicted. *(n)* In the Common Pleas, the defendant has been allowed, under circumstances, to withdraw a general demurrer, and plead the general issue; *(o)* or, where no delay or inconvenience would arise, to withdraw the general issue and plead specially, *(pp)* or plead it again with a notice of set-off, or upon bringing money into court, *(qq)* or to add a special plea to those already pleaded. *(r)* But, in general, the court will not permit a demurrer to be withdrawn, after a trial has been lost; *(s)* nor unless a full and reasonable cause be shown for so doing. *(t)* And they would not formerly have given the defendant leave to withdraw the general issue, in order to plead it again, with a plea of the statute of limitations. *(u)*

In the King's Bench, if a special plea or special demurrer be put in, and the book is made up, and delivered to the defendant's attorney, he may, by the ancient practice of the court, if not under terms of pleading **issuably*, strike out the special plea or demurrer, and return [*674] it with the general issue, or a general demurrer. *(aa)* To prevent this, if the defendant plead a dilatory or frivolous plea, the court in term-time, or a judge in vacation, *(bb)* will order him to *abide* by it, or plead some other plea, peremptorily, on the morrow; *(cc)* or, if it be towards the end of the term, (that the plaintiff may have sufficient time to give notice of trial,) the court will order the defendant, if he will not abide by his plea, to plead another *instantly*, provided always that the time allowed by the common rule to plead be expired; *(d)* And the practice is the same, with regard to frivolous demurrers. *(d)* The motion for these purposes is a motion of course, requiring only counsel's signature. But where the defendant is under terms of pleading *issuably*, he is bound to abide by his plea; and cannot afterwards strike out a special plea or demurrer, when the book is made up, and return it with the general issue. *(e)* After a rule for the defendant to abide by his plea, the plaintiff cannot sign judgment as for want of a plea, without an application to the court; although such a rule will not prevent the court from allowing the plaintiff to sign judgment. *(f)*

When the defendant, in the King's Bench, is ruled to abide by his plea, he either abides by it, *(g)* or pleads another: In the former case, he may

(i) 2 Str. 906, 1181. 1 Wils. 177, 254. 1 Blac. Rep. 357. *(k)* 2 Str. 1267.

(l) *Ante*, 668.

(m) 2 Chit. Rep. 400.

(pp) Barnes, 346. 2 Wils. 204, 254.

(r) *Id.* 362.

(t) 6 Moore, 495.

(u) 2 Wils. 253; and see Barnes, 338. 1 Blac. Rep. 35. 2 Durnf. & East, 390; but see 3 Durnf. & East, 124. 1 Bos. & Pul. 228. *Ante*, 471.

(aa) 2 Salk. 515. R. T. 5 & 6 Geo. II. *(b)*, K. B. 1 Wils. 29.

(bb) 2 Bur. 781. 2 Ken. 483, S. C.

(cc) Append. Chap. XXVII. § 14.

(d) 2 Salk. 515. R. T. 5 & 6 Geo. II. *(b)*. *(e)* *White v. Givens*, T. 57 Geo. III. K. B.

(f) 1 Chit. Rep. 565, *in notis*; and see 5 Maule & Sel. 518.

(g) 2 Str. 1234.

afterwards demur to the plaintiff's replication; in the latter, he can only plead the general issue, *(h)* to which, however, he may add a notice of set-off: *(i)* And whether he be ruled to abide by his plea or not, it is a general rule, that the defendant cannot waive a special plea or special demurrer, but in order to plead the general issue: *(k)* though leave has been given under circumstances, for the defendant to *add* a plea after issue joined, and even after two terms have elapsed since he first pleaded. *(l)* In the Common Pleas, the defendant must always abide by his plea, after the plaintiff has replied to it; and therefore where the plaintiff moved that the defendant might abide by his plea, the court rejected the motion as unnecessary. *(m)* But after a special plea pleaded, though the plaintiff has prepared his replication, yet the defendant in that court may the same term, before the delivery or filing of the replication, waive his special plea, and plead the general issue, without paying costs: *(n)* And where the defendant pleads fairly, and there has been no delay, *(o)* the court on motion will at any time give him leave to withdraw a special plea, and plead the general issue, upon payment of costs, in order to let in a trial upon the merits. But where a [*675] defendant has already pleaded a tender, *(p)* *or the plaintiff has been delayed, *(a)* the court will not grant this indulgence; and in one instance it was denied, where the defendant had pleaded a sham plea: *(b)* but in a subsequent case, where the defendant's attorney not having received instructions as to the nature of the defence to an action, pleaded a sham plea, and afterwards swore to merits, the court allowed such plea to be withdrawn on terms. *(c)* [1]

(h) 1 Durnf. & East, 693.

(k) 2 Str. 960. 1 Wils. 29.

(m) *Cooper v. Mansfield*, T. 31 Geo. III. C. P. Imp. C. P. 7 Ed. 253. *Ante*, 484, *(u)*.

(n) Cas. Pr. C. P. 155.

(p) Barnes, 330.

(b) *Id.* 369.

(i) *Id.* 634, *in notis*.

(l) 1 Wils. 223.

(a) 2 Wils. 391.

(a) 2 Wils. 392.

(c) 7 Taunt. 278. 1 Moore, 28, S. C.

[1] By the late act for the further amendment of the law. 3 & 4 W. IV. c. 42, § 1, and see 2 Rep. C. L. Com. 24, &c., 89, &c.; reciting that it would greatly contribute to the diminishing of expense in suits in the superior courts of common law at *Westminster*, if the pleadings therein were in some respects altered, and the questions to be tried by the jury left less at large than they then were, according to the course and practice of pleading in several forms of action; but this could not be conveniently done, otherwise than by rules and orders of the judges of the said courts, from time to time to be made; and doubts might arise, as to the power of the said judges to make such alterations, without the authority of parliament; it was enacted, that "the judges of the said superior courts, or any eight or more of them, of whom the chief of each of the said courts should be three, should and might, by any rule or order to be from time to time by them made, in term or vacation, at any time within five years from the time when that act should take effect, make such alterations in the mode of pleading in the said courts, and in the mode of entering and transcribing pleadings, judgments, and other proceedings, in actions at law, and such regulations, as to the payment of costs and otherwise, for carrying into effect the said alterations, as to them might seem expedient; and all such rules, orders, or regulations, should be laid before both houses of parliament, if parliament were then sitting, immediately upon the making of the same; or if parliament were not sitting, then within five days, after the next meeting thereof; and no such rule, order, or regulation, should have effect, until six weeks after the same should have been so laid before both houses of parliament; and any rule or order so made should, from and after such time aforesaid, be binding and obligatory on the said courts and all other courts of common law, and on all courts of error, into which the judgments of the said courts, or any of them, should be carried by any writ of error, and be of the like force and effect, as if the provisions contained therein, had been expressly enacted by parliament."

In pursuance of the power given by the law amendment act, general rules, we have seen, were made by all the judges of the superior courts of common law at *Westminster*, in *Hilary* term, 1834; which, after being laid the requisite time before both houses of parliament, and receiving their sanction, came into operation on the first day of *Easter* term following. These

* CHAPTER XXVIII.

Of REPLICATIONS and SUBSEQUENT PLEADINGS.

WHEN the defendant has put in his plea, he may rule the plaintiff to reply,^(a) by obtaining a rule from the master, in the King's Bench, on the

(a) Append. Chap. XXVIII. § 1, 2, 3.

rules, which are considered as statutory, and part of the law of the land, *Roffey v. Smith*, 6 Car. & P. 662, are of two kinds: first, general rules and regulations, relating to all pleadings, &c.; and secondly, rules relating to the mode of pleading in the particular actions of *assumpsit*, *covenant*, *debt*, *detinue*, *case*, and *trespass*. The former of these rules prescribe the form of declaring in a second action, after a plea in abatement of the non-joinder of another person, R. Pl. Gen. H. 4 W. IV. *reg.* 20. 5 Barn. & Ad. Append. vii. 10 Bing. 469. 2 Crompt. & M. 19. *Ante*, 210, 11; of a plea of payment of money into court. *Id. reg.* 17. *Ante*, Chap. XXV.; and the replication thereto. *Id. reg.* 19. *Ante*, Chap. XXV. *Post*, Chap. XXVIII.; of a plea *puis d'arien continuance*, or after the last pleading, or issuing of the jury process. *Id. reg.* 2. *Post*, Chap. XXXVII.; and of a demurrer, and joinder in demurrer. *Id. reg.* 14. *Post*, Chap. XXIX. Material alterations are also made thereby, in the mode of entitling and entering declarations, and other pleadings. *Id. reg.* 1. *Ante*, 207, 8. *Post*, Chap. XXX.; the beginning and conclusion of pleas. *Id. reg.* 9, 11, 13; the entry of proceedings on the record for trial, or on the judgment roll. *Id. reg.* 15. *Post*, Chap. XXXIV.; and of all judgments, whether interlocutory or final. *Id. reg.* 3. *Ante*, 295. *Post*, Chap. XXXIX.; and the fees chargeable in respect of issues. *Id. reg.* 16. *Post*, Chap. XXX. The statement of the *venue* in the body of the declaration, or any subsequent pleading. *Id. reg.* 8. *Ante*, 209; the formal defence in a plea. *Id. reg.* 10; the rule or order to pay money into court, except under the 3 & 4 W. IV. c. 42, § 18. *Id. reg.* 18. *Ante*, Chap. XXV.; the use of a protestation in any pleading. *Id. reg.* 12. *Post*, Chap. XXVIII.; the entry of continuances, with certain exceptions. *Id. reg.* 2. *Ante*, 227, 8. *Post*, Chap. XXX.; and of warrants of attorney to sue or defend. *Id. reg.* 4. *Post*, Chap. XXX.; are abolished by these rules: and the use of several counts. *Id. reg.* 5, 6, 7. *Ante*, 216, &c.; pleas, avowries, or cognizances. *Id. ib.*; are prohibited thereby, unless a distinct subject-matter of complaint, or ground of answer or defence, is intended to be established at the trial, in respect of each count, or plea, &c.

The principal object of the latter rules, or those which relate to pleadings in particular actions, seems to have been, to limit the operation of the general issues formerly used, and confine the pleas in denial substituted in lieu thereof, in actions upon *contracts*, to a direct denial of the contract. *Passenger v. Brookes*, 1 Bing. N. R. 587. 1 Scott, 560. 1 Hodges, 123. 7 Car. & P. 110, S. C.; and in actions for *wrongs*, to a denial only of the breach of duty, or wrongful act, alleged to have been committed by the defendant. *Pearcy v. Walter*, 6 Car. & P. 232; making him plead specially in denial or any other material fact stated in the declaration, and all matters in confession and avoidance, or discharge of the cause of action. 3 Rep. U. L. Com. 54, 5; 59, 60. These latter rules, however, do not contain any particular directions as to the mode of pleading in actions of *account*, *annuity*, *debt*, or *scire facias* on matters of record, as judgments, or recognizances, or *debt* on penal statutes; nor in the action of *replevin*, or *trespass to the person*; though these actions are subject to the general rules and regulations applicable to all pleadings, &c. And there is a *proviso* in the act, 3 & 4 W. IV. c. 42, § 1, that "no such rule or order shall have the effect of depriving any person of the power of pleading the general issue, and of giving the special matter in evidence, in any case wherein he then was, or thereafter should be entitled so to do, by virtue of any act of parliament then or thereafter to be in force."

In actions upon *contracts*, the plaintiff, by the above statutory rules, must prove, on the plea of *non assumpsit*, in all actions of *assumpsit*, except on bills of exchange and promissory notes, the *express* contract or promise alleged in the declaration, or the matters of fact from which the contract or promise alleged may be *implied* by law; as, in an action on a warranty, the fact of the warranty having been given upon the alleged consideration; in an action on a policy of insurance, the subscription to the alleged policy by the defendant; in actions against *carriers* and other bailees, for not delivering or not keeping goods safely, or not returning them on request. R. Pl. H. 4 W. IV. *Assumpsit*, *reg.* 1, § 1. 5 Barn. & Ad. Append. vii. 10 Bing. 469. 2 Crompt. & M. 20; and in actions against *agents* for not accounting, an express contract to the effect alleged in the declaration, and such bailment or employment as would raise a promise in the law to the effect alleged; in an action of *indebitatus assumpsit* for goods sold and delivered, the sale and delivery of the goods in point of fact; and

back of the plea; which is entered with the clerk of the rules, and a copy served on the plaintiff's attorney: In the Common Pleas, the rule to reply

in the like action for money had and received, both the receipt of the money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff. R. Pl. II. 4 W. IV. *Assumpsit*, reg. I. § 1. 5 Barn. & Ad. Append. vii. 10 Bing. 469. 2 Crompt. & M. 20. In *debt* on specialty, or *covenant*, the plaintiff must prove, on the plea of *non est factum*, the execution of the deed, in point of fact. *Id.* *Covenant and Debt*, reg. II. § 1. 5 Barn. & Ad. Append. viii. 10 Bing. 470. 2 Crompt. & M. 21; and in actions of *debt* on simple contract, other than on bills of exchange and promissory notes, the plea of *nunquam indebitatus* has the same operation as the plea of *non assumpsit* in *indebitatus assumpsit*: *Id.* § 2. 5 Barn. & Ad. Append. viii. 10 Bing. 470. 2 Crompt. & M. 22.

In actions for *wrongs*, independently of contract, the plaintiff must prove, on the plea of *non detinet* in an action of *detinue*, the detention of the goods by the defendant; and, on the plea of not guilty in actions on the *case*, the breach of duty, or wrongful act, alleged to have been committed by the defendant; as, in an action on the case for a *nuisance* to the occupation of a house, by carrying on an offensive trade, that the defendant carried on the alleged trade in such a way as to be a nuisance thereto; in an action on the case for obstructing a right of way, the obstruction complained of; in an action of *trover*, the conversion of the plaintiff's goods. R. Pl. II. 4 W. IV. *Detinue*, reg. III. 5 Barn. & Ad. Append. ix. 10 Bing. 470. 2 Crompt. & M. 22; and in an action of *slander*, the speaking of the words, or publication of the libel complained of, and that they were spoken or published maliciously, and in the sense imputed. *Empson v. Fairfax*, 13 Leg. Obs. 222; and, if spoken and published of the plaintiff in his office, profession, or trade, that they were so spoken or published with reference thereto. The plaintiff must also prove, in an action for an *escape*, the neglect or default of the sheriff, or his officers; and in action against a *carrier*, the loss or damage for which the action is brought. R. Pl. II. 4 W. IV. *Case*, reg. IV. § 1. 5 Barn. & Ad. Append. ix. 10 Bing. 470. 2 Crompt. & M. 22. In actions of *trespass quare clausum fregit*, he must prove, on the plea of not guilty, that the defendant committed the trespass alleged, in the *locus in quo*. R. Pl. II. 4 W. IV. *Trespass*, reg. V. § 2. 5 Barn. & Ad. Append. ix. 10 Bing. 470. 2 Crompt. & M. 23; and in actions of *trespass de bonis asportatis*, that he committed the trespass alleged, by taking or damaging the goods mentioned in the declaration. *Id.* § 3, 5, Barn. & Ad. Append. x. 10 Bing. 471. 2 Crompt. & M. 24.

It should also be remembered, that by the law amendment act, 3 & 4 W. IV. c. 42, § 8, "no plea in abatement for the non-joinder of any person as a co-defendant shall be allowed in any court of common law, unless it shall be stated in such plea, that such person is resident within the jurisdiction of the court; and unless the place of residence of such person shall be stated, with convenient certainty, in an *affidavit* verifying such plea; and that to any plea in abatement, in any court of law, of the non-joinder of another person, the plaintiff may reply that such person has been discharged by bankruptcy and certificate, or under an act for the relief of insolvent debtors." 3 & 4 W. IV. c. 42, § 9.

The plea of *nil debet* was abolished, and another plea substituted in lieu thereof, by the late statutory rules of pleading. R. Pl. II. 4 W. IV. *Covenant and Debt*, reg. II. § 2, 3. 5 Barn. & Ad. Append. viii. 10 Bing. 470. 2 Crompt. & M. 22. *Ante*, 338; which declare that "the plea of *nil debet* shall not be allowed in any action;" and that "in actions of *debt* on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that he never was indebted, in manner and form as in the declaration alleged; and such plea shall have the same operation as the plea of *non assumpsit* in *indebitatus assumpsit*: and all matters in confession and avoidance shall be pleaded specially, as therein directed in actions of *assumpsit*." In other actions of *debt*, in which the plea of *nil debet* has been hitherto allowed, including those on bills of exchange and promissory notes, it is declared by another statutory rule. R. Pl. II. 4 W. IV. *Covenant and Debt*, reg. II. § 4. 5 Barn. & Ad. Append. viii. 10 Bing. 470. 2 Crompt. & M. 22, that "the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance."

The form of plea to an action of *debt*, prescribed by the above rules, must be adhered to in terms: and therefore, a plea that the defendant "never did owe," was holden to be bad on special demurrer; the form being that he "never was indebted." *Smedley v. Joyce*, 1 Tyr. & G. 84. 2 Crompt. M. & R. 721. 1 Gale, 357. 4 Dowl. Rep. 421. 11 Leg. Obs. 484, S. C. In an action of *debt* for goods sold and delivered, if the defence be that the goods were sold on a credit which had not expired at the time of bringing the action, this, it has been holden in the King's Bench, must be specially pleaded. *Edmunds v. Harris*, 6 Car. & P. 547. 4 Nev. & M. 182. 2 Ad. & E. 414, S. C. 1 Chit. Jun. Pl. 204; 291; 378, 9; and see *Rose Law Tracts*, 21, 2; but from subsequent decisions it seems that this ground of defence may be given in evidence on the plea of *nunquam indebitatus*. *Taylor v. Hillary*, 1 Crompt. M. & R. 741. 5 Tyr. Rep. 373. 3 Dowl. Rep. 461. 1 Gale, 23. 9 Leg. Obs. 494, S. C. *Per Parke*, B. *Knapp v. Harden*, 1 Gale, 47. *Cousins v. Paddon*, 2 Crompt. M. & R. 553. 5 Tyr. Rep.

is given on a *præcipe*, with the secondaries. This rule may be given at any time in term, or within *sixteen* days after, in the King's Bench,^(b) or

(b) Imp. K. B. 10 Ed. 264. And the practice is the same in the Common Pleas, except that after *Easter* term, the rule must be given in *ten* days. Imp. C. P. 7 Ed. 295.

535. 4 Dowl. Rep. 488, S. C. *Jones v. Nanney*, 1 Meeson & W. 336. 1 Tyr. & G. 638. 5 Dowl. Rep. 90, S. C. *Per Parke*, B.; and see *Rose*, Law Tracts, 21, 2. *Ante*, 345. And in an action of *debt*, a plea that parcel of the money claimed was the residue of a sum agreed to be paid for a boat, warranted sound and fit for use, but which was afterwards found to be of no greater value than the amount paid at the time of sale, was holden to be bad on demurrer, as amounting to the general issue. *Dicken v. Neale*, 5 Dowl. Rep. 176. 1 Meeson & W. 556, S. C. In an action of *debt* for work and labor, on an implied contract, the defendant, on the plea that he never was indebted, may go into evidence to prove that the work was done under such circumstances as show that there was no implied contract to pay any thing; but upon this plea, the defendant cannot go into evidence of misconduct, except such as goes to show that there was no implied contract to pay. *Cooper v. Whitehouse*, 6 Car. & P. 445, *per Alderson*, B.; and see *Cousins v. Paddon*, 2 Crompt. M. & R. 553. 5 Tyr. Rep. 535. 4 Dowl. Rep. 488, S. C. *Ante*, 344, 5, 6. And in an action of *debt*, brought by two of three Syndics of a French bankrupt, it was doubted, whether the objection to the non-joinder of the third Syndic, if available, could be taken on the plea of *nil debet*. *Alison v. Furnival*, 1 Crompt. M. & R. 277. 4 Tyr. Rep. 751, S. C.

The late statutory rules of pleading do not contain any particular directions as to the mode of pleading in the actions of *account*, *annuity*, *debt*, or *scire facias*, on matters of record, as judgments or recognizances, or *debt* on penal statutes; though these actions are subject to the general rules and regulations applicable to all pleadings.

In *detinue*, the defendant might formerly have given in evidence under the general issue of *non detinet*, his property in the goods, or a gift of them from the plaintiff; for that proved he detained not the plaintiff's goods. Co. Lit. 283. But now, by a late statutory rule of pleading. R. Pl. H. 4 W. IV. *Detinue*, *reg.* III. 5 Barn. & Ad. Append. ix. 10 Bing. 470. 2 Crompt. & M. 22; "the plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial, shall be admissible under that plea." In this action, therefore, the defendant must, under the above rule, specially deny the plaintiff's property in the goods, when necessary for his defence; or he may plead a gift of them from the plaintiff, or some other matter of fact to prove that the defendant is entitled to the possession of them; as that they were pawned to him for money which still remains unpaid. Co. Lit. 283; or that he has a lien thereon. *Alexander v. McGowan*, Sit. after M. T. 3 Geo. IV. *per Abbott*, Ch. J.; or, if the action be founded upon a *bailment*, that they were delivered over to the person for whose use they were bailed. Com. Dig. tit. *Pleader*, 2 X. 6; and see 1 Chit. Pl. 114, 430. Tidd. Prac. 9 Ed. 652. *Ante*, 329. In an action of *detinue* against an attorney, for not delivering up papers to his client after his bill has been paid, if the defendant plead *non detinet*, the plaintiff must prove that the papers were in the defendant's possession; but evidence that they were produced by his agent before the master, on the taxation of his bill, is sufficient proof of his possession. *Anderson v. Passman*, 7 Car. & P. 193. And as the gist of the action of *detinue* is the *detainer*, the bailment in the declaration is in general immaterial; therefore, the defendant may set up in his plea, a bailment different from that stated in the declaration; and the plaintiff, without traversing it, may show that the detainer is wrongful notwithstanding, without being guilty of a departure. *Gledstone* (or *Gladstone*) v. *Hewitt*, 1 Tyr. Rep. 445. 1 Crompt. & J. 565. 1 Price, N. R. 71, S. C.

In actions on the *case*, the defendant, upon the plea of not guilty, might formerly not only have put the plaintiff upon proof, of the whole charge contained in the declaration, but might have offered any matter in excuse or justification of it. *Regina v. Tuckin*, 2 Mod. 276, 7. *Newton v. Creswick*, 3 Mod. 166. Anon. Com. Rep. 273. *Barber v. Dixon*, 1 Wils. 44. *Brown v. Best*, *Id.* 175; or he might have set up a former recovery, release, or satisfaction. *Bird v. Rawball*, 3 Bur. 1353. 1 Blac. Rep. 388, S. C. For an action on the *case* was considered as founded upon the mere justice and conscience of the plaintiff's case, and in the nature of a bill in equity, and in effect was so; and therefore such a former recovery, release, or satisfaction, need not have been pleaded, but might have been given in evidence under the general issue; since whatever would in equity and conscience, according to the circumstances of the case, bar the plaintiff's recovery, might in this action have been given in evidence by the defendant, because the plaintiff must recover upon the justice and conscience of his case, and upon that only. *Id.* *Ibid.* Tidd. Prac. 9 Ed. 651. 1 Chit. Pl. 432. But by a late statutory rule of pleading. R. Pl. H. 4 W. IV. *Case*, *reg.* IV. § 1. 5 Barn. & Ad. Append. ix. 10 Bing. 470, 71. 2 Crompt. & M. 22, 3, it is declared that, "in actions on the *case*, the plea of *not guilty* shall operate as a denial only of the breach of duty, or wrongful

Exchequer:(c) and, in the Common Pleas, when time to plead has been obtained, if the defendant plead, and give a rule to reply, before the

(c) R. II. 16 Geo. III. *in Scac. Man. Ex. Append.* 220.

act, alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea: all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration, and all matters in confession and avoidance shall be pleaded specially, as in actions of *assumpsit*." *Id.* § 2. 5 Barn. & Ad. Append. ix. 10 Bing. 471. 2 Crompt. & M. 23.

In an action on the case for an injury to real property *corporeal*, by *nuisances* to houses, lands, water-courses, &c., to the prejudice of the plaintiff's possession or reversion, or to real property *incorporeal*, by obstructing rights of *way*, &c., it was formerly incumbent on the plaintiff to prove, on the general issue, all the facts stated in the inducement to the declaration, as well as the wrongful act complained of, and the consequential damages arising therefrom; and the defendant was allowed to give the whole of his case in evidence under the general issue. But, by a late statutory rule of pleading. R. Pl. H. 4 W. IV. *Case, reg.* IV. § 1. 5 Barn. & Ad. Append. ix. 10 Bing. 471. 2 Crompt. & M. 22, it is declared that "in an action on the case for a *nuisance* to the occupation of a house, by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a *nuisance* to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house; and in an action on the case for obstructing a right of *way*, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way." In an action for a *nuisance*, however, where the defendant pleads not guilty, the plaintiff must still, notwithstanding the above rule, not only prove the existence of the *nuisance*, but that the defendant was the person who caused it. *Dawson v. Moore*, 7 Car. & P. 25. But since the above rule, the plea of not guilty to a declaration in case, for the wrongful diversion of water from the plaintiff's mill, puts in issue the mere fact of the diversion, and not its wrongful character. *Frankum v. Earl of Falmouth*, 4 Nev. & M. 330. 2 Ad. & E. 452. 1 Har. & W. 1. 6 Car. & P. 529, S. C.; and see 5 Nev. & M. 268, (a). Therefore, where the fact of the diversion was proved, but the plaintiff failed to show his right to the water, the court ordered the verdict, which had been entered for the defendant on the issue of not guilty, to be set aside, and a verdict to be entered for the plaintiff but without damages. And, in an action on the case for a *nuisance* to the plaintiff's property, by digging a trench in an adjoining close, the defendant cannot now, under the plea of not guilty, raise any objection as to defective proof of the inducement in the declaration. *Dukes v. Gostling*, 3 Dowl. Rep. 619. 1 Scott, 570. 1 Hodges, 120, S. C. To an action on the case for a *nuisance* in making a noise, &c., near plaintiff's dwelling-house, which he was possessed of for a term of years, the defendants pleaded that they had been possessed of certain workshops in which the noise was made *ten year* before the plaintiff was possessed of the term in his house, and that they had always during that time made the noise in question, which was necessary for carrying on the trade; and the plea was held to be bad. *Elliotson v. Fertham*, 2 Bing. N. R. 134. 2 Scott, 174. 1 Hodges, 259, S. C. And, in an action on the case by a lodger, for removing a water-closet, &c., if the defendant merely plead the general issue, he cannot give in evidence that the water-closet was useless before he removed it; but, in mitigation of damages, he may go into evidence to show that the plaintiff and his family were bad lodgers, and that he did the acts complained of to cause them to quit the house. *Underwood v. Burrows*, 7 Car. & P. 26. Where the defendant claims a right of *common* or of *way*, &c., he must set forth in his plea a strict legal right thereto. *Ryder v. Smith*, 3 Durnf. & E. 766. *Grimstead v. Marlowe*, 4 Durnf. & E. 717, 719.

In *traver*, it was formerly necessary for the plaintiff to prove, on the general issue of not guilty, his property in the goods for the conversion of which the action was brought, and their value, and that the defendant actually converted them to his own use, or, having them in his possession, refused to deliver them to the plaintiff on demand, which was evidence of a conversion. In this action, it was commonly said, there could be no special plea, except a release; but this was a mistake; for the defendant might have pleaded specially any thing else which, admitting the plaintiff had once a cause of action, went to *discharge* it, as the statute of limitations. *Cowper v. Towers*, 1 Lutw. 99. *Pratt v. Seaine*, 8 Barn. & C. 285. 2 Man. & R. 350, S. C.; or a former recovery, &c. *Lechmore v. Toplady*, 1 Show, 146. The *bankruptcy* of the plaintiff, before the cause of action accrued, might have been given in evidence in this action, under the plea of not guilty. *Webb v. Fox*, 7 Durnf. & E. 391; and see Tidd Prac. 9 Ed. 651. 1 Chit. Pl. 436. *Worswick v. Beswick*, 10 Barn. & C. 676. *Joll v. Fisher*, 5 Car. & P. 514, *per Tindal*, Ch. J.; but see *Alston v. Underhill*, 1 Crompt. & M. 492. 3 Tyr. Rep. 427. 2 Dowl. Rep. 26, S. C.: but where the bankruptcy happened after the cause of action accrued, it should it seems have been pleaded specially. But now, by

expiration of that time, the rule to reply will be of no avail, unless he give notice of his plea.(d) If the rule be not given till *four* terms have elapsed, after plea pleaded, the plaintiff must have a term's notice(e) of the defendant's intention to give it, unless the cause hath been stayed by injunction or privilege:(f) which notice must be given before the *essoin* day of the term:(g) and it is usual to give the rule on the day after the term is expired.(h) And where a cause has stood over for several terms, the rule to reply must be given of the term in which the judgment of *non pros* is signed.(i) The rule to reply expires in *four* days exclusive after service, in the King's Bench; and *Sunday*, or any holyday on which the court does not sit, or the office is not open, if it be not the last, is to be accounted a day within the rule.(k) If the plaintiff do not reply within the time limited, or obtain an order for further time, which may be obtained on a judge's summons, in like manner as an order for further time to plead, the defendant may sign a judgment of *non pros*:(l) and it is not necessary for him, in the King's Bench, to demand a replication, the service of the

(d) 1 New Rep. C. P. 273.

(f) R. T. 5 & 6 Geo. II. (b), K. B.

(h) Imp. K. B. 10 Ed. 264.

(k) R. T. 1 Geo. II. (a), K. B.

(l) Append. Chap. XXVIII. § 5, 6.

(e) Append. Chap. XXVIII. § 4.

(g) 2 Str. 1164.

(i) 2 Chit. Rep. 283.

a late statutory rule of pleading. R. Pl. II. 4 W. IV. *Case, reg.* IV. § 1. 5 Barn & Ad. Append. ix. 10 Bing. 471. 2 Crompt. & M. 23; it is declared that, "in an action for converting the plaintiff's goods, the plea of not guilty will operate as a denial of the conversion only, and not the plaintiff's title to the goods." The intention of this rule was to confine the operation of the plea of not guilty to the denial of the *fact* of conversion only, and not to allow the defendant to give evidence of its *legality*, any more than on a plea of not guilty to an action on the *case* for obstructing a right of way, the defendant could be allowed to show that the obstruction was lawful, or, under the like plea to an action for diverting a water-course, to give evidence that such diversion was justifiable, by licence or prescription. *Stanceliffe v. Hardwick*, 2 Crompt. M. & R. 1. 5 Tyr. Rep. 551. 1 Gale, 127. 3 Dowl. Rep. 762, S. C., *per Parke, B.*; and see *Farrar v. Beswick*, 1 Meeson & W. 682.

If the defendant mean to deny the plaintiff's *title* to the goods, he should plead that the plaintiff was not *possessed* of them as of his own property, or as of his own proper goods and chattels, as alleged in the declaration: and, under this plea, it will be incumbent on the plaintiff to prove his title to the goods; and the defendant may give in evidence any matter tending to disprove it. But it seems, that a plea that the goods are not, nor were the property of the plaintiff, as alleged in the declaration, and concluding to the country, where the declaration alleges that the plaintiff was *possessed* of the goods as of his own property, is an informal plea, and would be bad on special demurrer. *Samuel v. Morris*, 6 Car. & P. 629, *per Parke, B.*; and see *Howell v. White*, 1 Moody & R. 400. And where the plaintiff in *trover* claims under a sale, the defendant, on a plea that the plaintiff was not possessed of the goods as of his own property, cannot show the sale to have been fraudulent: the fraud must be pleaded. *Howell v. White*, 1 Moody & R. 400, *per Pattison, J.*

The conversion which is put in issue by the plea of not guilty since the new rules, is a conversion in *fact*, and not merely a wrongful conversion. *Ante*, 367. And wherever there has been a conversion in fact, and the defendant insist that such conversion was lawful, he must confess and avoid it, by pleading specially the right or title by virtue of which he was justified in the conversion. But where there has been no actual conversion of the goods, but merely a refusal to deliver them on demand, a defendant who pleads not guilty in an action of *trover*, admits thereby only that the plaintiff has *some* property in the goods, in respect of which he would be entitled to recover against the defendant; and such admission does not preclude the defendant from showing that he is tenant in common with the plaintiff. *Stanceliffe v. Hardwick*, 2 Crompt. M. & R. 1. 5 Tyr. Rep. 551. 1 Gale, 127. 3 Dowl. Rep. 762, S. C., *per Parke, B.*; and see *Farrar v. Beswick*, 1 Meeson & W. 682. *Vernon v. Shipton*, 2 Meeson & W. 9; or is otherwise entitled to retain the possession of the goods. And where the defendant in such case has a lien thereon, a doubt has been entertained as to the necessity of his pleading it specially: though as the lien may be considered as matter of title, the safer way seems to be to plead it specially, as in the action of *detinue*; and see *Townley v. Crompt*, 4 Ad. & E. 53. Rose. Law Tracts, 63, 4.

copy of the rule being deemed in that court a demand of itself: *(m)* but, in the Common Pleas, a replication must be demanded in writing, by the defendant's attorney; *(n)* after which, if a replication be not delivered, or filed at the prothonotaries' office, in due time, he may sign a judgment of *non pros.* *(o)* And it seems that such judgment may be signed [*677] by one of two defendants in **trespass*, who has pleaded separately: *(a)* or for not replying to a plea, as to one of several counts in a declaration. *(b)* This is a final judgment, on which the defendant may tax his costs, and take out execution. *(c)*

Within the time limited by the rule to reply, or order for further time, the plaintiff either moves the court to set aside the plea, if unfounded; or, admitting it to be well founded, in point of fact as well as law, he *discontinues* his action, *(d)* enters a *nolle prosequi*, *(e)* *stet processus*, or *cassetur billa vel breve*, *(f)* or in an action against an executor or administrator, takes judgment of assets *in futuro*, *(g)* &c.; or, admitting the fact, he denies the law by a demurrer; or, admitting the law, he denies the fact, or confesses and avoids it, or concludes the defendant by matter of estoppel.

If the defendant plead in abatement after a *general* imparlance, or to the jurisdiction of the court after a *special* imparlance, the plaintiff, we have seen, *(h)* may sign judgment, or apply to the court by motion to set aside the plea. We have also seen, that when it is doubtful whether the plea be issuable, the better way, in term time, is to move the court to set it aside: *(i)* And in general, if it be not clear that a bad plea may be considered as a nullity, the safest course is not to sign judgment, but to take issue thereon, demur, or move the court to set it aside. *(k)* When the defendant pleads a release, fraudulently obtained from the *nominal* plaintiff, to the prejudice of the party really interested, and for whose benefit the action is brought, or from one of several plaintiffs to the prejudice of the rest, the court on motion will set aside the plea, and order the release to be delivered up to be cancelled: Thus, where the obligor of a bond, after notice of its being assigned, took a release from the obligee, and pleaded it to an action brought by the assignee, in the name of the obligee, the court of Common Pleas set the plea aside; and under these circumstances, would not allow the obligor to plead payment of the bond. *(l)* So, if a person who is sued by a landlord, in the name of his tenant, procure a release from the nominal plaintiff, the court will order the release to be delivered up, and permit the landlord to proceed: *(mm)* And where a landlord, with the permission of his bailiff, who had made a distress for rent, commenced an action, in the bailiff's name, against the sheriff, for taking insufficient pledges, and the bailiff afterwards, without the landlord's privity, executed a release to the sheriff, who pleaded it *puis darien continuance*, the court of Common Pleas set aside the plea,

(m) Imp. K. B. 10 Ed. 263.

(n) Append. Chap. XXVIII. § 3.

(o) Imp. K. B. 10 Ed. 263, 4; 496. Imp. C. P. 7 Ed. 294, 5.

(a) *Philpot v. Muller*, T. 23 Geo. III. K. B. *(b)* 4 Barn. & Cres. 135.

(c) Imp. K. B. 10 Ed. 263, 4; 496. Imp. C. P. 7 Ed. 294, 5.

(d) Append. Chap. XXVIII. § 9, 10

(e) *Id.* § 11, 12, 13.

(f) *Id.* Chap. XXVI. § 7.

(g) *Id.* Chap. XXII. § 10, &c. 21, &c.; and see 1 Chit. Pl. 4 Ed. 498.

(h) *Ante*, 463, 4; 476, 638, 9; and see *ante*, 534, 636.

(i) *Ante*, 473.

(k) *Ante*, 565.

(l) 1 Bos. & Pul. 447; and see the case of *Craib and wife v. D'Aeth*, T. 30 Geo. III. 7 Durnf. & East, 670, *(b)*. 7 Moore, 617. 1 Younge & J. 362.

(mm) Doug. 407; and see 7 Durnf. & East, 670, *(a)*. 1 Bos. & Pul. 448, *(a)*.

and ordered the release to be delivered up to be cancelled.(n) So, a plea of release by one of several plaintiffs was set aside by the court of King's Bench, without costs, on the terms of indemnifying *the [*678] plaintiffs who had released the action, against the costs of it although the consent of such plaintiffs had not been obtained before action brought; it appearing that no consideration had been given for the release, and that the plaintiffs sued as trustees for the creditors of an insolvent person.(a) But, except a very strong case of fraud be made out, the court will not control the legal power of a co-plaintiff to release the action:(b) And unless the plea be set aside, a judge at *nisi prius* has no equitable jurisdiction, and can only look to the strict legal rights of the parties upon the record: Therefore if, in an action for goods sold, the defendant prove a receipt in full signed by the plaintiff, evidence cannot be admitted, by way of answer to this defence, that the plaintiff had assigned all his effects for the benefit of his creditors, that the action was brought by his trustees in his name, that no money passed when the receipt was given, and that the plaintiff on the record and the defendant had colluded together to defeat the action.(c)

If the plaintiff perceive that he cannot maintain his action, it is usual for him to take out a rule for leave to discontinue. *Discontinuance* in a civil suit, is either of process, or of pleading: The former, before judgment, is the act of the clerk: but after judgment, it is the act of the court:(d) the latter, of which something has been already said,(e) is the act of the party. The process, or proceedings in a suit, should be regularly continued from term to term, or from one day to another in the same term,(f) between the commencement of the suit and final judgment; and if there be any lapse or want of continuance that is not aided, the parties are out of court, and the plaintiff must begin *de novo*. Before declaration, there is, properly speaking, no continuance;(g) though we have seen,(h) that the parties by consent might have obtained a day before declaration, which was called a *dies datus prece partium*; After declaration, and before issue joined, the proceedings are continued by *imparlance*;(i) after issue joined, and before verdict, by *vicecomes non misit breve*;(k) and after verdict or demurrer, by *curia advisari vult*.(l) In the King's Bench, the practice is never to enter continuances till the plea roll is made up, though the declaration be of four or five terms standing:(m) And after plea pleaded, though the plaintiff have day to reply for several terms, yet no mention need be made on the roll, of any imparlance or continuance.(nn) After judgment by default, and writ of inquiry awarded, there is no subsequent continuance between the parties, in the Common Pleas;(o) but in the King's Bench, it is otherwise. Continuances may be entered at any time:(p)

*And in a late case, the court granted leave to enter continu- [*679]

(n) 7 Taunt. 48.

(a) 1 Chit. Rep. 390.

(b) 7 Taunt. 421; and see 4 Moore, 192. 7 Moore, 356.

(c) 1 Campb. 392; and see 1 Chit. Rep. 391, *in notis*. 6 Moore, 497.

(d) Cart. 51. 1 Salk. 177. 1 Wils. 40. *Id.* 303, cites Com. Rep. 419.

(e) *Ante*, 660, 61.

(f) 1 Str. 492. 1 Wils. 40.

(g) Gibb. C. P. 40.

(h) *Ante*, 421.

(i) Append. Chap. XXII. § 6, 19, 41. Chap. XXX. § 2, 4, 6.

(k) Append. Chap. XXX. § 46, 49, 52.

(l) Append. Chap. XXII. § 41. Chap. XXIX. § 3, 4. Chap. XXXIX. § 3, 4.

(m) 1 Salk. 179. 2 Ld. Raym. 872, S. C.

(nn) 5 Co. 75. 2 Wms. Saund. 5 Ed. 1, c. (2).

(o) 11 Co. 6. b. Yelv. 97. 1 Rol. Abr. 486.

(p) *Ante*, 162.

ances after verdict, in order to arrive at the justice of the case. *(a)* The want of a continuance is aided by the appearance of the parties: *(b)* And as a discontinuance can never be objected *pendente placito*, *(c)* so after judgment, it is cured by the statute of jeofails. *(d)* It has even been holden, that a continuance may be added, after judgment in a *penal* action; *(e)* but then, there must be something to amend by. *(f)*

A rule to discontinue *(g)* may be had either before or after declaration; *(h)* and it is usually granted upon payment of costs. *(i)* An executor or administrator is liable to costs upon a discontinuance, when he has knowingly brought a wrong action; *(k)* but when that is not the case, he may have leave to discontinue, without paying costs: *(l)* And where, upon setting aside a verdict for the plaintiff, the costs are directed to abide the event, and then the plaintiff discontinues the action, the defendant is not entitled to the costs of the trial. *(m)* The rule to discontinue is a side-bar rule; and may be had as a matter of course, from the clerk of the rules in the King's Bench, at any time before trial or inquiry: *(n)* and leave has been given to discontinue after argument, and before judgment on demurrer. *(o)* And even after a *special* verdict, the plaintiff may discontinue, by leave of the court, because that is not complete and final; but in this case it is a great favour: *(pp)* And it is never granted after a *general* verdict, *(qq)* or writ of inquiry executed and returned, *(q)* nor after a peremptory rule for judgment on demurrer. *(r)* In *replevin*, the avowant, though an actor, cannot have a rule to discontinue: *(s)* And where a rule to discontinue is obtained by unfair practice, the court will discharge it. *(t)*

The court of Common Pleas will not permit the demandant on a writ of right to discontinue; *(u)* And a discontinuance is not allowed in that court, after a *special* verdict, in order to adduce fresh proof in contradiction to the verdict. *(x)* The plaintiff cannot have leave to discontinue, pending a rule for judgment as in case of a nonsuit: *(y)* And where he moved to discontinue upon payment of costs, after judgment given for him on demurrer, but not entered of record, and a writ of error brought, and bail put in there-

upon, the court refused to make a rule to discontinue, without
[*680] *payment of costs on the writ of error. *(aa)* After notice of trial given, and regularly countermanded, the plaintiff in the Common Pleas, obtained a rule to discontinue, upon payment of costs; and it appearing that after the notice of trial, and before the countermand, a witness for the defendant, who resided in *London*, had set out for the *York* assizes, the question was, whether the expense of this witness could be allowed the

(a) 7 Darnf. & East, 618.

(b) 1 Wils. 40. 6 Darnf. & East, 255.

(c) Cro. Jac. 211.

(d) 32 Hen. VIII. c. 30. Cro. Eliz. 489. Cro. Jac. 528. 3 Lev. 374. 6 Darnf. & East, 255.

(e) 2 Str. 1227. 1 Wils. 125, S. C. in *Cam. Scac.* 6 Darnf. & East, 255, 618.

(f) 1 Wils. 303.

(g) Append. Chap. XXVIII. § 7, 8.

(h) R. M. 10 Geo. II. *(b)*, K. B.

(i) Comb. 299.

(k) Cas. Pr. C. P. 79. Barnes, 169, S. C. 3 Bur. 1451. 1 Blac. Rep. 451, S. C. 2 New Rep. C. P. 72.

(l) 2 Str. 871. 4 Bur. 1927. 8 Moore, 689.

(m) 1 Barn. & Ald. 566.

(n) 1 Salk. 178, 9.

(o) 3 Lev. 440. 1 Str. 76, 116.

(pp) 1 Salk. 178.

(q) Carth. 86.

(r) 1 Salk. 172; and see 2 Wms. Saund. 5 Ed. 73, (1).

(s) 1 Str. 112.

(t) 4 Bur. 2532.

(u) 1 New Rep. C. P. 64. 2 New Rep. C. P. 429.

(x) 2 Blac. Rep. 815.

(y) Barnes, 316.

(aa) Barnes, 169.

defendant in costs: The court held that, as the countermand was regular, the costs for this witness could not be allowed.(b)

The rule to discontinue is obtained from the clerk of the rules in the King's Bench, or secondaries in the Common Pleas; but in the latter court, if it be after plea pleaded, the defendant's attorney must first consent to a rule in the treasury chamber in term time, or before a judge in vacation;(c) or else there must be a rule to show cause. And upon a rule to discontinue, the plaintiff must get an appointment from the master in the King's Bench, or prothonotaries in the Common Pleas, to tax the costs, and serve a copy of it on the defendant's attorney; it having been holden, that the service of a rule to discontinue, without an appointment to tax the costs, is not of itself a discontinuance of the action.(d) In the King's Bench, the master will tax the costs *ex parte*, if the defendant's attorney do not attend on the first appointment:(e) But in the Common Pleas, another copy of the rule must be made, in case of non-attendance, and a second appointment obtained thereon, and served as before, and so a third time; and if he do not attend the third appointment, the prothonotaries will tax the costs *ex parte*.(f) The costs being taxed, are to be forthwith paid; otherwise the plaintiff may be compelled to proceed in the action: for the rule being conditional, is no stay of proceedings; and it has been holden that, for the non-payment of these costs, the plaintiff is not liable to an attachment.(g) An averment in an action for a malicious arrest, that the suit is wholly ended and determined, is proved by evidence of the rule to discontinue upon payment of costs, and that the costs were taxed and paid, without producing the roll, with judgment of discontinuance entered upon it.(h) And where a rule to discontinue, on payment of costs, was obtained by the plaintiff on the 6th of February, but the costs were not taxed until the 11th of March; the court held that, when the costs were taxed, and the judgment of discontinuance entered up, it related back to the day when the rule for a discontinuance was obtained, and that the action was to be considered discontinued from that time.(i) So, a rule for discharging the defendant out of custody at the *plaintiff's suit, in an action on [*681] a bill of exchange, and that all further proceedings in the cause should be stayed, and the bill of exchange delivered up to the defendant, has been deemed evidence of the termination of the suit.(a) But it seems that a judge's order to stay proceedings on payment of costs, and proof of such payment, is not sufficient evidence that the first suit is at an end.(bb) And where it was averred in the declaration, that the defendant voluntarily permitted his suit to be discontinued for want of prosecution, and thereupon it was considered by the court that he should take nothing by his bill, *prout patet per recordum*, whereby the suit was ended and determined; it was holden that this averment was not proved by the production of a

(b) *Id.* 307. *Sed quare*: for in a late case, the expenses of a witness, under similar circumstances, were allowed by the prothonotary; and see 1 Price, 381. *Post*, Chap. XXXV.

(c) Imp. C. P. 7 Ed. 723.

(d) 6 Durnf. & East, 765.

(e) Imp. K. B. 10 Ed. 675.

(f) Imp. C. P. 7 Ed. 723, 4.

(g) 7 Durnf. & East, 6; and see 2 Str. 1220. 3 Maule & Sel. 153. 5 Barn & Ald. 905. 1 Dowl. & Ryl. 556, S. C.

(h) 4 Campb. 214. 1 Stark. Ni. Pri. 48, S. C.; and see 2 Barn & Cres. 693. 4 Dowl. & Ryl. 187, S. C. 4 Barn. & Cres. 21. 6 Dowl. & Ryl. 12, S. C.

(i) 1 Barn. & Cres. 649. 3 Dowl. & Ryl. 2, S. C.

(a) 3 Bing. 297, 303.

(bb) 4 Campb. 214. 1 Stark. Ni. Pri. 48, S. C. 1 Esp. Rep. 80; and see 11 East, 319. 2 New Rep. C. P. 473.

rule to discontinue; but the record having been averred, ought to have been proved.(c)

A *nolle prosequi* is an acknowledgment or agreement by the plaintiff, that he will not further prosecute his suit, as to the whole or a part of the cause of action; or, where there are several defendants, against some or one of them.(d)

On a plea of *coverture*, &c., if the plaintiff cannot answer it, he may enter a *nolle prosequi* as to the whole cause of action; but the defendant in such case is entitled to costs, under the 8 Eliz. c. 2, § 2.(e) So, if the defendant demur to one of several counts of a declaration, the plaintiff may enter a *nolle prosequi* as to that count which is demurred to, and proceed to trial upon the other counts:(f) or if he join in demurrer, and obtain judgment, he may enter a *nolle prosequi* as to the issue, and proceed to a writ of inquiry on the demurrer:(g) And if the plaintiff enter a *nolle prosequi* as to any of the counts in a declaration, he is not entitled to costs on such counts.(h) But, after a demurrer for *mis-joinder*, the plaintiff cannot cure it, by entering a *nolle prosequi*:(i) And if there be a demurrer to a declaration, consisting of two counts, against two defendants, because one of them was not named in the last count, the plaintiff cannot enter a *nolle prosequi* on that count, and proceed on the other.(k)

If there be a *demurrer* to part, and an issue upon other part, and the plaintiff prevail on the demurrer, it was in one case holden that, without a *nolle prosequi* as to the issue, he cannot have a writ of inquiry on the demurrer; because, on the trial of the issue, the same jury will [*682] ascertain *the damages for that part which is demurred to.(a)

But, in a subsequent case,(b) where the declaration consisted of four counts, to three of which there was a plea of *non assumpsit*, and a demurrer to the fourth; and, after judgment on the demurrer, the plaintiff took out a writ of inquiry, and executed it: this was moved to be set aside, there being no *nolle prosequi* on the roll; and it was insisted, that the plaintiff ought to take out a *venire*, as well to try the issue, as to inquire of the damages upon the demurrer: *Sed per Curiam*, "that is indeed the course, where the issues are carried down to trial, before the demurrer is determined, and in that case the jury give contingent damages; but here, the demurrer being determined, and the plaintiff being able to recover all he goes for upon the fourth count, there is no reason why we should force him to carry down the record to *nisi prius*; and as to the want of a *nolle prosequi* upon the roll, he may supply that, when he comes to enter the final judgment; if not, the defendant will have the advantage of it upon a writ of error: The judgment upon the inquiry must stand."

(c) 5 Price, 540; and see 1 Moore & P. 191.

(d) Cro. Car. 239, 243. 2 Rol. Abr. 100. And for the nature and effect of a *nolle prosequi*, and in what cases it may or may not be entered, see 8 Co. 58. Cro. Jac. 211, S. C. Hardr. 153. 1 Wms. Saund. 5 Ed. 207, *in notis*. 1 Ld. Raym. 598, &c. 1 Wils. 90. 3 Durnf. & East, 511.

(e) 3 Durnf. & East, 511. Post, Chap. XL.

(f) 2 Salk. 456. 1 Bos. & Pul. 157. 6 Taunt. 444. 2 Marsh. 144, S. C.

(g) 1 Salk. 219. 2 Salk. 456. 1 Str. 532, 574.

(h) 16 East, 129. 2 Marsh. 145.

(i) 1 H. Blac. 108; and see 2 Chit. Rep. 697.

(k) 4 Durnf. & East, 360; and see 1 Wms. Saund, 5 Ed. 285, (5).

(a) 1 Salk. 219. 12 Mod. 558, S. C.

(b) 1 Str. 532. 8 Mod. 108, S. C.; and see 7 Durnf. & East, 473. 1 Wms. Saund. 5 Ed. 109, (1).

In *trespass*, or other action for a wrong, against several defendants, the plaintiff may, at any time before final judgment, enter a *nolle prosequi* as to one defendant, and proceed against the others: *(c)* And so in *assumpsit*, or other action upon contract, against several defendants, one of whom pleads bankruptcy, or other matter in his *personal* discharge, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the other defendants: *(d)* So, in *trespass* against several defendants, where the jury by mistake have assessed several damages, the plaintiff may cure it by entering a *nolle prosequi* as to one of the defendants, and taking judgment against the others: *(e)* But a *nolle prosequi* cannot be entered as to one defendant, after final judgment against the others: *(f)* And it seems that in *assumpsit*, or other action upon contract, against several defendants, the plaintiff cannot enter a *nolle prosequi* as to one, unless it be for some matter operating in his *personal* discharge, without releasing the others: *(g)* So, where the plaintiff declares on a joint contract against two defendants, and one of them pleads infancy, the plaintiff cannot enter a *nolle prosequi* as to him, and proceed against the other defendant in that action; but should commence a new action against the adult defendant only: *(h)* In entering a *nolle prosequi*, the plaintiff need not be amerced *pro falso clamore*; but it is sufficient that the defendant be put without day: *(i)*

Of a nature similar to a *nolle prosequi*, is the entry of a *stet processus*, *(k)* by which the plaintiff agrees that all further proceedings in the action shall be stayed. This entry is usually made, where the defendant becomes *insolvent pending the action; and the object of it is to [*683] prevent him from obtaining judgment, as in case of a nonsuit: *(a)*

On a plea in *abatement*, if the plaintiff cannot deny the truth of the matter alleged, and it is sufficient in law to quash the bill or writ, he may enter a *cassetur billa, vel breve*; *(b)* or, in other words, pray that the bill or writ may be quashed, to the intent that he may exhibit or sue out a better bill or writ against the defendant: and upon such entry, the defendant is not entitled to costs. For the purpose of making this entry, a roll should be obtained, of the term of the declaration, on which the declaration and plea should be entered: after which, the roll is taken to and docketed with the clerk of the judgments, in the King's Bench; and the master having marked the *cassetur billa* thereon, it is filed with the clerk of the treasury: *(cc)* In the Common Pleas, the roll is obtained from the prothonotaries, with whom it is afterwards docketed and filed: *(dd)*

In an action against an *executor* or *administrator*, if the defendant plead *plene administravit*, and it cannot be proved that he has assets in hand, the plaintiff may confess the plea, and take judgments of assets *in futuro*; which is an interlocutory or final judgment, according to the nature of the action: and if it be only interlocutory, there must be a writ of inquiry to complete it. So, in an action against an insolvent debtor or fugitive,

(c) Hob. 70. Cro. Car. 239, 243. 2 Rol. Abr. 100. 2 Salk. 455, 6, 7. 3 Salk. 244, 5. 1 Wils. 306.

(d) 1 Wils. 89.

(e) 11 Co. 5. Cro. Car. 239, 243. Carth. 19. *(f)* 2 Salk. 455.

(g) 1 Wils. 89; and see 2 Maule & Sel. 23, 444. 6 Taunt. 179.

(h) 3 Esp. Rep. 76. 5 Esp. Rep. 47, S. P.; and see 3 Taunt. 307. 4 Taunt. 463.

(i) 1 Str. 574.

(k) Append. Chap. XXVIII. § 14.

(a) 7 Taunt. 180.

(b) Append. Chap. XXVI. § 7.

(cc) Imp. K. B. 10 Ed. 218, 19.

(dd) Imp. C. P. 7 Ed. 279, 80.

whose future effects remain liable to the payment of his debts, the plaintiff may take judgment for his demand, to be levied of those effects. *(ee)*

A replication, denying the truth of the plea, is either in denial of the whole, or a part of it; and such denial is either direct and immediate, or consequential to, and preceded by an inducement: the latter mode of denial is called a *traverse*. *(f)*

When the defendant's plea consists merely of matter of fact, triable by the country, in excuse or justification of the injury complained of, as where the defendant, in trespass and assault, pleads *son assault demesne*, or justifies in an action for words, there the plaintiff may reply generally, that the defendant committed the injury of his own wrong, and without any such cause as the defendant hath alleged; which puts the whole matter of the plea in issue, and is called a replication *de injuriâ suâ propriâ, absque tali causâ*. *(g)* But where the plea consists of matter of record, as well as matter of fact, or the defendant claims, in his own right, or as servant to another, any interest in the land, or any common or rent issuing out of the land, or a way or passage over it, there *de injuriâ*, &c. generally is not a good replication; *(h)* but the plaintiff must either deny *the matter [*684] of record, or traverse the title specially; or, admitting the matter of record or title, he must reply, that the defendant committed the injury of his own wrong, and without the *residue* of the cause alleged by the defendant. So, if the defendant, without claiming any interest in the land, justify under an authority derived *immediately* or *mediately* from the plaintiff, or by authority of law, *de injuriâ*, &c. generally, is not a good replication.

When there is an affirmative and negative, either in express words or by necessary implication, *(a)* or a complete confession and avoidance, a traverse is unnecessary and superfluous. But when there are two affirmatives which do not impliedly negative each other, or a confession and avoidance by argument only, it is necessary to add a traverse. A *traverse* is a denial of the whole, or most material point of the adversary's pleading; *(b)* or, if there be several points equally material, of one of them: *(c)* and it should consist of some matter of fact, triable by the country, either expressly alleged, *(d)* or necessarily implied. *(e)* Matter of inducement therefore, or conveyance to the action, *(ff)* a mere suggestion, surmise or supposal, the time and place, or what is alleged under a *scilicet*, if immaterial, is not allowed to be traversed; nor matter of law, *(gg)* or mere legal inference; matter of intention, which is not triable, as the *sciens* in an action of deceit; matter of record which is not triable by the country; or any other matter, which is not expressly alleged, or necessarily implied. But matter of inducement, &c., is traversable, if material. *(hh)*

(ee) 1 Durnf. & East, 80. Append. Chap. XXII. § 14.

(f) For the replications usually made to pleas in different actions, see 1 Chit. Pl. 4 Ed. 509, &c. *(g)* *Crogate's* case, 8 Co. 67.

(h) *Id. ibid.* and see Willes, 52, 99, 202. 7 Price, 670. Yet, where the title alleged is only inducement, *de injuriâ*, &c. generally, is a good replication. 2 Wms. Saund. 5 Ed. 295, (1.) And see further, as to the replication of *de injuriâ*, &c., and when allowed, or not proper or advisable, and the form of it, 1 Chit. Pl. 4 Ed. 525, &c. Steph. Pl. 186, &c.

(a) 2 Str. 1177. 1 Wils. S. C.

(b) Steph. Pl. 256, 7.

(c) *Id.* 258, 9.

(d) *Id.* 216, 17, 18.

(e) *Id.* 218, 19.

(ff) *Id.* 212, 13; 257, 8.

(gg) *Id.* 215.

(hh) See further as to the nature and properties of traverses in general, and their different kinds, &c. Steph. Pl. 170, &c. 230, &c. And as to special traverses, and what fact may be traversed or denied, see 1 Chit. Pl. 4 Ed. 531, &c. Steph. Pl. 188, &c.

Every traverse ought to have a proper inducement; and if that be bad, the traverse is insufficient: *(i)* But the inducement to a traverse does not require much certainty; though the traverse itself should be certain, *(k)* and neither too large nor too narrow, *(l)* that is, it should deny so much as is material, and no more. The proper words for beginning a traverse, are *absque hoc*; but any words tantamount are sufficient, as *et non*: And the replication ought not to conclude to the country, unless it comprise the whole matter of the plea. There cannot be a traverse after a traverse, when the first was apt and material: *(m)* but it is otherwise, when the first traverse was not to the point of the action, or immaterial. *(n)* And the king is allowed to take a traverse after a traverse, when his title appears by office, or other matter of record.

The want of a necessary traverse, or a traverse that is unnecessary and superfluous, is merely form, and aided after verdict, on a general demurrer, *or by pleading over. A traverse improperly taken [*685] is also aided in like manner; as where it is without an inducement, or of an immaterial point, or of one that is not the most material, or too large or too narrow, or after a former traverse. *(a)*

If the plaintiff cannot deny the truth of the plea, he may confess and avoid it, or conclude the defendant by matter of estoppel. *Avoidance*, we have seen, *(b)* is either by matter precedent, which is called an avoidance in law, or by matter subsequent, which is called an avoidance in fact. *(c)* And it is a rule, with regard to *estoppels*, that they should be pleaded with certainty in every particular; *(d)* and in pleading or replying, the party must rely upon them. *(e)*

In general we may observe, that the qualities of a replication are similar to those of a plea: therefore it should answer the whole matter alleged, and be single, *(f)* certain, direct and positive, triable, and capable of proof. *(g)* But though a replication must not be double, yet it may contain several distinct answers to different parts of the plea: Thus, at common law, where the defendant in *assumpsit* pleads infancy, to a declaration consisting of several counts, the plaintiff may reply, as to part of his demand, that it was for necessities; to other part, that the defendant was of full age at the time of the contract; and to other part, that he confirmed it after he came

(i) Steph. Pl. 208, 9, 10.

(k) *Id.* 213, 14.

(l) *Id.* 259, &c.

(m) *Id.* 210, 11.

(n) *Id.* 211, 12.

(a) For the above rules respecting traverses, and the cases which illustrate them, see Com. Dig. tit. *Pleader*, (G.) &c. And see further as to traverses when necessary, and when not; 1 Wms. Saund. 5 Ed. 85, (1), 133, (4), 207, *d. c.* (3, 4, 5), 209, (7, 8). 2 Wms. Saund. 5 Ed. 5, (3), 50, (3), what may or may not be traversed; 1 Wms. Saund. 5 Ed. 23, (5), 298, (3), 312, *d.* (4, 5). 2 Wms. Saund. 5 Ed. 10, (11), 206, (21, 22), in what manner a traverse should be taken; 1 Wms. Saund. 5 Ed. 82, (3), 268, (1), 269, *a.* (2). 2 Wms. Saund. 5 Ed. 207, (21), 295, *b.* (2), of a traverse after a traverse: 1 Wms. Saund. 5 Ed. 22, (2), and when and how the want of, or a bad or defective traverse is aided; 1 Wms. Saund. 5 Ed. 14, (2), 20, *a.* (1). See also 1 Chit. Pl. 4 Ed. 531, &c. Steph. Pl. 188, &c.

(b) *Ante*, 643.

(c) See further, as to replications in *confession* and *avoidance*, 1 Chit. Pl. 4 Ed. 540, &c. Steph. Pl. 219, &c.

(d) Co. Lit. 303, *a.*

(e) 1 Wms. Saund. 5 Ed. 325, *a.* (4). And see further, as to *estoppels*, 1 Wms. Saund. 5 Ed. 216, (2). 2 Wms. Saund. 5 Ed. 418, (1). 1 Chit. Pl. 4 Ed. 522, 3. Steph. Pl. 239, 40, 41. *Ante*, 662.

(f) But see 2 Barn. & Cres. 908. 4 Dowl. & Ry. 579, S. C.

(g) See further, as to these qualities, 1 Chit. Pl. 4 Ed. 556, 7. Steph. Pl. 264, &c. 297, &c. 342, &c.

of age.(h) So, if an executor or administrator plead several judgments outstanding, and no assets *ultra*, the plaintiff may reply, as to one of the judgments, *nul tiel record*; and to another, that it was obtained or kept on foot by fraud.(i) And to a plea of set-off, consisting of several demands upon judgment or recognizance and simple contract, the plaintiff in his replication may give several answers; as, to the judgment [*686] or *recognizance, *nul tiel record*, and to the simple contract, that he was not indebted, or the statute of limitations.(a)

At common law, when an action was brought on a bond with a penalty, conditioned for the performance of covenants, the plaintiff could only have assigned *one* breach of the condition, by which the forfeiture was incurred; for if he had assigned *several* breaches, the declaration would have been bad for duplicity; and if the issue joined on the breach assigned had been found for the plaintiff, he was entitled not only to recover the penalty, that being the legal debt, but also to take out execution for the same, although it far exceeded the amount of the damages actually sustained; and the defendant could only have obtained relief in a court of equity. For preventing these inconveniences, to the plaintiff as well as to the defendant, it was enacted by the statute 8 & 9 W. III. c. 11, § 8, that “in all actions upon any bond or bonds, or on any penal sum, for non-performance of any covenants or agreements, in any indenture, deed or writing contained, the plaintiff or plaintiffs may assign as many breaches as he or they shall think fit; and the jury, upon the trial of such action or actions, shall and may assess, not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches, so as to be assigned, as the plaintiff, upon the trial of the issues, shall prove to have been broken; and that the like judgment shall be entered on such verdict, as heretofore hath been usually done in such like actions.” This statute, we have seen,(b) is *compulsory* on the plaintiff, to proceed in the method it prescribes: and under it, the breaches may either be assigned in the declaration, or in the replication. It was not formerly usual to assign them in the declaration; but this is now commonly done, for avoiding the necessity of a suggestion after judgment on demurrer, or by confession or *nil dicet*, or after a plea of *non est factum*, &c.; And where they are so assigned, the defendant may deny the truth of them in his plea; and, if necessary for his defence, may plead several matters. But when the breaches are not assigned in the declaration, the usual course of pleading is, for the defendant in his plea to set out the condition, and plead performance generally; upon which the plaintiff *assigns* the breaches in his replication.(c) In *debt* on bond, conditioned for the payment of mortgage money, when the defendant pleads that he paid the money according to the condition, the plaintiff in his replication may take issue thereon, and conclude to the country, without assigning any fur-

(h) But a promise made after the commencement of an action, is not sufficient to sustain a replication that the defendant, (who had pleaded infancy) ratified his contract after he came of age. 2 Barn. & Cres. 824. 4 Dowl. & Ry. 545, S. C.

(i) 1 Wms. Saund. 5 Ed. 337, *a. b.* (2), and see 1 Salk. 298. 1 Ld. Raym. 263, S. C.

(a) 1 Chit. Pl. 4 Ed. 500, 501.

(b) *Ante*, 584.

(c) *Per Chambre*, J. 5 Taunt. 390. 1 Marsh. 97, S. C. 2 Chit. Rep. 298, (a). And see Com. Dig. tit. *Pleader*, F. 14, and the authorities there cited; by which it seems, that at common law, where a breach was not admitted by the plea, the plaintiff must have assigned it in his replication, and concluded with a verification, so as to give the defendant an opportunity of answering it.

ther breach: *(d)* But, in general, the breaches are held to be sufficiently assigned, though they are *not said in terms, to be *according to the form of the statute*. *(aa)* After a plea of *non est factum*, *(bb)* or that the bond was obtained by fraud, *(cc)* &c. when the breaches are not assigned in the declaration, the plaintiff, in the King's Bench, is allowed to *suggest* them, in making up the issue; and proceed to assess damages thereon, at the time the issue is tried. This suggestion may be entered at any time before the trial; though, where the issue has been previously made up and delivered on such plea, it is irregular to deliver a second issue with a suggestion, without a summons and judge's order. *(dd)* And, in a late case, *(e)* leave was given by the court of King's Bench to the plaintiff, in *debt* on bond conditioned to perform an award, after judgment for him upon a plea of judgment recovered, and writ of error allowed, to execute a writ of inquiry upon the above statute, and to sign a new judgment, on the terms of paying costs, and putting the defendant *in statu quo*, &c. But, in the Common Pleas, on a plea of general performance, if the plaintiff, instead of *assigning* breaches in his replication, deny the performance and conclude to the country, and then *suggest* breaches of the condition, it is bad on demurrer; and if the defendant do not demur, but take issue and go to trial on the question of performance, the court will after verdict award a repleader. *(f)*

In order to avoid duplicity, when a party is to answer two matters, and yet by law he can only plead or reply to one of them, he may *protest* against the one, and plead or reply to the other: as where a delivery and acceptance are stated, of money or goods, &c. he may protest against the delivery, and take issue on the acceptance; or if a defendant plead that he is seised in fee of land, and prescribe for common of pasture, &c. the plaintiff in his replication may protest against the seisin, and take issue on the prescription. This is called a *protestation*, or, from the *gerund* used in making it when the proceedings were in Latin, a *protestando*; and is defined to be a saving to the party who takes it, from being concluded by any matter alleged or objected against him on the other side, upon which he cannot take issue. *(g)* A *protestando* is said by Lord Coke to be an exclusion of a conclusion; or a safeguard to the party, which keepeth him from being concluded by the plea he is to make, if the issue be found for him: *(h)* And where it is doubtful whether a pleading be good, it is usual for the party to protest that it is insufficient in law, before he answers it. But that which is the ground of the party's suit cannot be taken by protestation; for it may be denied by answer, and issue may be joined upon it: as in *detinue* by the executor of A., the defendant cannot *take by protestation that A. did not make the plaintiff his executor, for it is the ground of the suit, and utterly destroys the plaintiff's action; and that which is the effect of the party's suit cannot be

(d) 5 Moore, 198, and see 2 Chit. Rep. 697, and the cases there cited.

(aa) 13 East, 3; and see 5 Durnf. & East, 540.

(bb) 8 Durnf. & East, 255; and see 1 Esp. Rep. 277. Append. Chap. XXX. § 10.

(cc) 5 Maule & Sel. 60. 2 Chit. Rep. 298, S. C.

(dd) 8 Durnf. & East, 255.

(e) 14 East, 401.

(f) 5 Taunt. 386. 1 Marsh. 95, S. C. And for the mode of proceeding in general, on the statute 8 & 9 W. III. c. 11, § 8, see 1 Wms. Saund. 5 Ed. 58, (1). 2 Wms. Saund. 5 Ed. 187, (2). Sel. Xi. Pri. 6 Ed. 591, &c. 1 Chit. Pl. 4 Ed. 501, &c. 540. Ante, 583, &c.

(g) Plowd. 276, b. Finch. L. 359, 60.

(h) Co. Lit. 124, b. Doc. Plac. 295.

taken by protestation.(a) Also it is a rule, that a protestation which is repugnant to, or inconsistent with the plea, or an idle and superfluous protestation, is not good.(b)

A protestation is perfectly inoperative in the pleading in which it is used, it neither admitting nor denying any thing in that suit; and where one pleads a plea, and takes another matter by protestation, and the issue is found against him, the protestation is of no service;(c) it being a rule, that a protestation does not avail the party that takes it, if the issue be found against him, but only prevents a conclusion where the issue is found for him, unless it be a matter that cannot be pleaded,(d) or on which issue cannot be joined;(e) and then it shall be saved to the party protesting, though the issue be found against him.(f)

The only additional quality required in a replication, is that it be consistent with, and do not depart from the declaration. *Departure* in pleading is, when a man quits or departs from the case or defence which he has first made, and has recourse to another;[A] or, in other words, when the replication or rejoinder contains matter not pursuant to the declaration or plea, and which does not support and fortify it.(g) Thus, if the declaration be founded on the common law, the plaintiff in his replication cannot maintain it by a special custom, or act of parliament.(h) So, in an action of *debt* on an arbitration bond, if the defendant plead "no award made," and the plaintiff, in his replication, set out an award, and assign a breach, the defendant cannot rejoin that the award was not tendered,(i) or is void,(k) or that the defendant hath performed, or been ready to perform it.(l) So, in an action of *debt* on bond, conditioned for the payment of an annuity, if

(a) Plowd. 276. *Doc. Plac.* 296; and see Moor, 355, 6. Cro. Car. 365. 3 Wils. 109, 10; 116.

(b) Bro. Abr. tit. *Protestation*, l. 5. Plowd. 276. (c) Bro. Abr. tit. *Protestation*, 14.

(d) Finch, L. 359.

(e) Plowd. 276, b. Co. Lit. 124, b.

(f) For the several cases on this subject, see 2 Wms. Saund. 5 Ed. 103, (1). See also 3 Blac. Com. 311, 12. Reg. Plac. 70, 71. 3 Reeve's Hist. 437. 1 Chit. Pl. 4 Ed. 533, &c. Steph. Pl. 235, &c.

(g) Co. Lit. 304, a. 2 Wils. 98; and see 2 Wms. Saund. 5 Ed. 84, (1), 189, (3).

(h) Co. Lit. 304, a. 1 Lev. 81. 3 Lev. 48.

(i) 1 Lev. 300. 2 Wms. Saund. 5 Ed. 188, S. C. 3 Salk. 123.

(k) 1 Lev. 85, 127, 133. 1 Wils. 122.

(l) 1 Sid. 10.

[A] A departure in pleading, is where a previous ground in the pleading is abandoned and a new ground assumed. *Haley v. M'Pherson*, 3 Humph. 104. *M'Aden v. Gibson*, 5 Ala. 341. To assumpsit on an account, the defendant pleaded the statute of limitations, to which the plaintiff replied fraud. Held, that the replication was a departure in pleading, and defective on demurrer. *Allen v. Mayson*, 3 Brevard, 207. So in debt on a note, the plea was, "no consideration." The replication set out a consideration, and the rejoinder showed a partial failure of consideration. Held, that the rejoinder was a departure. *Kidgore v. Powers*, 5 Blackf. 22. On a declaration in the usual form, in a suit by the assignee against the maker of a promissory note, the pleas were, want of consideration, &c. The replication was, that the note was made in the State of Ohio, &c., setting out a statute of that State, which showed the pleas to be inadmissible. Held, that the replication was a departure. *Yeatman v. Cullen*, 5 Blackf. 240. Departure consists, also, in alleging new matter not tending to fortify the traversed matter, and will vitiate a pleading. *Paine v. Fox*, 16 Mass. 129. *Keay v. Goodwin*, *Ib.* 1, 2. *Darling v. Chapman*, 14 *Ib.* 101, 103. Thus, a marshal, to whom an execution was given upon a judgment obtained by the United States for a penalty, re-delivered to the debtor the goods upon which he had levied, on being served with a warrant of remission. An action was thereupon brought against him, in the name of the United States, for the moiety of the penalty allowed to the officers of the customs; but the declaration alleged no interest in them, but only in the United States. The defendant pleaded the remission. The plaintiffs replied, the interest of the officers in the penalty. Held, on special demurrer, that this was a departure. *United States v. Morris*, Paine, 209.

the defendant plead, "no such memorial as the statute requires," to which the plaintiff replies that there was a memorial, which contained the names of the parties, &c. and the consideration for which the annuity was granted, and the defendant rejoins that the consideration is untruly alleged in the memorial to have been paid to both obligors, for that one of them did not receive any part of it; this rejoinder is bad, as being a departure from the plea.^(m) So, in an action of *debt* on bond, conditioned for the performance of covenants, if the defendant plead performance, and *the plaintiff reply and assign a breach, the defendant cannot [*689] rejoin any matter in excuse of performance.^(a) But where the rejoinder discloses new matter, in explanation or fortification of the bar, it is no departure:^(b) Thus, where the defendant in an action of *debt* on an arbitration bond, pleaded no "award," and the plaintiff in his replication set out the award, and the defendant in his rejoinder stated the whole award, in which was recited the bond of submission, by which it appeared, upon the face of the award, that it was not warranted by the submission, and then demurred; the court held, that the rejoinder was not inconsistent with, nor a departure from the plea.^(c) In *scire facias* against bail, they pleaded that there was no *ca. sa.* against the principal, the plaintiff replied, by showing the *ca. sa.* and a return of *non est inventus*, the defendant rejoined that the *ca. sa.* did not lie four days in the office; and this, on demurrer, was holden to be a departure; although, by the practice of the court, the proceedings were on that account irregular, and might have been set aside.^(d) But where bail, sued in *scire facias* upon their recognizance, pleaded that no *ca. sa.* was *duly* sued out, returned and filed, against the principal, according to the custom and practice of the court, to which the plaintiff in his replication showed a writ of *ca. sa.* issued into *Middlesex*, it was holden to be no departure for the defendant to rejoin, that the venue in the action against the principal was laid in *London*; for that sustains the plea.^(e)

Time and place, when material, cannot be departed from; as, in an action upon a bond,^(f) or promissory note,^(g) the plaintiff in his replication cannot vary from the day laid in the declaration. So, in an action for a local trespass, he cannot reply that it was committed at a different place. But when the time laid in the declaration is immaterial, there, if it become necessary by the defendant's plea, the plaintiff in his replication may depart from it; as in *trespass*,^(h) or *trover*,⁽ⁱ⁾ or upon a general *indebitatus assumpsit*,^(k) when the time becomes material by the defendant's plea of a release, tender, or the statute of limitations, &c. So, in an action for a transitory trespass, when the defendant pleads a local justification, the plaintiff, in his replication, may vary from the place laid in the declaration.^(l) The proper mode of taking advantage of a departure, is by demur-

(m) 4 Durnf. & East, 585.

(a) Co. Lit. 304, a. 2 Lev. 67. 1 Salk. 221, 2. (b) 2 Wils. 98.

(c) 11 East, 188; and see 1 Barn. & Cres. 465, 6. 2 Dowl. & Ryl. 472, 3. S. C.

(d) 1 Wils. 334. 16 East, 41. 1 Dowl. & Ryl. 50.

(e) 16 East, 39; and see 5 Dowl. & Ryl. 615. (f) 1 Salk. 222. 3 Lev. 348.

(g) 1 Str. 22. 2 Str. 806.

(h) Co. Lit. 282, a. b. 1 Salk. 222. 2 Ld. Raym. 1015.

(i) Cro. Car. 245, 333. 1 Salk. 222.

(k) 1 Str. 22. 2 Str. 806. 1 Lev. 110. 1 Keb. 566, 578. 10 Mod. 251. Fort. 375. 1 Barnard. K. B. 54.

(l) 1 Ld. Raym. 120.

rer; for if the defendant, instead of demurring, take issue upon a replication containing a departure, and it be found against him, the court will not arrest the judgment.(m)

*But though a departure be not allowable, yet in many actions, [*690] and particularly in trespass, the plaintiff, who has alleged in his declaration a general wrong, may, in his replication, after an evasive plea by the defendant, reduce that general wrong to a more particular certainty, by assigning the injury afresh, with all its specific circumstances, in such manner as clearly to ascertain and identify it, consistently with his general complaint; which is called a *new* or *novel assignment*.(a)

A new assignment is either as to time, place, or other circumstances. With respect to *time*, when the defendant justifies under a right of common, &c. at particular times, the plaintiff may new assign the trespass at other times. So, in an action of assault and battery, if the defendant plead *son assault demesne*, and there were in truth two assaults, one of which the defendant can justify, and the other not, the plaintiff may new assign the assault for which he brought his action.(b) And it seems that the defendant in such case may prove an assault on any day before the action brought; and the plaintiff cannot give in evidence an assault at another day, or at another time on the same day, without a new assignment.(c) But where the defendant, in trespass *quare clausum fregit* on several days, pleads leave and license to the whole, if some of the trespasses were committed after the license was revoked, the plaintiff need not new assign; as the defendant, by his plea, undertakes to prove a license sufficient to cover all the acts of trespass.(d)

With respect to *place*, it is a rule, that if the plaintiff in *trespass* give it a name by his writ, the defendant cannot vary from that name; but if the writ be only general, *quare clausum fregit*, and the plaintiff give a name in his count, this shall not bind the defendant, but he may give the place another name.(e) And it is on all hands agreed, that when the writ and count are both general, the defendant may give the place a name in his plea;(f) or he may plead *liberum tenementum* generally, without giving it a name.(g) But when the place is made material by the defendant's plea, he must show it with certainty; as in *trespass*, for taking and carrying away the plaintiff's goods in D., the defendant pleaded that the *locus in quo* was his freehold, and that he took the goods *damage feasant*, &c. the plaintiff demurred generally, and had judgment; for the action being transitory, there is no *locus in quo* supposed, D. being only alleged for a venue; therefore, if the defendant will make the place material, it must come on his part to show the certainty of it.(h)

If the defendant say, that the *locus in quo* is six acres in D. which are his freehold, and the plaintiff say they are *his* freehold, and in truth the plaintiff and defendant have both six acres there, it was in one [*691] case *determined, that the defendant cannot give in evidence, that he committed the trespass in his own soil, unless he give a name

(m) T. Raym. 86. And see further, as to *departure* in pleading, 2 Wms. Saund. 5 Ed. 84, a. &c. 1 Chit. Pl. 4 Ed. 556, &c. Steph. Pl. 405, &c.

(a) 3 Blac. Com. 311.

(b) 6 Mod. 120. 2 Ld. Raym. 1015.

(c) Bul. Ni. Pri. 17: and see 1 Esp. Rep. 38. Ry. & Mo. 118. 1 Car. & P. 381, S. C.; but see Cro. Car. 514, 15, *contra*.

(d) 1 Car. & P. 448, 677: and see 11 East, 451.

(e) *Per Fulkfux*, Just. 22 Edw. IV. 17. Willes, 222, &c. 2 Blac. Rep. 1090.

(f) Bro. Abr. tit. *Trespass*, pl. 277, 360, 366. (g) *Id.* pl. 153.

(h) 2 Salk. 453. 6 Mod. 117, S. C.

certain to the six acres ; for otherwise, it is said, the plaintiff cannot make a new assignment.(a) So where the plaintiff, in trespass *quare clausum fregit*, names the close in his declaration, and the defendant pleads *liberum tenementum* generally, without giving any further description of the close, the plaintiff is not driven to a new assignment ; but is entitled to recover, upon proving a trespass committed in a close in his possession, bearing the name given in the declaration, although the defendant may have a close in the same parish, known by the same name.(b) But where the defendant, in trespass *quare clausum fregit* in D. pleads *liberum tenementum*, without giving the close a name, and issue is joined thereupon, it seems to be sufficient for him to show *any* close there that is his freehold ;(c) and therefore, in that case, the better way is to make a new assignment.

As the plaintiff may new assign the trespass in a different close, so he may new assign it in another part of the same close. In the latter case, he ought to allege, in what other part of the close the defendant committed the trespass, as in the *south* or *north* part, so that the difference may be plainly perceived.(d) If the defendant justify under a right of way, the plaintiff may either deny the existence of the right claimed by the defendant, or admitting it, he may new assign the trespass, *extra viam* : or, if the declaration be so framed as to include several trespasses of the same nature, he may deny the right, as well as make a new assignment, by saying that he brought his action, not only for the trespass attempted to be justified, but also for the other trespass *extra viam*. And where the defendant justifies under a right of common of pasture, or turbary, &c. the plaintiff may, if the declaration will admit of it, state the trespass to have been committed on other occasions, and for other purposes, than those mentioned in the plea. But where the plaintiff complains of a single act of trespass, which is justified by the defendant, the plaintiff cannot in his replication take issue upon the facts of the justification, and also newly assign either the same or different matters ; such replication and new assignment being double.(e) The plaintiff therefore, in such case, should either reply to the plea, or new assign the trespass, according to the facts of the case : If the plea do not contain a complete answer to the trespass, then the plaintiff should reply, by denying or confessing and avoiding it : (f) but if the trespass be completely justified by the plea, the plaintiff should not reply thereto, but make a new assignment, if the facts of the case will warrant it : (g) By new assigning, however, he admits that the trespass in *the declaration is answered [*692] by the plea ; and therefore, unless a different trespass of the same nature can be proved, the plaintiff must fail in his action.(aa) And where the declaration consisted of two counts, to the first of which there was a justification, and the plaintiff new assigned the trespass, as having been committed at a subsequent time, but failed at the trial in proving his new

(a) Dyer, 23.

(b) 1 Barn. & Cres. 489. 2 Dowl. & Ry. 719, S. C. ; and see 2 Bing. 49.

(c) 2 Salk. 453. 6 Mod. 119, S. C. ; and see Willes, 223. 7 Durnf. & East, 335, *per Lawrence, J. Atherton v. Pritchard*, E. 43 Geo. III. K. B. 2 Taunt. 159. 1 Wms. Saund. 299, *b. c.* 1 Chit. Pl. 4 Ed. 516, 7.

(d) Bro. Abr. tit. *Trespass*, pl. 203.

(e) 10 East, 73, 80 ; and see 7 Taunt. 156. (f) 16 East, 82.

(g) 2 Wils. 3 ; and see Cro. Car. 228. 2 Durnf. & East, 172, 177. 3 Durnf. & East, 292. 7 Durnf. & East, 654. 11 East, 406. 8 Moore, 326. 1 Bing. 317, S. C. Ry. & Mo. 118. 1 Car. & P. 381, S. C. 4 Barn. & Cres. 794. 7 Dowl. & Ry. 187, S. C. 5 Barn. & Cres. 485. 8 Dowl. & Ry. 257, S. C.

(aa) 16 East, 82.

assignment, the court held, that he could not have recourse to the second count: for by new assigning he admitted that he did not intend to proceed for the trespass that was justified, but to rely on his new assignment; and as there were only two trespasses, one of which was admitted to be answered, he could not avail himself of the other trespass, both on the new assignment and on the second count.(b)

A new assignment, being in nature of a new declaration,(c) should be equally certain; and the defendant may answer it in the same way, either by pleading the general issue of not guilty, or a special justification.(d) But, in answer to a new assignment at a different place, he cannot say that the places mentioned in the plea and new assignment are the same;(ee) for by new assigning, the plaintiff admits the truth of the plea, and is estopped from giving any evidence in the place stated therein; so that if the places are in truth the same, the defendant may take advantage of it on the general issue of not guilty. Neither can the defendant justify at a different place, and traverse the place mentioned in the new assignment.(ff)

When a replication denies the whole substance of the defendant's plea, there the plaintiff ought to tender an issue, and conclude to the country:(gg) and it matters not whether the replication in such case be with or without a traverse; for where a traverse comprises the whole matter of the plea, the replication may still conclude to the country.(h) But when a particular fact is selected and denied, the conclusion seems to depend on the form of the replication: If it be so framed, as simply to deny the fact, without any inducement or traverse, it ought to conclude to the country;(i) but the plaintiff is not always obliged to reply in that way, for in some cases he is allowed, after a proper inducement, to traverse the fact, with an *absque hoc*;(k) and when a particular fact is so traversed, the replication should conclude to the court, with an averment and prayer of damages, [*693] or *of the debt and damages:(l) And it is an invariable rule, that whenever new matter is alleged in the replication, it should be concluded with an averment, in order to give the defendant an opportunity of answering it.(bb) A new assignment concludes, by averring that the trespass newly assigned is another and different trespass than that mentioned in the plea; wherefore, inasmuch as the defendant hath not answered the trespass newly assigned, the plaintiff prays judgment, and his damages, &c.

(b) 2 Durnf. & East, 176, 7; and see 1 Durnf. & East, 479. Bul. Ni. Pri. 17. 1 Car. & P. 394, 5.

(c) 1 Ken. 389.

(d) Bro. Abr. tit. *Trespass*, pl. 168, 359.

(ee) *Id.* pl. 3. 168. Cro. Eliz. 355, 492, 3.

(ff) *Id.* pl. 168. And see further as to *new assignments*, when necessary or not, and how made, and the pleadings thereon, 1 Wms. Saund. 5 Ed. 299, (6). 2 Wms. Saund. 5 Ed. 5, (3). 1 Chit. Pl. 4 Ed. 542, &c. Steph. Pl. 241, &c.

(gg) 1 Bur. 316. 2 Bur. 1022. Doug. 94, 428. 2 Durnf. & East, 442, 3.

(h) 1 Salk. 4.

(i) 2 Durnf. & East, 439; and the cases there cited of *Bush v. Leake*, T. 23 Geo. III. K. B. *Slater v. Curne*, H. 25 Geo. III. K. B. and *Carter v. Yates*, T. 27 Geo. III. K. B. accord. *Mulliner v. Wilkes*, E. 23 Geo. III. K. B. *semb. contra*.

(k) *Fen v. Alston*, cited in 1 Bur. 320, 21. 2 Str. 871. 2 Wils. 113. Barnes, 161, S. C. Doug. 428.

(l) *Id.* *Ibid.* 1 Bur. 319. 2 Durnf. & East, 442, 3.

(bb) 2 Wils. 65. Doug. 58. 2 Durnf. & East, 576. And see further, as to the mode of concluding replications, &c., and when they should conclude to the contrary, or with a verification: 1 Wms. Saund. 5 Ed. 103, (1), 327, (1), 334, (9), 338, (5, 7), 339, (8). 2 Wms. Saund. 5 Ed. 190, (5). 1 Chit. Pl. 4 Ed. 554, &c. Steph. Pl. 247, 8; 396, &c.

In the King's Bench, when the plea was *entered* in the general issue book, or *delivered* to the plaintiff's attorney, the replication should in all cases be *delivered* to the defendant's attorney; but otherwise it should be *filed* in the office of the clerk of the papers: And a *similiter* to the general issue must be delivered, or the defendant will be entitled to sign a judgment of *non pros.*(*c*) The replication also should be signed by counsel, unless it conclude to the country. In the Common Pleas, the replication is either filed in the prothonotary's office, or delivered to the defendant's attorney: And, in that court, a tender of an issue in fact must be signed by a serjeant, but a joinder in issue need not.(*d*)

If the plaintiff reply, without joining issue, the defendant may be called upon to *rejoin*; or if there be a new assignment, he may be ruled to *plead* thereto, in like manner as to the original declaration.(*e*) The rejoinder should be delivered to the plaintiff's attorney, or filed in the office of the clerk of the papers, in the King's Bench, in like manner as the replication; In the Common Pleas, it is filed with the prothonotaries. And after a rejoinder, if the parties are not yet at issue, the plaintiff must *surrejoin*, the defendant *rebut*, and the plaintiff *surrebut*, &c. till issue is joined. The rule for these purposes is given by the master or secondaries, in like manner as the rule to reply; and if the defendant neglect to rejoin or rebut, when called upon for that purpose, the plaintiff, in the King's Bench, may strike out the previous pleadings, and sign judgment by default, as for want of plea.(*f*) If the plaintiff, on the other hand, do not surrejoin, or surrebut, within the time limited by the rule, or order for further time, the defendant may sign a judgment of *non pros*; and it is not necessary for him, in the King's Bench, to demand a surrejoinder, &c. the service of the copy of the rule being deemed a demand of itself; but, in the Common Pleas, a surrejoinder, &c. must be demanded, before judgment is signed.

* CHAPTER XXIX.

[*694]

Of DEMURRERS, and AMENDMENT.

A *Demurrer* admits the facts, and refers the law arising thereon to the judgment of the court:(*a*) And it is either to the whole or part of a declaration; or to the plea, replication, &c. When there are several counts in a declaration, some of which are good in point of law, and the rest bad, the defendant can only demur to the latter; for if he were to demur generally to the whole declaration, the court would give judgment against him.(*b*) So, if the sum demanded by a declaration in *scire facias* be divisible on the record, and there be no objection to one part of it, a demurrer which goes to the whole is bad.(*cc*) If a plea or replication, which is entire, be

(*c*) 3 Dowl. & RyL. 1.(*d*) 1 Bos. & Pul. 469. 3 Bos. & Pul. 171.(*e*) Append. Chap. XVIII. § 9.(*f*) 5 Durnf. & East, 152. And see further, as to *rejoinders*, &c. 1 Wms. Saund. 5 Ed.318, *a.* (1). 1 Chit. Pl. 4 Ed. 563, &c.(*a*) Co. Lit. 71, b. 5 Mod. 132.(*b*) 1 Wms. Saund. 5 Ed. 286, (9). 2 Wms. Saund. 5 Ed. 380, (14). 1 Wils. 248. 1 New Rep. C. P. 43.(*cc*) 11 East, 565

bad in part, it is in general bad for the whole: (d) But a plea of set-off, wherein the demands are divisible, and in nature of several counts in a declaration, forms an exception to this rule. (e)

Demurrers are *general* or *special*; (f) the former are to the *substance*, the latter to the *form* of pleading. Thus if a defective title be alleged, it is a fault in substance, for which the party may demur generally; but if a title be defectively stated, it is only a fault in form, which must be specially assigned for cause of demurrer. Of the latter nature is *duplicit*y: and it is not sufficient to say that the pleading is double, or contains two matters; but the party demurring must specially show wherein the duplicity consists. (g)

At common law, there were special demurrers, but they were never necessary except in cases of duplicity, and therefore were seldom used; for as the law was then taken to be, upon a special demurrer, the party could take advantage of no other defect in the pleadings, but of that which was specially assigned for cause of his demurrer; but upon a general demurrer, he might take advantage of all manner of defects, that of duplicity only excepted. And there was no inconvenience in this practice; for the pleadings being at bar *vivâ voce*, and the exceptions taken *ore tenus*, [*695] *the causes of demurrer were as well known upon a general demurrer, as upon a special one. (aa)

Afterwards, when the practice of pleading at bar was altered, this public inconvenience followed from the use of general demurrers; that the practice went on to argument, without knowing what they were to argue: and this was the occasion of making the statute 27 Eliz. c. 5, by which it is enacted, that “after demurrer joined and entered in any action or suit, in any court of record, the judges shall proceed and give judgment, according as the very right of the cause and matter in law shall appear to them, without regarding any imperfection, defect, or want of form, in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding whatsoever, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer.” This statute, by making known the causes of demurrer, was so far restorative of the common law: (a) and as a general demurrer before did confess all matters formally pleaded, so by this statute, whenever the right sufficiently appeared to the court, it confessed all matters, though pleaded informally. (b)

But there were still many defects and imperfections, which were not aided as form upon a general demurrer: to remedy which it was enacted, by the statute 4 Ann. c. 16, § 1, that “no advantage or exception shall be taken of or for an immaterial traverse, the default of entering pledges upon any bill or declaration, the default of alleging a *profert in curiâ* of any bond, bill, indenture, or other deed, mentioned in the declaration or other pleading, or of letters testamentary, or letters of administration, the omission of *vi et armis*, or *contra pacem*, the want of averment of *hoc paratus*

(d) 1 Wms. Saund. 5 Ed. 28, (2), 337, (1). 2 Wms. Saund. 5 Ed. 127, *b. c.* 1 Salk. 312. 1 Durnf. & East, 40. 3 Durnf. & East, 374. 1 Chit. Pl. 4 Ed. 464, 5. Steph. Pl. 159, &c.

(e) 2 Blac. Rep. 910.

(f) Co. Lit. 72, a. Steph. Pl. 403, 4. And for the forms of general demurrers to declarations, and pleas, &c. and joinders therein, see Append. Chap. XXIX. § 1, 3, 6, 7.

(g) R. M. 1654, § 17. K. B., R. M. 1654, § 20, C. P. 1 Salk. 219. Willes, 220. Cas. temp. Hardw. 167; and see 1 Wms. Saund. 5 Ed. 337, *b.* (3). Steph. Pl. 264, &c. 1 Moore & P. 102. 4 Bing. 428, S. C.

(a) 3 Salk. 122.

(b) Hob. 233.

(aa) 3 Salk, 122.

est verificare, or hoc paratus est verificare per recordum, or not alleging prout patet per recordum :-(c) but the court shall give judgment, according to the very right of the cause, without regarding any such imperfections, omissions and defects, or any other matter of like nature, except the same shall be specially and particularly set down, and shown for cause of demurrer, notwithstanding the same might have heretofore been taken to be matter of substance, and not aided by the statute of Queen *Elizabeth*, so as sufficient matter appear in the pleadings, upon which the court may give judgment, according to the very right of the cause." Since the making of these statutes, the party, on a general demurrer, can only take advantage of defects in substance ; and therefore, if the defects be not clearly of that nature, it is safest to demur specially, in which case he might not only take advantage of such defects, but also of any others that are specially set down.(d) The plaintiff, however, need never demur specially to a plea in abatement.(e)

*All demurrers, whether general or special, must be signed by [*696] counsel in the King's Bench,(aa) or a serjeant in the Common Pleas ;(bb) and, in the King's Bench, general demurrers to the declaration must be delivered(cc) to the plaintiff's attorney ; but special demurrers, or general demurrers after special pleas, must be filed in the office of the clerk of the papers, who makes copies of them. And a general demurrer to part of a declaration, and a general issue to the rest, or a general demurrer to a plea of *nil debet*, in an action of *debt* on bond, must, we have seen,(dd) be *delivered* to the opposite attorney, and not *filed* with the clerk of the papers. In the Common Pleas, all demurrers, whether general or special, may either be filed in the prothonotaries' office, or delivered to the opposite attorney.(ee) And when either party has demurred, he should obtain a rule from the master in the King's Bench, and enter it with the clerk of the rules, for the opposite party to join in demurrer ;(f) a copy of which rule should be duly served. In the Common Pleas, a rule to join in demurrer is given with the secondaries,(g) in like manner as the rule to plead ; and a joinder in demurrer should be demanded,(h) before judgment ; and in that court, a joinder in demurrer must have a serjeant's hand.(i) The defendant, we may remember, cannot waive a general demurrer to the declaration, in the King's Bench ; but a special one may be waived after the book is made up, unless the defendant has been previously ruled, and elected to abide by it.(k) In the Exchequer it is a rule,(l) that "in all cases where the plaintiff demurs to the defendant's plea, or other subsequent pleading, and the defendant joins in demurrer, the plaintiff shall be at liberty to enter the issue in law upon the roll, and move for a *concilium*, without giving the defendant any rule to bring in the demurrer book."

(c) 11 East, 516, 565.

(d) 1 Wms. Saund. 5 Ed. 337, b. (3). And see further, as to *demurrers* and *joinders*, 1 Chit. Pl. 4 Ed. 573, &c. Steph. Pl. 158, &c.

(e) *Per Bayley*, J. 2 Maule & Sel. 485. *Ante*, 638. (aa) *Per Cur.* T. 21 Geo. III. K. B.

(bb) *Douglas v. Child*, E. 33 Geo. III. C. P. *Allen v. Hall*, Imp. C. P. 7 Ed. 298, S. P.

(cc) 1 Chit. Rep. 212. 2 Chit. Rep. 295.

(dd) *Ante*, 672.

(ee) Imp. C. P. 7 Ed. 298.

(f) Append. Chap. XXIX. § 7.

(g) *Id.* § 8.

(h) *Id.* § 10.

(i) 2 Bos. & Pul. 336 ; and see 3 Bos. & Pul. 171, *in notis*.

(k) *Ante*, 673, 4.

(l) R. T. 26 & 27 Geo. II. § 4, *in Scac.* Man. Ex. Append. 211.

When either party demurs, the other, in due time, joins in demurrer, and proceeds to argument; or he amends, discontinues,^(m) or enters a *nolle prosequi*.⁽ⁿ⁾

Amendments are either at common law, or by statute.^(o) [A] At common law, there was very little room for amendments: for, according to *Britton*, the judges were to record the *parols*, or pleadings, deduced before them in judgment; but they were not to erase their records, nor amend them, nor record against their inrolment,^(p) &c. All mistakes, however, were amendable at common law, during the same term;^(q) and afterwards, an *amendment was in some instances permitted, as in the recital of a writ, or entry of an *essoins* or continuances,^(a) &c. So, at common law, when the pleadings were *ore tenus* at the bar of the court, if any error was perceived in them, it was presently amended.^(b) Afterwards, when the pleadings came to be in paper, it was thought but reasonable that the parties should have the like indulgence.^(c) And hence it is now settled,^(d) that whilst the pleadings are in paper, and before they are entered of record, the court or a judge will amend the declaration,^(e) plea,^(f) replication,^(gg) &c. in form or substance, on proper and equitable terms; [A] and declarations in actions on bail bonds may be amended, in

(m) *Ante*, 677.

(n) Co. Lit. 72, a. R. M. 1654, § 17. K. B., R. M. 1654, § 20. C. P. *Ante*, 681, 2.

(o) 1 Str. 137.

(p) 4 Inst. 255. Gilb. C. P. 107.

(q) Gilb. C. P. 108, 9.

(a) 2 Salk. 520. Gilb. C. P. 114, 15.

(e) 1 Wils. 7.

(gg) *Id.* 76.

(g) 8 Co. 157. Gilb. C. P. 108.

(b) 10 Mod. 88. 1 Str. 11.

(d) 1 Salk. 47. 3 Salk. 31.

(f) *Id.* 223.

[A] See note [B] ante p. 161.

[B] An amendment in a declaration may be allowed which does not change the nature or subject-matter of the action, even though without such amendment, the action could not have been sustained. *Skinner v. Grant*, 12 Verm. 456. *Cabarga v. Seeger*, 5 Harris, 514. So long as the form of action is not changed, and the court can perceive that its identity is preserved, the particular allegations of the declaration may be changed by amendment, and others superadded, in order to cure imperfections and mistakes in the manner of stating the plaintiff's case. *Stevenson v. Mudgett*, 10 New Hamp. 338. *Perley v. Brown*, 12 New Hamp. 493. *Thompson v. Phelin*, 2 Fost. (N. H.) 339. *Christian v. Penn*, 5 Geo. 482. *Lawrence v. Langley*, 14 New Hamp. 70.

Thus, it has been held, that a new count for the assertion of a right or the enforcement of a claim, growing out of the same transaction, act, agreement, or contract, upon which the original declaration is founded, is not for a new cause of action, and may be inserted as an amendment, however different the form of liability may be. *Smith v. Palmer*, 6 Cush. 513. But the form of the action must remain the same. *Bishop v. Baker*, 19 Pick. 517. *Guilford v. Adams*, 19 Pick. 376. *Casnard v. Eve*, Dudley, (Geo.) 108. *Pearson v. Reid*, 10 Geo. 580. *Rugby v. Robson*, 19 Ala. 404. *French v. Gerrish*, 2 Foster, (N. H.) 97. *Wilcox v. Sherman*, 2 Rh. Island, 549; and the court will presume the cause of action to remain the same unless the contrary is shown. *Penobscot Co. v. Baker*, 4 Shep. 233. Thus, in an action of trover, a count for additional property may be added. *Hoskins v. Berris*, 8 Washb. (Vt.) 673; or for conversion, 3 Red. 353; or perfect of a covenant relied on even after demurrer. *Bowles v. Ellmore*, 7 Gratt. 385. *Hale v. Lawrence*, 2 Zab. (N. J.) 72; or a variation between the declaration and the bond. *Fulkerson v. The State*, 17 Miss. 49; or after demurrer overruled, plaintiff may amend. *Whitfield v. Woldredge*, 1 Cushm. (Miss.) 183; or an omission of seizin and disseizin. *Rowell v. Small*, 17 Shep. (Maine) 30; or by adding a separate demise. *Den v. La Greaves*, 1 Harr. (N. J.) 357; or diminishing the extent of the claim. *Plummer v. Walker*, 11 Shep. 14; or by striking out a count as to which the court has no jurisdiction. *Potlard v. Barnes*, 2 Cushm. 191. *Soule v. Russel*, 13 Metef. 436; or in the assignment of a breach. *Sharp v. Colgan*, 4 Miss. 29; or by adding a bill of particulars. *Tarbell v. Dickinson*, 3 Cush. 345; or adding a plea of property in replevin. *Helling v. Wright*, 2 Harris, (Penn.) 273; or a new count alleging promises to an administrator. *Smith v. Proctor*, 1 Sandf. Sup. C. Rep.

the Common Pleas, as well as any other declarations. (*hh*) Amendments are commonly made by summons and order, at a judge's chambers: or they may be made by the judges, on their circuits, by the statute 1 Geo. IV. c. 55, § 5; (*ii*) previously to which statute, it seems that when the amendment proposed was material, it could not have been made by a judge

(*hh*) Barnes, 26, 114.

(*ii*) *Ante*, 510. 1 Car. & P. 137, 8, (*d*.)

72. *Hill v. Pinny*, 5 Shep. 409; or an omission in ejectment to state the quantity of the estate, whether in fee or a lesser estate. *Hanning v. Harley*, 4 Denio, 263; or after arbitration and award, 5 Harris, (Penn.) 173; or judgment by default. *Nöidenburger v. Campbell*, 11 Miss. 359; or by striking out names of some of the defendants. *Taylor v. Jones*, 1 Carter (Ind.) 17; or by correcting a writ, *sci. fa.* and declaration to make it conform to the record. *Condet v. Gregory*, 1 Zab. (N. J.) 429; or an omission to plead a custom specially. *Legatt v. Withers*, 5 Gratt. 24; or a misdescription of a note. *Nimmons v. Worthington*, 1 Smith, 226; or in covenant, the omission to state that the contract was under seal. *Wing v. Chase*, 5 Red. 260; or in a date laid under a *videlicet*. *Zeigler v. David*, 23 Ala. 127. *Moore v. Boyd*, 11 Shep. 242; or in the amount of damages laid in the declaration. *Williamson v. Cannaday*, 3 Ired. 349; or new ground may be laid for damages even after general demurrer, to a special plea. *Ten Eyck v. The Del. & Rar. Can. Co.*, 4 Harr. (N. J.) 5; or new count on an agreement where the former count is for work and labour. *Mixer v. Howarth*, 21 Pick. 205; or a new count for goods and merchandize where fresh count is on a note. *Burnham v. Spooner*, 10 New Hamp. 165; or in the style or name in which the action is brought. *Margell v. The Hazle. Coal Co.*, 8 W. & S. 342. *Elett v. Abbott*, 12 New Hamp. 569. But an entirely new cause of action cannot be introduced by amendment; though a count substantially different from the declaration may be added. *Maxwell v. Harrison*, 8 Geo. 61. Thus, in an action of trover an amendment was allowed, adding a count for additional property, which was taken at the same time with that originally mentioned in the declaration. *Haskins v. Berris*, 23 Vt. (8 Wash.) 6, 673. But where the original declaration was trover for certain goods, the plaintiff cannot amend by introducing a new count—charging that the defendant attached the same goods on a writ in favour of the plaintiff, and by his negligence lost them. *Goddard v. Perkins*, 9 New Hamp. 488. Neither will the court, after trial, a verdict for the plaintiff, and an arrest of judgment for the insufficiency of the declaration, allow an amendment of the declaration in ordinary cases. *Betts v. Hoyt*, 13 Conn. 469. Nor after a case has gone to the jury and been arrested by *non suit*. *Law v. Franks*, 1 Cheves, 9. Neither can a declaration in a suit against two, husband and wife, for slander, be amended by striking out those counts which allege a joint slander, and leaving those only which allege slander by the wife, where the writ was against the two, without naming them as husband and wife. *Martin v. Russell*, 3 Scam. 342.

In New York, where a suit is intended to be commenced by the filing and service of a declaration; and by mistake the declaration and the rule to plead are entered in the Clerk's Office of a court different from that in which the subsequent proceedings are had, the court in which the subsequent proceedings are had cannot grant an amendment by permitting a declaration to be filled and rule to plead to be entered *nunc pro tunc*. *The People v. Superior Court New York*, 18 Wend. 675.

These applications are matters of discretion, and a refusal to grant them is not assignable as error. *Phillips v. Dana*, 1 Scam. 498. *Cartright v. Chabril*, 3 Texas, 261; and generally they must go to the merits. *Waples v. McGee*, 2 Harring. 444. *Robinson v. Holland*, 2 Id. 445; and if granted upon terms, they must be complied with before the cause can proceed. *Smith v. Johnston*, 4 Harring. 541.

As to the Statute of Amendments, in Maine, consult *Carter v. Thompson*, 3 Shep. 464. *Treat v. Strickland*, 10 Id. 234. *White v. Carter*, 5 Red. 534. Eastman's Digest tit. Amendment. As to New Hampshire, *Smith v. Brown*, 14 New Hamp. 67. Gilchrist's Digest, tit. Amendment, p. 15. As to Massachusetts, Minot's Digest and Supp. tit. Amendment, p. 28, 11. As to Connecticut, Day's Digest, tit. Amendment, p. 15. As to New York, 1 Clinton's Digest, tit. Amendment Law, p. 44. As to New Jersey, 1 Halsted's Digest, tit. Amendment, p. 51. As to Pennsylvania, 1 Wharton's Digest, tit. Amendment, p. 96, 6 Ed. As to Virginia, 1 Tate's Digest. As to North Carolina, 1 Ired. Digest, tit. p. 28. As to South Carolina, Rice's Digest, tit. Amendment. As to Georgia, *Fane v. Crawford*, 4 Geo. 445. *Arnold v. Wells*, 5 Id. 380. *Short v. Kellogg*, 10 Id. 180. As to Alabama, Clay's Digest, p. 312, § 39. *Chen v. Owens*, 22 Ala. 782. As to Kentucky, Digest of Ken. Reps. by Monroe and Harlan, vol. i. p. 54. As to Ohio, Wilcox's Digest, p. 29. As to Indiana, Gilman's Digest, tit. Amendment. As to Illinois, Anthony's Digest, tit. Amendment, p. 71. As to Michigan, *Parks v. Barkham*, 1 Mann. 95. As to Arkansas, *Anthony v. Beebe*, 2 Eng. 447. As to Iowa, *Humphries v. Dagg*, 1 Greene, 435.

at *nisi prius*.(kk) And, by the statute 9 Geo. IV. c. 15, "it shall and may be lawful for every court of record holding plea in civil actions, any judge sitting at *nisi prius*, and any court of *oyer* and *terminer* and general gaol delivery, in *England, Wales*, the town of *Berwick-upon-Tweed*, and *Ireland*, if such court or judge shall see fit so to do, to cause the record on which any trial may be pending before any such judge or court, in any civil action, or in any indictment or information for any misdemeanor, where any *variance* shall appear between any matters in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular, by some officer of the court on payment of such costs, if any, to the other party, as such judge or court shall think reasonable; and thereupon the trial shall proceed, as if no such variance had appeared: and in case such trial shall be had at *nisi prius*, the order for the amendment shall be indorsed on the *postea*, and returned together with the record, and thereupon the papers, rolls, and other records of the court from which such record issued, shall be amended accordingly."

The declaration may be amended, in form or in substance: and it may be so amended, even after a plea in abatement of misnomer,(l) or the statute of additions,(m) &c. or a plea of *nul tiel record*.(n)[A] And leave has been granted, upon the application of the plaintiff, to amend the declaration after verdict, by increasing the damages laid, according to the truth of the case, as found by the jury; the former verdict being at the same time set aside, and a new trial granted, to enable the defendant to make his defence to the demand so enlarged.(o)[B] So, after a nonsuit had been set aside in *prohibition*, the plaintiff had leave to amend the suggestion, which inadvertently alleged immemorial payment of tithes to the king and his predecessors, by inserting "and to such other person or persons as had or claimed title thereto." (p) And the court of Common Pleas permitted the record to be amended, and a new trial had, after nonsuit for a variance, in an undefended cause.(q) And that court, in a late case, amended the declaration in *quare impedit*, after it had been twice amended before, and after a trial had thereon.(qq) But in the King's Bench, the plaintiff was not formerly allowed to add a new count to his declaration, under pretence

(kk) 1 Stark. Ni. Pri. 74.

(l) 1 Salk. 50. 1 Ld. Raym. 669, S. C. 1 Str. 11 Cas. temp. Hardw. 44. 7 Durnf. & East, 698. 3 Maule & Sel. 450. 2 Chit. Rep. 8, 28. *Per Cur.* 11. 32 Geo. III. C. P. Imp. C. P. 7 Ed. 176.

(m) 2 Str. 739. 2 Ld. Raym. 1472, S. C.; but see 1 Salk. 50. 2 Ld. Laym. 859, S. C. *Id.* 1307, *contra*.

(n) 1 Wils. 87. 7 Durnf. & East, 447, (d). 2 Chit. Rep. 27, K. B.; and see Cas. Pr. C. P. 76. Barnes, 3 S. C. *Id.* 4, 5; but see 1 Salk. 52. 6 Mod. 263, 310, S. C. *semb. contra*. See also 2 Bur. 901.

(o) 7 Durnf. & East, 132; and see 2 Chit. Rep. 27.

(p) *Franklin v. Holmes*, T. 21 Geo. III. K. B.

(q) 3 Taunt. 31; and see 2 Bos. & Pul. 243. 1 New Rep. C. P. 28. 9 East, 335. 1 Stark. Ni. Pri. 312, 13. 5 Barn. & Ald. 896. 8 Moore, 104. 1 Bing. 233, S. C.; but see 5 Moore, 164. 2 Brod. & Bing. 397, S. C. *contra*.

(qq) 4 Bing. 525; and see 13 Price, 736. McClel. 388, 392, S. C.

[A] See *Cartwright v. Chabell*, 3 Texas, 261. But one action cannot be substituted for another, as trover for trespass. *Wileox v. Sherman*, 2 Rhode Island, 540. *Maxwell v. Harrison*, 8 Geo. 61.

[B] See accord *McVicar v. Beedy*, 1 Red. Maine R. 314. *Spence v. Ondott*, 3 Texas, 147. *Strange v. Floyd*, 9 Gratt. Va. 474. *Garland v. Davis*, 4 How. S. C. Rep. 131.

of amending it, after plea pleaded, or after the end of the second term *from the return of the writ :(a) and a new right of action [*698] was considered, in this respect, as a new count.(b) Yet, where the plaintiffs declared as executors, on a promise to their testator, and issue was joined on a plea of the statute of limitations, the court of King's Bench, after two terms, permitted the plaintiffs to amend, by laying the promise to have been made to themselves :(c) But the amendment in this case was under particular circumstances ; and if it had not been allowed, the action would have been lost, by the running of the statute of limitations.(d) It is now the practice however, in the King's Bench, to permit a new count to be added after the end of the second term, when the cause of action is substantially the same ; though not for a different cause of action.

In the Common Pleas, the course of the court formerly was, that the plaintiff might, at any time before the end of the second term, have leave to amend his declaration, by adding new counts, but not afterwards.(e) At present, however, it is not an invariable rule in that court, that a new count shall not be added after the second term. The principle of the rule is, that as the plaintiff would have been out of court at the end of the second term, if he had not declared at all, so the court will not suffer him to declare upon a fresh cause of action, after that time has elapsed :(f) but when the cause of action is substantially the same, a new count may be added : Therefore, where the plaintiff having obtained leave to amend a count in his declaration, added new counts, which contained no new cause of action, but only varied the manner of stating that which was demurred to, the court of Common Pleas would not order them to be struck out.(g) So in an action by the assignees of a bankrupt, for the rescue of goods distrained for rent due to the bankrupt, that court allowed the declaration to be amended, by adding new counts, stating the facts to have taken place in the time of the provisional assignees, though two terms had elapsed since the return of the writ, the cause of action being substantially the same.(h) In an action for money lost by stock-jobbing, on the statute 7 Geo. II. c. 8, the court of Common Pleas permitted the declaration to be amended, as between the plaintiff and defendant, by changing it from *assumpsit* to *debt* :(i) But where the plaintiff having sued out process in *debt*, declared in *case*, by which the bail were discharged, that the court refused to amend the declaration, by changing it from *case* to *debt*.(k) And in an action of *debt*, to recover penalties against a sheriff's officer for extortion, on the statute 32 Geo. II. c. 28, § 12, that court will not allow the declaration to be amended, by adding new counts on the statute 23 Hen VI. c. 9.(l)

*In a *real* action, it is not of course to amend the declaration or count, in the Common Pleas ; but the demandant ought to make [*699] out a case by affidavit :(aa) And the court refused to allow the de-

(a) R. M. 10 Geo. II. *reg.* 2 *in notis*, K. B. 1 Wils. 149. Say. Rep. 97, 151, 234.

(b) Say. Rep. 234.

(c) 2 Str. 890. Fitzgibb. 193. 1 Barnard, K. B. 408, 418, S. C. 1 Ken. 141.

(d) 1 Wils. 149. Say. Rep. 235, 6; and see Barnes, 488.

(e) Cas. Pr. C. P. 131 : and see Barnes, 19.

(f) 2 Marsh. 60, *per Gibbs*, Ch. J. ; and see 6 Moore, 490.

(g) 6 Taunt. 300. 1 Marsh. 609, S. C.

(h) 6 Taunt. 358. 2 Marsh. 59, S. C. ; and see 6 Moore, 490.

(i) 6 Taunt. 419. 2 Marsh. 124, S. C. ; and see 6 Taunt. 422. 2 Marsh. 125, (a).

(k) 6 Taunt. 483. 2 Marsh. 185, S. C.

(l) 5 Moore, 330.

(aa) 3 Bos. & Pul. 456.

mandant in a writ of right to amend the mistake of a christian name in the count, or to discontinue the suit, though an affidavit accounting for the mistake was produced.(b) In a subsequent case, they refused to permit the count in a writ of right to be amended, by introducing an additional step in the descent; though it was sworn that the mistake had arisen from the demandant having been misinformed in the country, where inquiry had been made, respecting the title, and that the demandant would be barred, unless the amendment were allowed:(c) And amendments are so little favoured in a writ of right, that after an amendment of the count had been made under a judge's order, the court discharged the order for making it.(d) So, they would not allow a writ of *summons* to be quashed, which had been irregularly executed.(ee) And an amendment of the disseisor's name was refused, in a writ of entry *sur disseisin en le post*.(f) But a declaration on a writ of *partition*, and the sheriff's return, were amended, by striking out an erroneous description of the *quality* of the estates conveyed to the different parties.(g) And the demandant was allowed to withdraw a demurrer and reply *de novo*, in a writ of *formedon*, upon showing good ground by affidavit.(h)

Fines and *recoveries*, being considered as common assurances, the court of Common Pleas will amend them, when they have sufficient authority, so as to effectuate the intention of the parties. The ground upon which the court proceeds, in making these amendments, is the statute 8 Hen. VI. c. 12, which authorises them to amend the misprision of the clerk; and as the *præcipe* in the cursitor's instruction for an original writ, so a deed to lead or declare the uses is considered as his instruction for a fine or recovery.(i) By the above statute, a mistake in the form,(k) *teste*,(l) or return,(m) of a writ of covenant for levying a fine, or writ of entry for suffering a recovery,(n) may be amended by the court, where the mistake was occasioned by the misprision of the clerk, and there is something to amend by; but otherwise, it seems, it is not amendable.(o)

Fines may in general be amended, by the deed to lead or declare the uses,(p) in the names of the parties,(q) or in the description of the [*700] premises,(r) *or of the place where they are situate:(a) and, in one case,(bb) the court permitted a fine to pass as to all the conusors except one, whose acknowledgment had been taken incorrectly, and whose interest was so inconsiderable that the parties did not think it worth while

(b) 1 New Rep. C. P. 64. 2 New Rep. C. P. 429. *Ante*, 679, 80; but see 2 Wils. 118. 2 Blac. Rep. 758. 3 Wils. 206, S. C.

(c) 1 New Rep. C. P. 233.

(d) 1 Bing. 208. 8 Moore, 42, S. C.

(f) 4 Taunt. 572.

(h) 10 Moore, 246. 3 Bing. 1, S. C.

(k) 4 Taunt. 644, 708.

(m) Cas. Pr. C. P. 127.

(n) 1 Salk. 52. Willes, 563. Barnes, 17, S. C. 2 Blac. Rep. 1013. 8 Taunt. 104, 5.

(p) 4 Taunt. 257. 6 Taunt. 73. 1 Marsh. 452, S. C.

(q) 1 Marsh. 578. 6 Taunt. 586. 1 Moore, 125. 8 Taunt. 20. 1 Brod. & Bing. 151; but see 2 Bos. & Pul. 455. 8 Moore, 15, 449. 4 Bing. 104.

(r) Cas. Pr. C. P. 10. 4 Taunt. 257, 708. 6 Taunt. 276. 7 Taunt. 79. 2 Marsh. 391, S. C. 8 Taunt. 74, 335.

(a) Cas. Pr. C. P. 10, 52, 121. Barnes, 216, S. C. *Id.* 24. 3 Wils. 58. 3 Taunt. 396. 6 Taunt. 73. 1 Marsh. 452, S. C. *Id.* 468. 6 Taunt. 162. 1 Marsh. 519, S. C. 7 Taunt. 79. 2 Marsh. 391, S. C. 8 Taunt. 87. *Id.* 692. 3 Moore, 22, S. C. 4 Moore, 170. 8 Moore, 163, 334. 10 Moore, 109.

(bb) 5 Taunt. 249.

(ee) 1 Marsh. 602.

(g) 6 Taunt. 193. 1 Marsh. 537, S. C.

(i) Barnes, 22.

(l) 5 Rep. 44, 5.

(n) 5 Taunt. 259. 8 Taunt. 197.

to have another fine. So, the court allowed the warranty in a fine to be amended, by altering it from a warranty by the husband and wife, and the heirs of the *husband*, to a warranty by the husband and wife, and the heirs of the *wife*.(c) But where there was no deed to declare the uses, they would not permit an alteration to be made in the christian(d) or surnames(e) of the parties: And if the name of a party be written on an erasure, this, being a suspicious circumstance, must be explained by affidavit, before the amendment can be made; (ff) although the party had signed his right name at the foot of the deed.(gg) Where the deed was general, and the intent only proved by affidavit, the court would not allow the number of acres inserted in a fine to be increased.(hh) So, where a fine was levied, of *thirty* acres of land, *twelve* acres of meadow, and *twenty-five* acres of pasture, and in the deed to lead the uses, the estate was described as consisting of *thirty-five* acres in the whole, the court refused to amend the fine, by increasing the quantity of each species of land, so as to make each cover the whole quantity intended to be conveyed.(i) And where a mistake having been made in the *concord* of a fine, in the number of messuages to be conveyed, the writ of *covenant* was altered in conformity thereto, but was afterwards restored to its original form; the court would not amend the *concord* by the writ of *covenant* so altered, but left the party to his remedy by a new caption, or by re-acknowledging the concord.(k) So, if there be two *præcipes* to a fine, and the premises be described in the one as manors, tithes and tenements, and in the other as tenements only, the court will not allow the fine to pass.(l) But a fine, with a double operation, was amended, by striking out lands in reversion.(m)

The court in one case permitted the name of a parish to be inserted in a fine, according to the deed to lead the uses, although, on account of the length of time which had elapsed since the date of the deed, no one could swear that the parcels lying in that parish were intended to pass;(n) and in another, the fine was amended, by inserting a parish different from that which was named in the deed to lead the uses, it being certain by the deed, which specified the quantities and occupiers, that the land was *intended to pass.(a) And a fine may be amended, by substi- [*701] tuting one county for another, if it appear that the lands intended to pass are situate in the same parish, which runs into both counties.(b) But in general an amendment cannot be made, by transposing parishes from one county to another.(c) And where a fine comprised only lands lying in the parishes of S. and S., within a larger district, the deed so describing the lands, which were in truth within the parish of F. in the same district, the court refused to amend the fine, by inserting also the parish of F.(d)

(c) 3 Moore, 329. 1 Brod. & Bing. 68, S. C.; but see 8 Taunt. 87.

(d) 2 Blac. Rep. 816. 4 Taunt. 226.

(e) 2 Bos. & Pul. 455.

(ff) 3 Moore, 23. 8 Taunt. 693, S. C. 1 Brod. & Bing. 15.

(gg) 3 Moore, 241.

(hh) 2 Blac. Rep. 1202; and see 1 H. Blac. 73.

(i) 6 Taunt. 58. 1 Marsh. 446, S. C.; and see 3 Moore, 70. 5 Moore, 94. 6 Moore, 50.

Post, 703, 4.

(k) 6 Taunt. 1. 1 Marsh. 406, S. C.

(l) 3 Moore, 210.

(m) 5 Taunt. 631.

(n) 2 Taunt. 1.

(a) 5 Taunt. 207. 1 Marsh. 23, S. C.; and see 5 Taunt. 303. 1 Marsh. 532. 9 Moore, 195. 2 Bing. 93, S. C. 9 Moore, 740. 2 Bing. 386, S. C.

(b) 8 Taunt. 87. 1 Moore, 530, S. C.

(c) 4 Taunt. 708; and see 3 Taunt. 418; and the other cases referred to in 8 Taunt. 88. 1 Moore, 530, S. C. accord.

(d) 6 Taunt. 284.

A fine may also be amended, where there has been a mistake in the entry of the king's silver,(e) or of the proclamations:(f) And the concord of a fine being lost, before it had passed the *custos breviarum* office, the court permitted a new concord and acknowledgment to be prepared, and the fine to be perfected.(g) So, a fine was allowed to pass, by a copy of the *præcipe* and concord left with the chief justice, and signed by the parties, the original having been lost.(h) But although the court will amend a fine in matters of *form*, yet when it is recorded of one term, they will not alter it, and make it a fine of another.(ii) A fine cannot in general be amended, without an affidavit connecting it with the deed produced to warrant the amendment:(kk) And the affidavit must state that the possession has been in conformity to, and followed the deed to lead or declare the uses, since the fine was levied.(ll)

Recoveries in like manner may be amended, by the deed to lead or declare the uses, in striking out,(m) altering,(n) adding to,(o) or transposing(p) the names of the parties: And where a recovery was intended to be suffered by A. B. and C. his wife, but the name of the wife was totally omitted, the court ordered it to be amended.(q) So, a recovery may be amended in *feri*, by substituting a new commissioner for the demandant in the *dedimus potestatem*, and retaking the acknowledgment:(r) But the court would not amend a recovery, by inserting the name of the husband of a vouchee;(s) nor by substituting the name of one joint-tenant to the *præcipe*, for that of his companion.(t) And a recovery cannot be amended, by insert-
[*702] ing an additional christian name of the vouchee, if he has *always been known, and signed the deed to make a tenant to the *præcipe*, without such name.(a)

A warrant of attorney in a recovery was amended in one case, by inserting an additional christian name of the vouchee;(b) and in another, by substituting the name of the attorney for that of the vouchee, which had been inserted by mistake instead of the attorney's.(c) But it is now settled, that the court will not amend a warrant of attorney, which is the act of the party:(d) and therefore they refused to amend a recovery, by adding the name of one of the parties, which had been omitted in the warrant of attorney; nor would they suffer the recovery to pass with this defect.(e) So, where the *præcipe*, in the vouchee's warrant of attorney in a recovery, rightly described the parties to the plea, but the body of the warrant of attorney expressed that the vouchee appointed his attorney, to gain or lose in a plea of land against the *tenant*, instead of the *demandant*, the court refused either to amend the warrant of attorney, or to suffer the recovery to

(e) 5 Rep. 43.

(g) 4 Taunt. 195.

(ii) 2 Blac. Rep. 788; and see Vin. Abr. tit. *Fine* B. b. 2. Wilson on Fines, 53.

(kk) 6 Taunt. 432.

(m) 3 Taunt. 59. 5 Taunt. 73. 7 Taunt. 697.

(n) Cas. Pr. C. P. 127. Pigott, 170, 71. 2 Blac. Rep. 1230. 8 Taunt. 226, 556. 4 Moore, 514. 2 Brod. & Bing. 98, S. C.

(o) 8 Taunt. 27; but see 3 Moore, 577.

(p) Barnes, 24. 2 Taunt. 222. 4 Moore, 514. 2 Brod. & Bing. 98, S. C. But the court will not allow a recovery to be amended, by transposing the names of the demandant and tenant, unless the documents relative to its being suffered be produced. 6 Moore, 46.

(q) Cas. Pr. C. P. 127.

(s) 1 Taunt. 478.

(a) 8 Taunt. 645. 2 Moore, 721, S. C.

(c) *Id.* 98.

(e) *Id.* 652. 2 Marsh. 328, S. C.

(f) *Id.* 44.

(h) 6 Taunt. 231. 1 Marsh. 553, S. C.

(ll) 6 Moore, 259.

(r) 5 Taunt. 747.

(t) 4 Taunt. 101; and see 3 Moore, 577.

(b) 4 Taunt. 196.

(d) 6 Taunt. 373.

pass, and construe the latter clause as repugnant and inoperative. *(f)* So, they would not direct their officer to pass a recovery, where there was a mistake in the form of the writ of entry, to which the warrant of attorney related, by making it a *demand*, instead of a *præcipe*; *(g)* nor would they permit the same mistake to be rectified, by amending the warrant of attorney; *(h)* And where a part of the premises named in the deed to lead the uses had been omitted in the copy of the *præcipe*, which precedes the warrant of attorney, the court refused to permit an amendment, by inserting the words omitted; saying they could not apply the warrant of attorney to premises not named in the *præcipe*. *(i)* The *præcipe* for the writ of entry however, at the head of the warrant of attorney, is not so conclusively a part of it, but that it may be amended, after execution, by the writ of entry: *(k)* And where the vouchee's warrant of attorney in a recovery omitted to express, in the body of the warrant, against whom the plea of land was, which appeared by the *præcipe*, the court, though they would not amend the warrant of attorney, held that the authority must refer to the plea as described by the *præcipe*, and permitted the recovery to pass. *(l)* So, a recovery was permitted to pass, where the warrant of attorney did not state between whom the plea of land was; it being evident from the *præcipe*, for what purpose the attorneys were appointed: *(m)* and also, where the warrant of attorney was "in a plea of land," omitting the words "to gain or lose." *(n)* And where, in the warrant of attorney, the words, to gain or lose *in a plea of *trespass*, were inserted by mistake, instead of the [*703] usual words, to gain or lose in a plea of *land*, the court permitted the recovery to pass; as the word *trespass* might be rejected as surplusage. *(a)* So, a recovery was allowed to pass, although the words "their attorneys," were omitted in the warrant of attorney given by two vouchees. *(b)* And if a wrong surname of the demandant be inserted by mistake in the warrant of attorney and subsequent instruments, the court will allow the recovery to pass, on the production of a new warrant of attorney, rectifying such mistake, and on depositing the other instruments with the officer in the mean time. *(c)*

A recovery may also be amended, by the deed to lead or declare the uses in the description of the premises, or of the place where they are situate. *(d)* With regard to the former, it has been holden, that a recovery may be amended, by inserting other premises not mentioned therein, according to the deed to lead or declare the uses, on payment of an additional fine at the alienation office: *(e)* and it has been amended, by increasing

(f) 1 Brod. & Bing. 92. 3 Moore, 495, S. C.

(g) 8 Taunt. 167.

(h) *Id.* 168.

(i) 3 Bing. 446.

(k) 7 Taunt. 434. 1 Moore, 130, S. C. In the printed reports of this case the *præcipe* for the writ of entry is inappropriately called the *caption* of the warrant of attorney. 3 Moore, 499, n. 1 Brod. & Bing. 96, S. C.; and see 7 Moore, 257. 1 Bing. 22, S. C. 7 Moore, 372. 1 Bing. 72, S. C.

(l) 6 Taunt. 373; and see 7 Taunt. 435, *(a)*.

(m) 8 Taunt. 164.

(a) 8 Moore, 339. 1 Bing. 343, S. C.

(b) 8 Moore, 51. 1 Bing. 212, S. C.

(c) 3 Moore, 673.

(d) Cas. Pr. C. P. 9, 10, 17, 30. Com. Rep. 386, S. C. Cas. Pr. C. P. 85. Pr. Reg. 371, S. C. Pigott, 171, 2. Barnes, 21. 2 Blac. Rep. 747. 3 Wils. 154, S. C. 2 Blac. Rep. 1065. 1 H. Blac. 73. 2 Bos. & Pul. 560, 578. 4 Taunt. 249, 738, 749. 5 Taunt. 624, 661. 6 Taunt. 177. 1 Marsh. 532, S. C. 8 Taunt. 86. 8 Moore, 324. 1 Bing. 317, S. C.; but see 8 Moore, 520. 1 Bing. 425, S. C. 10 Moore, 109.

(e) 1 Bos. & Pul. 137. 2 Bos. & Pul. 578, 580, *(a)*. 1 Taunt. 257, 355, 484. 3 Taunt. 74, 408, 462. 4 Taunt. 155, 226, 366, 734, 737, 8. 5 Taunt. 748, 811. 8 Taunt. 303. 2 Moore, 299, S. C.; but see 5 Taunt. 616. 6 Taunt. 145.

the quantities of specific closes, described in the deed as being less than they really were.(*f*) But no amendment can be made in the description of the premises, or of the parish in which they are situate,(*g*) where it is not warranted by the deed to lead or declare the uses ;(*h*) nor unless the true number of messuages, &c. be distinctly and precisely sworn to ;(*i*) nor without proof of seisin of the vouchee of an estate tail therein, at the time of the recovery, and that it was intended they should pass.(*k*) And where a recovery of *fifty* years old was found by mistake to comprise only *two* messuages and *twenty* acres of land, instead of *six* messuages and *three hundred* acres of land, the blunder being wholly unexplained and unaccounted for, the court refused to permit an amendment, by substituting the larger quantity.(*ll*) If *marsh* land be described as land generally, in a recovery, it may be amended, by inserting the word “marsh” before “land,” on an affidavit stating how the premises had been occupied since the recovery was suffered.(*mm*) So, a recovery of land may be amended, by inserting the words “*meadow* and *pasture*” before land ; although it was described as land generally in the recovery, and deed to lead the uses.(*n*) But where *wood* land had been converted into *arable*, [*704] the court would not allow an *amendment by increasing the quantity of the latter ; as the land would have passed under either description.(*a*) So, the court would not permit a recovery to be amended, by increasing the quantity of land, where the deed to lead the uses contained sufficient terms to show that it was intended to pass : nor was it deemed necessary that the exact admeasurement should be inserted in such deed.(*b*) And as *meadow* will pass in a recovery under the word “*land*,” the court it seems will not now amend a recovery, by adding the word “*meadow*.”(*c*) A recovery may be amended, by inserting a rent charge,(*d*) fee farm rent,(*e*) or tithes,(*ff*) where it appears that they were intended to pass, and the words of the deed are sufficiently comprehensive to include them ; or, by inserting the words “the advowson of,” before those of “the rectory of the church of H.,”(*gg*) or, of “the vicarage,”(*hh*) &c. ; or by substituting the words “advowson of the church,” for the word rectory ;(*ii*) or, the words “perpetual advowsons,” for those of “tithes to rectories belonging and appertaining :”(*kk*) or, by describing tithes, as arising out of a borough and parish, instead of a rectory.(*l*) But the court refused to amend a recovery, suffered many years before, by inserting an advowson, although it was omitted by mistake, and had formed part of the estate since the recovery was suffered ; without an affidavit, stating how the presentations had gone in the mean time.(*m*) So, an amendment was refused, by striking out the aggregate sum of several rents, and inserting the different rents or sums of which it was composed.(*nn*) And the court will not amend a reco-

(*f*) 4 Taunt. 734. 8 Taunt. 74. 2 Moore, 163. 9 Moore, 591 ; but see 5 Taunt. 616.

(*g*) 8 Moore, 520. 1 Bing. 425, S. C.

(*h*) 3 Bos. & Pul. 362.

(*i*) 5 Taunt. 632.

(*k*) *Id.* 811 ; and see 3 Moore, 70. 1 Brod. & Bing. 69.

(*ll*) 1 Brod. & Bing. 83.

(*mm*) 5 Moore, 98.

(*n*) 7 Moore, 257. 1 Bing. 22, S. C.

(*a*) 5 Moore, 94.

(*b*) 6 Moore, 50.

(*c*) 4 Bing. 90.

(*d*) 1 Taunt. 484.

(*e*) 5 Moore, 474.

(*ff*) 2 Marsh. 264. 7 Taunt. 341, 352. 1 Moore, 95, S. C. 8 Taunt. 303. 2 Moore, 299, S. C. 5 Moore, 94, 5. 6 Moore, 224.

(*gg*) 8 Moore, 586.

(*hh*) 10 Moore, 251.

(*ii*) 8 Taunt. 333. 6 Moore, 53.

(*kk*) 4 Moore, 49.

(*l*) *Id.* 170.

(*m*) 7 Moore, 268. 3 Bing. 176.

(*nn*) 2 Marsh. 264.

very, by adding the *tithes* of the premises, under the words *hereditaments*, where the word does not occur in the operative part of the deed; *(o)* nor, by striking out a “*portion* of tithes,” and substituting “*all* the tithes” arising from the lands conveyed. *(p)*

With regard to the situation of the premises, recoveries have been amended, by substituting a hamlet for a parish. *(q)* or part of a parish which lay within a liberty, for other part of a parish which lay within a borough, in the same county; *(r)* and by inserting a parish named in the deed to lead or declare the uses, after a considerable lapse of time. *(s)* So, a recovery of the manor of A. and eight messuages in A. was amended, by adding the names of the parishes in which the premises were partly situate; those parishes being comprised in the manor of A. *(t)* And a recovery was amended by inserting a parish not named in the deed to lead the uses; the lands intended to pass having been specified therein, as to the *number of acres, as well as the names of the vendor and occu- [*705] pier, at the time the recovery was suffered. *(u)* So, where lands in two parishes were conveyed as lying in the parish of G. which was not the true name of either, nor of any parish, but was an addition equally applicable to both, the court permitted both parishes to be added to an old recovery. *(b)* And where a deed to make a tenant to the *præcipe* comprised tithes in two parishes, and an amendment had been improperly introduced into the recovery, which confined its operation to one parish only, the court allowed the words of such amendment to be transposed, so as to give effect to the deed, and comprise both parishes. *(c)* So, a recovery may be amended, by substituting the parish of A. for B. if the deed to lead the uses comprehend all the estates of the demandant, situate in the county where such parishes lie. *(d)* So, a recovery has been amended, by altering the name of a parish misnamed in the deed, making the tenant to the *præcipe*, as well as in the recovery, upon an affidavit that the vouchee was seised of the land in question in one parish, and that he was seised of no land whatever in the other. *(e)* And the recovery was amended in a modern case, by inserting the county of the town of S. or the county of S. the court considering it merely as a clerical misprision. *(f)* But where the situation of the premises is mistaken in the deed to lead or declare the uses, it cannot be amended by the court: *(g)* And they would not permit a recovery to be amended, by inserting a parish not named in the deed to make a tenant to the *præcipe*, although it appeared that the parish was named in the instructions given for preparing that deed, and that the lands were parcel of an estate which was intended to pass: for by the omission in the deed, there could be no good tenant to the *præcipe*. *(h)* So, the court refused to amend a recovery, by adding two parishes in unqualified

(o) 2 Marsh. 194; and see 4 Moore, 604. 2 Brod. & Bing. 105, S. C.

(p) 6 Taunt. 489. 2 Marsh. 195, S. C.; but see 2 Marsh. 264.

(q) 1 Moore, 131.

(r) 3 Taunt. 396.

(s) 5 Taunt. 2; and see 3 Taunt. 408. 8 Taunt. 191, 262. 3 Moore, 326.

(t) 2 Marsh. 336.

(u) 9 Moore, 195. 2 Bing. 93, S. C.; and see 5 Taunt. 207. 1 Marsh. 23, S. C. 9 Moore, 740. *Ante*, 700, 701.

(b) 4 Taunt. 737. 5 Taunt. 624.

(c) 7 Taunt. 352. 1 Moore, 95, S. C.

(d) 2 Moore, 237.

(e) 5 Taunt. 303; and see 8 Taunt. 244; but see *Id.* 262.

(f) 4 Taunt. 855; and see 6 Moore, 259, *Id.* *(a)*; but see 4 Moore & P. 178. 4 Bing. 426, S. C.

(g) 6 Taunt. 145.

(h) 2 Taunt. 96; but see 9 Moore, 195. 2 Bing. 93, S. C. *Ante*, 700, 701, 704, 5.

terms, where the deed enumerated several manors, and a great extend of lands in many parishes, and the purpose of the amendment was only to include certain parcels of one manor, which lay in the omitted parishes.(i) And they will not amend a recovery, by inserting more parishes, unless it be clear that the land in those parishes passed by the deed;(k) nor unless it appear to be absolutely necessary.(l) So, where a recovery was suffered in the city of *Litchfield*, which is a county of itself, where the vouchee had lands upon which it might operate, the court would not suffer it to be amended, by striking out the city of *Litchfield*, and inserting the county of *Stafford*, with other consequential amendments, and also by [*706] *inserting the name of a vill, after another mentioned in the recovery:(aa) nor can a recovery be amended, so as to make it of premises in one of two counties, in the alternative;(bb) nor by changing it from one county to another.(cc) So, where a vouchee had, in his instructions to suffer a recovery, and in the deed to lead the uses prepared in pursuance thereof, misdescribed the parish in which certain closes were situate, though they were described in the deed with truth and certainly in other respects, the court refused to substitute the parish in which the lands lay, for the parish named in the deed and recovery.(d)

The return of the writ of entry may be amended, by adapting it to the time of taking the acknowledgment:(e) And the return of a writ of summons was altered, by inserting a subsequent return day, where there were several vouchees residing in different counties, and one of them could not sign it until a day after it was made returnable.(f) So the court, in order to give effect to a recovery, allowed the returns of the writ of entry and summons to be abridged to *three* returns inclusive, instead of *four*, as required by the statute 24 Geo. II. c. 48, § 8. 1 Moore & P. 136. 4 Bing. 425, S. C. But the court would not enlarge the return of a writ of summons, as to make a term intervene between the *teste* and return.(g) The judgment on a common recovery has been amended, by striking out the word *adjudged*, and inserting instead thereof, the word *considered*:(h) and amendments have been made in the award and return of the writ of seisin.(i) But, by the statute 23 Eliz. c. 3, § 10, "none of the fines or recoveries theretofore levied, passed or suffered, which shall be exemplified under the great seal, according to the form of that act, shall after such exemplification had, be in any wise amended."

The court, we have seen,(kk) will not entertain a motion on the last day of term, for the amendment of fines or recoveries, or any of the proceedings therein,(ll) or on any subject relating thereto.(m) And when a fine or recovery is moved to be amended, the court will always require an *affidavit* to be made, that the possession has been in conformity to, and followed the deed to lead or declare the uses, since such fine or recovery was levied or suffered:(n) And a recovery was not permitted to be amended, on an un-

(i) 7 Taunt. 177.

(k) 4 Taunt. 738.

(l) 8 Taunt. 683. 3 Moore, 20, S. C.

(aa) 2 Blac. Rep. 874.

(bb) 1 Taunt. 538.

(cc) 3 Taunt. 418; and see 4 Taunt. 708; but see 8 Taunt. 87. 1 Moore, 530, S. C.

(d) 6 Taunt. 145.

(e) 5 Taunt. 259; and see 8 Taunt. 197.

(f) 7 Moore, 269.

(g) 2 Blac. Rep. 1201, 1223, 4; and see 8 Taunt. 104, 5.

(h) Barnes, 20, 22.

(i) Cas. Pr. C. P. 127. Barnes, 23. 2 Wils. 2. 6 Taunt. 195. 1 Marsh. 538, S. C.

(kk) *Ante*, 499.

(ll) R. H. 69, Geo. III. & 1 Geo. IV. C. P. 4 Moore, 320. 2 Brod. & Bing. 122.

(m) 4 Moore, 113. 1 Brod. & Bing. 468, S. C.

(n) 6 Moore, 259.

qualified affidavit that the possession had gone along with the title, for a period long before the deponent's knowledge, without stating the grounds of his belief. *(o)* On applying to amend a recovery, it is not necessary to show a title to the court, further back than a seisin in tail of the vouchee. *(p)* And it is a rule, that the material part of the deed, which is to authorize the amendment, shall be read to the court by one of the sergeants at law, *or by the officer of the court, and not by the attorney for [*707] the amendment. *(a)* The court refused to make an order, compelling the amendment of a recovery suffered by an insolvent debtor: *(b)* And a remainder-man in tail may be heard to show cause against the amendment of a recovery. *(c)* When the deed is lost, a recovery cannot be amended by an attested copy; nor by an office copy of the enrolment of the deed: but it may be amended by the enrolment itself being brought into court. *(dd)* If there be palpable mistakes in a fine or recovery, through the neglect of the attorney, the court will order him to pay the costs of its amendment. *(ee)*

Before plea, there are no costs payable upon amending the declaration, in ordinary cases, except the costs of the application; and in the King's Bench, the declaration may be amended in matter of *form*, after the general issue pleaded, and before entry, without paying costs, or giving an imparlance: *(f)* But if the amendment be in matter of *substance*, or after the general issue is entered, *(g)* or a special plea pleaded, *(h)* the plaintiff must pay costs or give an imparlance, at the election of the *defendant*. *(i)* And where the plaintiff gave notice of trial for the assizes, and afterwards countermanded, and then applied for an order to amend the declaration, which order was obtained on the terms of the defendants having an imparlance till the next term, the court of King's Bench refused to rescind so much of the order as related to the imparlance. *(k)* In the Common Pleas, it is a rule, that before the declaration is actually entered, the plaintiff may amend it, paying costs or giving an imparlance at his own election, by order of a judge of the court, or prothonotary: and even after it is entered, if the amendment be but a small matter, that doth not deface the roll, it is amendable, before issue or demurrer entered, by rule of court, upon payment of costs, and liberty to plead with a new or further imparlance. *(l)* But where the defendant had demurred, and given a rule to join in demurrer, the court held that the plaintiff must pay costs, on amending his declaration, and could not amend on giving an imparlance. *(m)* And where a motion was made to amend a declaration, after the plea-roll filed, it was objected that the motion ought to be to amend the roll, and not the declaration: and the amendments prayed being very long, and such as could not be made without greatly defacing the roll, the motion was denied; although it was con-

(o) 7 Taunt. 697.

(p) 4 Taunt. 155.

(a) 5 Taunt. 579.

(b) 8 Taunt. 105.

(c) 7 Taunt. 352.

(dd) 4 Taunt. 798; and see 5 Taunt. 579.

(ee) 4 Moore, 171.

(f) R. M. 10 Geo. II. *reg.* 2, *(b)*, K. B. And for the form of the rule to amend, in K. B. or C. P. see Append. Chap. XXIX. § 11, 12.

(g) R. M. 10 Geo. II. *reg.* 2, *(b)*, K. B. Sty. P. R. 20. 2 Str. 950. 1 Lil. P. R. 59.

(h) 2 Str. 890. Lofft. 155.

(i) *Sed quære*: as it seems, from R. M. 1654, § 13, K. B. & § 17, C. P., that the election to pay costs, or give an imparlance, is with the *plaintiff*: and see 2 Keb. 120, 362. 1 Lil. P. R. 58, 60, 62. *accord*.

(k) 1 Chit. Rep. 246. *Ante*, 469.

(l) R. M. 1654, § 17, C. P.; but see 2 Str. 950, *scmb. contra*. *(m)* Barnes, 6.

tended that a *vacatur* might be marked on the roll filed, or it [*708] might be taken off the file, and a new roll of the *same number filed in its place, which the court held to be an unwarrantable practice. (a) It has been said, that when amendments are made at the trial, they are made without costs. (b) But this must be understood as confined to cases, where the action is meant to be defended on the merits: For where the ground of defence is some formal slip or mistake in the declaration, which would be obviated by the amendment, the plaintiff must pay all the costs subsequent to the declaration, if the defendant will thereupon pay the debt and previous costs; or, in an action for general damages, let judgment go by default; (c) or, in *ejectment*, give up the possession of the premises; (d) but otherwise, the plaintiff will be allowed to amend, on payment of the costs of the application merely. (d)

On amending the declaration in the King's Bench, after plea pleaded, the defendant is at liberty to plead *de novo*, if his case require it, and has *two* days allowed him for that purpose, after the amendment made, and payment of costs; (e) and if a rule to plead be entered the same term the amendment is made, though before such amendment, it is sufficient; otherwise a new rule to plead must be entered. (f) But, in the Common Pleas, we have seen, the defendant is entitled in all cases, on amending the declaration, to a new *four* day rule to plead: (g) And in that court, after an amendment of a declaration, the defendant is at liberty to plead *de novo*, that is, he may do so if he has occasion, or thinks proper, but he is not obliged to vary his first defence: (h) And as this liberty is not incident to every amendment, it is not always necessary to insert it in the judge's order to amend. (i) If the declaration, however, be amended after issue delivered, it should be re-delivered after the amendment made, and payment of costs. (i)

The reason for not permitting a new count to be added, or right of action alleged, after the end of the second term, is that the plaintiff is obliged to declare within two terms; and a new count or right of action is considered as a new declaration. (k) But this reason is not applicable to pleas or replications, &c. which may be amended at any time, so long as they are in paper: Thus, where the defendant in *trespass* pleaded two pleas in *Hilary* term, and in *Trinity* term, after issue joined, obtained a rule to shew cause why he should not have leave to amend his two pleas, and to add a third plea, the rule was made absolute, upon payment of costs. (l) So where, in a plea by an executor of a former judgment recovered, a less sum [*709] was stated by mistake than the judgment was really *for, the court of Common Pleas permitted the defendant to amend the record, by inserting the real sum in the plea, though the application for such amendment was not made till a considerable time after the record

(a) Barnes, 8; and see 2 Chit. Rep. 34. *Id.* 302. 1 Dowl. & Ry. 173, S. C.

(b) 3 Taunt. 81.

(c) ——— v. *Horne*, T. 7 Geo. IV. K. B. per Bayley, J. (d) Ry. & Mo. 380.

(e) R. M. 10 Geo. II. reg. 2, (b), K. B. Anciently, it seems, the defendant did not plead *de novo*, after an amendment: 2 Salk. 517; but he is now at liberty to do so, when the amendment is of such a nature as to occasion any alteration in the plea, but not otherwise.

(f) 2 Salk. 517, 18; 520. R. T. 5 & 6 Geo. II. (b), K. B. *Yates v. Edmonds*, T. 35 Geo. III. K. B. 8 Durnf. & East, 87. 2 Chit. Rep. 332.

(g) 2 Blac. Rep. 785. *Ante*, 469, 475.

(h) Barnes, 273.

(i) 6 Taunt. 400.

(k) 1 Wils. 223.

(l) *Id.* *ibid*; and see Barnes, 22.

had been made up: (a) and the plaintiff in such case was allowed to reply *per fraudem*. (a) So where, in *covenant*, the defendant was not allowed to give a counter-demand in evidence at the trial, under a notice of set-off delivered with the plea of *non est factum*, the court afterwards granted a rule to show cause, why the defendant should not be permitted to plead a set-off, on payment of the costs of the former trial. (b) And, in a late case, (c) the court of Common Pleas allowed several avowries in *replevin* to be amended, by altering the name and description of the *locus in quo*, and stating the holding to have been for a year, instead of half a year, and also by adding new avowries, varying the amount of the rent; although issue had been joined, and notice of trial given and countermanded, and more than two terms had elapsed, previously to the application for the amendment. In like manner, the plaintiff has been allowed to amend, by withdrawing his replication, and replying *de novo*, after a lapse of many terms: (d) And, in one case, the plaintiff had leave to amend his replication, where issue had been joined upon it, and the cause entered at the assizes, and made a *remaneat* for defect of jurors. (e) But where, to a plea of specialties outstanding, in an action on simple contract against an executrix, the plaintiffs replied *assets ultra*, which was found for them, but the verdict set aside, the court of King's Bench refused to give them leave to alter their replication, and reply *fraud*; (ff) for besides that there had been a trial, it might have been dangerous to permit the alteration; because the defendant, on the former issue, might have paid away *assets*, as knowing the replication could not affect her. So, where the plaintiff had been nonsuited upon a general replication, "that the cause of action arose within six years," the court refused to set aside the nonsuit, and to give the plaintiff leave to reply *de novo*, "that the writ of *latitat* issued within the six years." (g)

After a *demurrer*, the courts would not formerly have permitted an amendment to be made, without the consent of the adverse party. (h) But of late years, they have not observed the same strictness as formerly, with regard to amendments: (i) and it is much better for the parties that they should not. Hence it is now settled, that after a demurrer or joinder in demurrer, either party is at liberty to amend, as a matter of course, whilst the proceedings are in paper: (k) Indeed, the very intent of requiring mistakes in point of form to be shown for cause of demurrer, was to give the *party an opportunity of amending. (aa) And even where [*710] the proceedings are entered on record, (bb) and the demurrer has been argued, (cc) the courts will give leave to amend, where the justice of

(a) 1 H. Blac. 238.

(b) 1 Stark. N. Pri. 312, 13; and see 2 Chit. Rep. 28. 5 Barn. & Ald. 896; but see 5 Moore, 164. 2 Brod. & Bing. 395, S. C.

(c) 8 Moore, 584.

(d) Say. Rep. 172. 2 Bur. 756; and see 1 Dowl. & Ry. 473. (e) Say. Rep. 285.

(ff) 2 Str. 1092; and see 6 Taunt. 45. 1 Marsh. 401, S. C. (g) 5 Bur. 2692, 3.

(h) 1 Ld. Raym. 310. *Id.* 668. 1 Salk. 50, S. C. 1 Ld. Raym. 679, S. P.; but see *Cas. temp. Hardw.* 171.

(i) 2 Bur. 756.

(k) 2 Salk. 520. *Gilb. C. P.* 114, 15.

(aa) 2 Str. 846.

(bb) *Id. ibid.* 1 Barnard. K. B. 213, 220, S. C. Barnes, 8.

(cc) 2 Wms. Saund. 5 Ed. 492. 2 Str. 735, 954, 976. *Cas. temp. Hardw.* 42, S. C. 1 Bur. 321, 2. Doug. 330, 620. 1 East, 372. Barnes, 9, 20, 21, 25. But after the court had given their opinion on the argument, an amendment was denied. 1 East, 394; and see Barnes, 9. 1 H. Blac. 37. 2 Bos. & Pul. 482. 3 Bos. & Pul. 11, 12. 5 Taunt. 765. 6 Taunt. 248. 1 Marsh. 567, S. C.

the case requires it, and there is any thing to amend by, upon payment of costs.*(d)* But, in the Common Pleas, after a party has once amended on a demurrer, the court will not give him leave to amend again, on a second demurrer.*(e)*

Upon similar grounds, the courts will sometimes give a party leave to *withdraw* his demurrer, after it has been argued, and to plead or reply *de novo*, in order to let in a trial of the merits.*(f)* Thus, in the King's Bench, after a demurrer to the defendant's plea had been argued, and the matter stood over for the judgment of the court, a rule was made to show cause, why the plaintiff should not have leave to withdraw his demurrer, and reply to the plea; which rule, no cause being shown, was afterwards made absolute.*(gg)* So, in the Common Pleas, where the defendant pleaded, in *debt* on bond, that he paid the money *before* the day, according to the condition, which was in the disjunctive, to pay *on* or *before* the day, and the plaintiff demurred to the plea, the court, after argument, allowed him to withdraw his demurrer, and to reply, upon payment of costs.*(hh)* And the demandant, we have seen,*(ii)* was allowed to withdraw a demurrer, and reply *de novo*, in a writ of *formedon*, upon showing good ground by affidavit. The courts, however, will always take care, that if one party obtain leave to amend, or to withdraw his demurrer, the other party shall not be delayed or prejudiced thereby.*(kk)*

But the giving or withholding leave to withdraw demurrers, is altogether discretionary in the courts:*(l)* Therefore where, to an action of *debt* upon a bail bond, the defendant pleaded there was no bill of *Middlesex*, and the plaintiff demurred, the court of King's Bench, after delivering their opinion in favour of the defendant, refused to give the plaintiff leave to withdraw his demurrer, and amend:*(m)* And by *Wright*, Just. "It is not usual to amend, after a demurrer has been argued, and the opinion of the court is known: and it is certainly improper to give leave in the present case, it being an action against bail, whom the court are always inclined to favour." So, where the defendant rejoined to several replications in *trespass*, and demurred to others, and a verdict was found for him [*711] *upon the issues in fact, and contingent damages assessed upon the demurrers, which were afterwards overruled; the court of King's Bench refused to let the defendant withdraw his demurrers, and plead to issue:*(a)* And, by *Denison*, Just. "Where the demurrer is first argued, before any trial of the issues, the court will give leave to amend; as in the case of *Giddlins v. Giddlins*:*(b)* But this is an attempt to amend issues in law, after a verdict has been found on the issues in fact, and contingent damages assessed; of which there never was an instance. And we do not know where it would end; nor how the cause could be again carried down to trial. The court cannot help seeing that this is upon record: Here are verdicts and contingent damages found. The cases of amendment cited

(d) 2 Chit. Rep. 292.

(e) 2 H. Blac. 561; but see 8 Taunt. 515, 16. 2 Moore, 566, S. C.

(f) Doug. 385, 452.

(gg) 1 Ken. 335. Say. Rep. 316, S. C.; and see 2 Chit. Rep. 5.

(hh) 2 Wils. 173; and see 1 Moore, 61.

(ii) *Ante*, 699.

(kk) 2 Bur. 756; but see 1 East. 372, where the plaintiff had leave to amend a replication to a *shewn* plea, after argument, without paying costs.

(l) 1 East. 135, *(a)*. 5 Price, 412.

(m) Say. Rep. 116, 17; and see 7 Dowl. & Ry. 41.

(a) 1 Bur. 321, 2.

(b) Say. Rep. 316.

are, when the whole is supposed to be in paper; or else the court could not have done it. We have no authority to do this, after it is plainly upon record." So, where judgment had been given for the defendant on demurrer to a plea, the court of Common Pleas would not, in a subsequent term, set aside that judgment, and suffer the plaintiff to reply, by confessing the matters contained in the plea, and taking judgment of assets *quando acciderint*.(c)

Whilst the proceedings are *in paper*, the amendment is at common law; and not within any of the statutes of amendments, which relate only to proceedings of record.(d) And there is no difference, as to the doctrine of amending at common law, between *civil* and *criminal* cases : (e) nor between *penal* and other actions. (f) Thus, in a *qui tam* action of usury, the plaintiff was permitted to amend his declaration, by altering the date of a note, after issue joined and entered on the roll, and after many terms had elapsed since the commencement of the action. (g) A similar amendment was permitted, in a subsequent case, after the record had been made up for trial, and withdrawn upon discovery of the mistake. (h) So, where the defendant was served with the copy of a *latitat* in a penal action, by a wrong name, and declaration filed conditionally by the same name, to which he appeared, and pleaded a misnomer in abatement, the court of King's Bench held, that a judge's order to amend the bill and declaration, by substituting the true name, was good; and that after such amendment, the proceedings could not be set aside for irregularity. (i) And in general it seems that where there has been no unnecessary delay on the part of the plaintiff, the courts will give him leave to amend his declaration in a penal action, even after the time allowed for bringing a new one is expired. (k) But where the plaintiff in such an action has been guilty of any *unneces- [*712] sary delay in prosecuting his suit, the courts in their discretion will not permit amendments to be made in the declaration, though the pleadings are still in paper : (a) And in a late case, the court of Common Pleas would not, in a penal action, alter the term of which the declaration was entitled, to a previous term, without a sufficient reason being assigned by affidavit. (b) So, in an action of *debt*, to recover penalties against a sheriff's officer for extortion, on the statute 32 Geo. II. c. 28, that court, we have seen, (cc) would not allow the declaration to be amended, by adding new counts on the statute 23 Hen. VI. c. 9. And there is said to be no instance, in which the court of King's Bench have given leave to amend, as to the parties to the suit in a *qui tam* action, after demurrer. (dd)

When the proceedings are entered on *record*, the courts, it is said, will amend no farther than is allowable by the statutes of amendments. (ee)

(c) 6 Taunt. 45. 1 Marsh. 401, S. C.

(d) 1 Salk. 47. 3 Salk. 31.

(e) 1 Salk. 51. 2 Ld. Raym. 1068. 6 Mod. 285, S. C. Cas. temp. Hardw. 42. 2 Str. 739. 4 East, 175.

(f) 1 Str. 137. 2 Str. 1227. 1 Wils. 256. 1 Bur. 402. 2 Ken. 82, S. C. 3 Maule & Sel. 450.

(g) 2 Bur. 1098, 9.

(h) 5 Bur. 2833, 4; and see *Tailleur, qui tam v. Cocks*, T. 22 Geo. III. K. B. 6 Durnf. & East, 173.

(i) 3 Maule & Sel. 450.

(k) 6 Durnf. & East, 543. 7 Durnf. & East, 55. 4 East, 433, 435; and see 2 Chit. Rep. 23, 25.

(a) 2 Durnf. & East, 707. 6 Durnf. & East, 171. 8 Durnf. & East, 30.

(b) 6 Taunt. 19. 1 Marsh. 419, S. C.; but see 2 Chit. Rep. 22, 25.

(cc) *Ante*, 698.

(dd) *Per Buller*, J. 4 Durnf. & East, 228.

(ee) 1 Salk. 47. 3 Salk. 31. Gilb. C. P. 114, 15. 2 Wils. 147. 2 Blac. Rep. 920.

By the first of these statutes, (14 Edw. III. stat. 1, c. 6,) it is enacted, that "no process shall be annulled or discontinued, by misprision of the clerk, in writing one syllable or letter too much or too little; but as soon as the mistake is perceived, by challenge of the party, or in other manner, it shall be amended in due form, without giving advantage to the party that challengeth the same, because of such misprision." The judges construed this statute so favourably for suitors, that they extended it to a word.^(f) And, by the 9 Hen. V. stat. 1, c. 4, it is declared, that they shall have the same power, as well *after* as *before* judgment, so long as the record and process are before them. This statute is confirmed, and made perpetual by 4 Hen. VI. c. 3, with a proviso, that it shall not extend to process of outlawry, &c. By the 8 Hen. VI. c. 12, the justices are further empowered to examine and amend what they shall think, in their discretion, to be the misprision of their clerks, in any record, process,^[A] word, plea, warrant of attorney, writ, panel, or return: And, by the 8 Hen. VI. c. 15, they may amend the misprisings of their clerks and other officers, as sheriffs, coroners, &c. in any record, process, or return before them, by error or otherwise, in writing a letter or syllable too much or too little. These are, properly speaking, the only statutes of *amendments*;^(g) and it seems they apply to *penal* as well as to other actions;^(h) but they do not extend to *criminal* cases,⁽ⁱ⁾ nor, as it should seem, to process in *inferior* courts.^(kk)^[B]

[*713] *In order to amend upon these statutes, it is a general rule, that there must be something to amend by.^[c] And in compliance with this rule, it has been determined, that the original writ,^(a) or bill,^(b) is amendable by the instructions given to the officer; the declara-

(f) 8 Co. 157, a.

(g) 1 Salk. 51. The rest, beginning with the 32 Hen. VIII. c. 30, are statutes of *jeofails*. *Id. ibid*; and see Steph. Pl. Append. xxxv. v.

(h) 1 Rol. Abr. tit. *Amendment*. 2 Str. 1227. Doug. 114. 1 Marsh. 180. 2 Chit. Rep. 25. 1 Stark. Ni. Pri. 400, S. C.

(i) 1 Salk. 51. 2 Ld. Raym. 1307. Gilb. C. P. 116.

(kk) Willes, 122. The language, however, used by the court in this case, "that the words of the statutes of amendments do not extend to inferior courts," must, it is presumed by Mr. *Durnford*, be understood with this qualification, that the inferior court itself cannot amend; For, if a writ of error be brought in the King's Bench from an inferior court, for an error amendable by the statute 8 Hen. VI. c. 12, there seems to be no reason why the superior court should not amend that error; the words of that statute not being, that "in any action brought in any of the superior courts," but "for error assigned in any records, &c.," no judgment shall be reversed, &c. but the king's judges, &c. may amend, &c. *Id.* 126, n.; but see 1 Rol. Abr. 209, 10, *semb. contra*.

(a) 8 Co. 161. 1 Ld. Raym. 564. 1 Salk. 49, S. C. Barnes, 10, 16, 22.

(b) Barnes, 3, 11, 16, 24, 26.

[A] An original writ may be amended. *Bartholomew v. Chautauque Bank*, 19 Wend. 99. *Dean v. Swift*, 11 Verm. 531. *Fitzgerald v. Garvin*, T. U. P. Charlton, 281. *Sneets v. Weathersbee*, R. M. Charl. 537; so a writ of right. *Boston v. Otis*, 20 Pick. 38; so an attachment in Alabama. *Scott v. Maey*, 3 Ala. 250. But where there is no declaration in the writ, the court, in Massachusetts, will not grant leave to amend by filing a declaration. *Brown v. Seymour*, 1 Pick. 32. *Bringham v. Esbe*, 2 Pick. 425.

A *ca. sa.* returnable on Sunday, or out of term, being final process, is amendable. *Aliter*, per Bronson C. J., of mesne process, which would be void in such case. *Stone v. Martin*, 2 Denio, 185. *Wood v. Hill*, 5 New Hamp. 229. *Bell v. Austin*, 13 Pick. 90. *Cramer v. Van Alstyne*, 9 Johns, 386. *Kyles v. Ford*, 2 Rand. 1. S. P. 2. Pen. 632. 1 Monr. 146. But a writ of entry cannot be amended by striking out the name of one of the demandants. *Pickett v. King*, 4 New Hamp. 212. *Treat v. M'Mahan*, 2 Greenl. 120.

[B] See note [B] ante p. 161.

[c] See ante, note [u] page 161, where the cases are collected.

tion by the bill; (c) the pleadings, subsequent to the declaration, by the paper-book, (d) or draft under counsel's hand; (e) the *nisi prius* roll by the plea roll; (f) the verdict, whether general or special, by the plea roll, (g) memory, (h) or notes (i) of the judge, or notes of the associate, (k) or clerk of assize: (l) and if special, by the notes of counsel, (m) or even by an affidavit of what was proved upon the trial; (n) the judgment by the verdict; (o) and the writ of execution by the judgment, (p) or by the award of it on the roll, (q) or by former process. (r) But notwithstanding the general rule, which prohibits amendments not authorized by the above statutes, after the proceedings are entered on record, the courts, we have seen, (s) have in particular instances permitted the plaintiff to amend his declaration or replication, and the defendant to amend his plea, in cases where there has been nothing to amend by, after issue joined, and after the proceedings have been entered on record, and *even [*714] after a trial has been had thereon, and the plaintiff has been nonsuited, or failed in producing the record.

The amendment may be made in any stage of the proceedings: (aa) and those things which are amendable *before* error brought, are amendable *afterwards*, so long as diminution may be alleged, and a *certiorari* awarded. (bb) After error brought in the King's Bench, on a judgment of the Common Pleas, the amendment may be made in the former court, (cc) or in the court below. (d) If it be made below, a *certiorari* may be had, on alleging diminution, to bring up the record in its amended state; or, if the clerk of the treasury of the Common Pleas attend with the record in the King's Bench,

(c) 1 Str. 583. 2 Str. 954, 1151, 1162, 1271. 1 Ken. 368. Say. Rep. 294, S. C.

(d) 8 Co. 161, b. Palm. 404, 5. Latch, 58, 86, S. C. Cro. Car. 144. 1 Salk. 50, 88. 2 Ld. Raym. 895, S. C.

(e) Cro. Eliz. 258. 2 Str. 846. 1 Barnard, K. B. 213, 220, S. C.

(f) 8 Co. 161, b. Cro. Car. 203. 1 Salk. 48. 1 Ld. Raym. 94. 12 Mod. 107. Comb. 393, S. C. 2 Str. 1264. Say. Rep. 76. Barnes, 14. 1 Campb. 57. 2 Chit. Rep. 22; but see 1 Ld. Raym. 511.

(g) 1 Ld. Raym. 133.

(h) Cro. Car. 338. Gilb. C. P. 164. 1 Bac. Abr. 101. Bul. Ni. Pri. 320. Cas. Pr. C. P. 118, 19. Barnes, 6, S. C. *Id.* 449.

(i) 2 Str. 1197. 1 Wils. 33, S. C. Doug. 376, 673, 722, 745. 3 Durnf. & East, 659, 749. 8 East, 357. 1 Bos. & Pul. 329. 3 Bos. & Pul. 343. 1 Marsh. 182. 3 Bing. 334; but see 1 H. Blac. 78. 6 Durnf. & East, 691. 1 Barn. & Ald. 161. 2 Chit. Rep. 352. 7 Moore, 269. But the court of King's Bench rejected an application to amend the entry of a verdict, according to the notes of an arbitrator, to whom the cause had been referred, on the ground that they had no power to compel such notes to be brought before them. 1 Chit. Rep. 283. And the application to amend the verdict by the judge's notes, should be made to the judge who tried the cause, and not to the court. *Id. ibid.*

(k) 2 Chit. Rep. 352.

(l) Cro. Car. 144. 1 Salk. 47, 8. 1 Ld. Raym. 138, S. C. 1 Salk. 53. 1 Ld. Raym. 335. 1 Barnard, K. B. 191. 1 Bac. Abr. 101. Gilb. C. P. 163; but see 2 Durnf. & East, 281.

(m) 1 Rol. Rep. 82. 1 Rol. Abr. 207, pl. 15. 1 Salk. 47, 8; 53.

(n) 1 Str. 514. 8 Mod. 49, S. C.

(o) 2 Str. 787. 3 Durnf. & East, 349. 1 Marsh. 182. 11 Price, 410. 3 Bing. 346.

(p) Barnes, 10, 11. 2 Blac. Rep. 836. 2 Durnf. & East, 737. 5 Durnf. & East, 577. 6 Durnf. & East, 450. 4 Taunt. 322.

(q) Say. Rep. 12. 3 Wils. 58. 2 Bos. & Pul. 336. 1 Marsh. 237. 5 Taunt. 605, S. C.

(r) 3 Wils. 58. 3 Durnf. & East, 657. 1 H. Blac. 541.

(s) *Ante*, 697, 8; 708, 9.

(aa) *Ante*, 697, 8.

(bb) 8 Co. 162, a. W. Jon. 9. 3 Durnf. & East, 349, 569, 749. 7 Durnf. & East, 474, 703. 4 Taunt. 588. 2 Chit. Rep. 22, (a); and see 1 Salk. 269. *Cas. temp. Hardw.* 119, for the time of awarding a *certiorari*.

(cc) Poph. 102. 8 Co. 162, a. 2 Rol. Rep. 471. 3 Maule & Sel. 591. 3 Bing. 346.

(dd) Poph. 102. Hardr. 505. 1 Salk. 49, 270, 71. 2 Str. 787. 1 H. Blac. 643. 4 Taunt. 588. 1 Marsh. 180. 3 Bing. 346.

the latter court on motion will order the transcript to be amended by it.(e) And this way of amending the transcript in the King's Bench, is the course of the court, in order to save a *certiorari*; for if the record be right below, the party, upon diminution alleged, may have a *certiorari* of common right for bringing it up.(f) After error brought in the Exchequer Chamber, upon a judgment of the King's Bench, it is said to be necessary to make the amendment in the latter court; as this differs from the case of a writ of error from the Common Pleas, because that court is supposed to send up the very record, but the King's Bench sends only a transcript.(g) But where the issues are entered informally, the court of Exchequer Chamber will adjourn the hearing of the case, to afford an opportunity for the party to apply to the court below, to amend the record, unless the counsel will consent to argue upon the supposition of such an amendment.(h) When the record has been amended, it is either certified into the Exchequer Chamber, upon diminution alleged;(i) or upon carrying it there, by the clerk of the treasury of the King's Bench, the justices and barons will order the transcript to be amended:(k) or the transcript may be brought back, and amended in the King's Bench, by the original record.(l) So, after error brought in the House of Lords, upon a judgment of the King's Bench,(m) or of the Common Pleas affirmed in that court on a writ of error,(n) the amendment should be made in the court of King's Bench, where the record still remains. If there be any *mistake* in the transcript, by the negligence of the clerk, the court above, on carrying up the record, will order the transcript to be amended by it:(o) and though after a writ of error, it is [*715] not usual to *suffer an amendment of the record of an inferior court,(a) yet where there is a mistake in the transcript, the court above will order it to be rectified:(b) And a *certiorari* has been issued to the judge of an inferior jurisdiction, to return the practice of this court.(c) The clerk of the errors in the Common Pleas, in transcribing the record, by mistake entitled the declaration generally, instead of specially, and error was assigned thereon; after which he amended the transcript, by inserting the special title; and the court of King's Bench would not restore the transcript, to the state in which it stood at the time when the plaintiff in error assigned his error.(dd)

On an amendment after error brought, it was not formerly usual to allow the plaintiff his *costs* of the writ of error:(ee) but it is now settled, that they shall be allowed him, provided the amendment be made after final judgment, and the plaintiff, after notice of the amendment, do not proceed farther;(ff) though if the amendment be made before final judgment,(gg) or the plaintiff proceed after notice thereof,(hh) he shall not be allowed his

(e) 2 Rol. Rep. 471. Hardr. 505.

(f) 1 Salk. 49; and see Cas. temp. Hardw. 118. 2 Str. 1023, S. C.

(g) 2 Str. 837. But see 6 Moore, 135. 3 Brod. & Bing. 66. 9 Price, 432, S. C., where the amendment was first made in the Exchequer Chamber, and afterwards in the King's Bench.

(h) 1 Younge & J. 376.

(i) Cro. Jac. 429, 628. 2 Rol. Rep. 471.

(k) 1 Rol. Abr. 208.

(l) Id. 209. 2 Str. 837.

(m) 3 Durnf. & East, 659.

(n) 3 Maule & Sel. 591.

(o) Hardr. 505.

(a) 1 Rol. Abr. 209, 10; but see Willes, 126, (n). Ante, 712.

(b) 1 Wils. 337. Say. Rep. 59, S. C. 4 Dowl. & Ry. 315.

(c) 4 Dowl. & Ry. 315.

(dd) 1 Maule & Sel. 232.

(ee) 3 Mod. 113.

(ff) 3 Lev. 361. 2 Ld. Raym. 897. Lloyd v. Skutt, T. 23, Geo. III. K. B.

(gg) 1 Ld. Raym. 95.

(hh) 1 Salk. 49, in marg. Lloyd v. Skutt, T. 23 Geo. III. K. B.

costs. And when amendments are made upon a writ of error, after verdict, &c., by virtue of the statutes of jeofails, no costs are given; for the construction of those statutes has been, to give judgment for the party upon the writ of error, as if the amendments had been made. (i)[1]

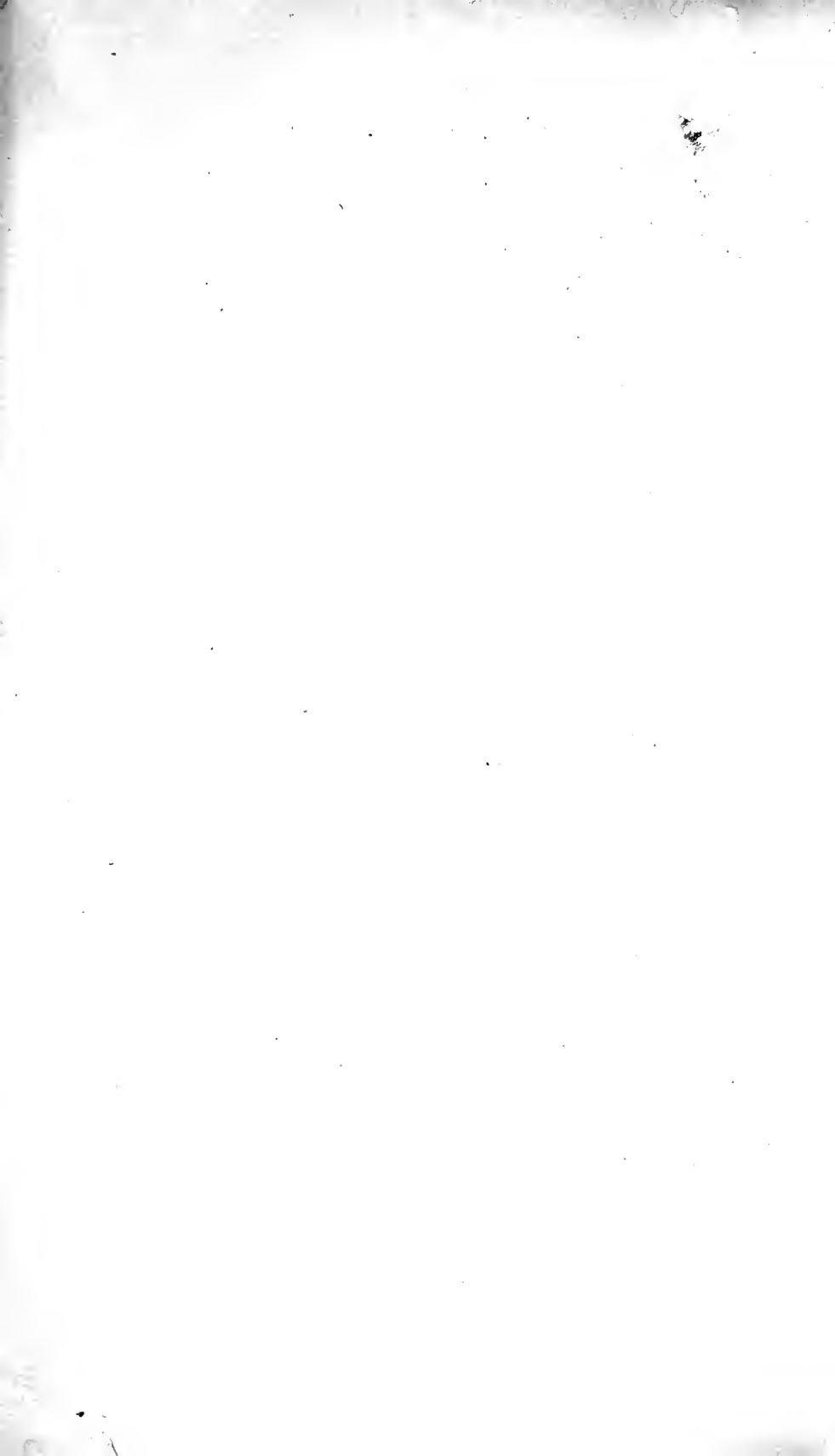
(i) Cas. temp. Hardw. 314. And see further, as to the doctrine of *amendment*, Steph. Pl. 97, 8. 2 Archb. K. B. 230, &c.

[1] By the law amendment act, 3 & 4 W. IV. c. 74, which is one of the principal recent statutes for the improvement of the law in England, fines and recoveries are abolished, and there is a clause therein, § 7, that "if it shall be apparent, from the deed declaring the uses of any fine already levied, or hereafter to be levied, that there is in the indentures, record, or any of the proceedings of such fine, any error in the name of the conossor or conusee of such fine, or any misdescription or omission of lands intended to have been passed by such fine, then and in every such case the fine, without any amendment of the indentures, record, or proceedings, in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done, if there had been no such error, misdescription, or omission." On this clause, the court refused to amend a fine, in a case of misdescription cured by the statute; Lockington, demandant; Shipley and wife, conossors; 1 Bing. N. R. 355. 1 Scott. 263, S. C. And they would not amend the warrant of attorney for suffering a recovery, even to the extent of transposing names placed in a wrong order; Lamont, vouchee, 3 Bing. N. R. 297.

By another clause of the same statute, § 8, "if it shall be apparent, from the deed making the tenant to the writ of entry, or other writ for suffering a common recovery, already suffered, or hereafter to be suffered, that there is in the exemplification, record, or any of the proceedings of such recovery, any error in the name of the tenant, demandant, or vouchee in such recovery, or any mis-description or omission of lands intended to have been passed by such recovery, then and in every such case the recovery, without any amendment of the exemplification, record, or proceedings in which such error, mis-description, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done, if there had been no such error, mis-description, or omission. Provided always, that nothing in this act contained shall lessen or take away the jurisdiction of any court, to amend any fine or common recovery, or any proceeding therein, in cases not provided for by this act." § 9.

END OF VOLUME I.

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